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COURT USES JUDICIAL NOTICE TO FIND THAT THE COLOR OF ICE CREAM IS FUNCTIONAL AND TO DENY A TRADE DRESS CLAIM

Section 43(a) of the Lanham Act creates a federal cause of action for trade dress infringement. “Trade dress” refers to the appearance of a product when the appearance is used to identify the producer. To prevail on a claim for trade dress infringement, the plaintiff must prove, among other things, that the features of the product design are primarily non-functional.

In Dippin’ Dots, Inc. v. Frosty Bites Distribution, LLC, Dippin’ Dots claimed Frosty Bites’ frozen ice cream product and logo infringed Dippin’ Dots’ trade dress. The trial court granted summary judgment for Frosty Bites on the grounds that Dippin’ Dots’ product design, which consists of small, separated colored beads of ice cream, is functional and not subject to trade dress protection, and the two companies’ logos are so dissimilar that Dippin’ Dots could not prove any likelihood of customer confusion as to the source of the products as a matter of law.

The Eleventh Circuit Court of Appeals affirmed the trial court’s decision. As regards Dippin’ Dots’ claim for trade dress infringement of its product design, the trial court used judicial notice to determine that the color of Dippin’ Dots’ ice cream is functional. Judicial notice is a concept included within the rules of evidence. If applicable, it allows a court to consider certain facts as proven without requiring the usual process of proving facts by the submission of evidence in the form of testimony or documents. Under the pertinent rules, a court may take judicial notice of adjudicative facts at any stage in a proceeding; however, an opposing party is entitled to be heard on the propriety of taking judicial notice.

In this case, the trial court took judicial notice of the fact that color is indicative of flavor in ice cream. It concluded this is a fact generally known among consumers. At the hearing on Frosty Bites’ motion for summary judgment, the court asserted that chocolate ice cream is brown, vanilla ice cream is white, and strawberry ice cream is pink. Counsel for Dippin’ Dots generally agreed, although he noted that was not always or necessarily the case, as sometimes chocolate can be white, for example. Based on this colloquy, the appellate court agreed that the trial court properly took judicial notice of the fact that ice cream color is indicative of its flavor.

In doing so, it noted that to support judicial notice of this fact, it was not necessary that consumers generally know pink denotes strawberry ice cream, for example. Rather, it was only necessary that they generally know pink coloring denotes some flavor of ice cream such as strawberry, bubble gum, or cherry.

Further, based on oral argument, the appellate court, independently, took judicial notice of the fact that the color of ice cream is indicative of its flavor. Therefore, it concluded color is functional in this case because it is essential to the purpose of the product and affects its quality.

NIGHTCLUB LIABLE FOR INJURIES TO PARTICIPANT IN PROMOTIONAL BOXING MATCH NOTWITHSTANDING HIS WRITTEN RELEASE

Nineteen year old college student Carlos Silva went to a nightclub, Club Boca, to box in its weekly “Monday Night Boxing” promotional event. He was going to fight a friend and former wrestling teammate, Charlie Mejia. Mejia had boxed at the Monday Night Boxing event once before, but Silva had never been in a boxing match. Before the match, Club Boca required Silva to sign a document titled, “Release, Assumption of the Risk and Indemnification Agreement.” This document stated in part that Silva “assum[ed] the inherent and extraordinary risks involved in Monday Night Boxing and any risks inherent in any other activities connected with this event in which I may voluntarily participate.”

Within seconds after the bell sounded for Round One, Silva got hit and fell through the ropes. He hit his head on a wooden stage located next to the ring. He got up and completed the round. During the second round, Silva took several punches to the head, but the referee did not stop the fight. The nightclub did not have a physician ringside. Silva made it through Round Three, which was the final round. But, at the end of the round he simply sat in the corner of the ring with his head down. Ultimately, the referee helped move Silva from the ring. He sat in a chair at a table and kept leaning his head forward. Within a few minutes, he became unresponsive, his head was completely down, he lost consciousness, and he made snoring noises. His friends requested help. One friend asked a bouncer to call the paramedics, but when the bouncer came over, he thought Silva was drunk, picked him up under his arms, and dragged him outside, even though Silva’s friends explained the situation to the bouncer. Finally, someone called for medical assistance, but it was forty-five minutes from the time he left the boxing ring until he received any sort of medical treatment.

As a result of the boxing match, Silva sustained a subdural hematoma and severe brain swelling. The swelling was the result of the delay in Silva’s receiving medical attention. Silva’s brain was so swollen that doctors were required to remove the part that controlled speech and motor functions on his right side. As a result, Silva, is in a partial vegetative state and cannot walk or speak.

Silva’s parents sued Club Boca for negligence. The nightclub filed a motion for summary judgment based on the release and assumption of risk agreement. The trial court denied the motion for summary judgment. The case went to trial, and the jury awarded over \$12 million, which was reduced by fifteen percent to account for Silva’s comparative negligence.

Florida’s Fourth District Court of Appeal affirmed this aspect of the case in Cousins Club Corp. v. Silva. It agreed with the trial court that the language of the release did not cover negligence on the part of Club Boca because under the agreement, Silva assumed only the risks inherent in the boxing match itself and released liability only for injuries resulting from his voluntary participation in the match. The jury found that Silva’s damages were mostly caused by Club Boca’s negligence and not any inherent risks in boxing by specifically finding the nightclub was negligent in failing to provide or obtain medical treatment, failing to maintain the club in a reasonably safe condition, and failing to supervise the event properly.

FIRST DISTRICT COURT OF APPEAL ENJOINS FORMER EMPLOYEE FROM SOLICITING CUSTOMERS WHEN CUSTOMERS APPROACHED HIM FIRST

Larry Scarbrough was an agent for Liberty National Life Insurance Company. He signed a non-compete agreement with it in connection with his employment. As part of that agreement, he agreed not to solicit Liberty's customers for replacement insurance coverage for a period of eighteen months after his employment with Liberty ended. Subsequently, Scarbrough left and became employed by Colonial Life Insurance Company. Within the eighteen month period, former Liberty customers approached Scarbrough – he did not approach them first – about securing replacement coverage. When Liberty National Life discovered this, it sued Scarbrough seeking an injunction preventing him from soliciting its customers. The trial court entered the injunction.

In Scarbrough v. Liberty National Life Insurance Co., Florida's First District Court of Appeal affirmed the decision. It held that the trial court did not abuse its discretion by enjoining Scarbrough. Scarbrough argued that Florida's non-compete statute had been construed consistently as not forbidding a former employee from soliciting a former employer's former clients who voluntarily followed the employee to his or her new place of business. Nonetheless, without substantial discussion, the First District said those cases were distinguishable on their facts because here, the evidence showed that Scarbrough did not simply sign up the former Liberty National clients but also made a comparison for them of the benefits and premiums afforded by both insurance companies. The appellate court agreed with the trial court that these facts could constitute a "solicitation."

To reach this conclusion, the court relied on a legal dictionary's definition of the term as "the act or an instance of requesting or seeking to obtain something; a request or petition." It believed that it reasonably appeared from that definition that a person may solicit another's business regardless of who initiates the meeting – that is, any active involvement of a former employee in enticing a customer away from his or her former employer or facilitating a change may be a sufficient basis upon which to enter an injunction.

WELCOME JASON HILL AND THE FIRM'S SUMMER ASSOCIATES

Jason W. Hill

Jason Hill has joined the firm as its newest associate. Jason graduated from the William & Mary School of Law in May, where he was a member of the William & Mary Bill of Rights Journal and the school's National Trial Team. Jason received his Bachelor of Arts degree in psychology, cum laude, from Kenyon College in Ohio.

Jason is working part time this summer while he studies for the Florida Bar examination to be given in July. Jason will return full time in September. We know you will enjoy working with Jason Hill.

Hutch K. Hicken

Hutch Hicken is clerking for the firm all summer. In May, Hutch completed his second year at the William & Mary School of Law, where he is the Associate Articles Editor for the William & Mary Law Review. Hutch graduated from the University of Utah in 2002 with a Bachelor of Arts degree in philosophy. Many of you will have a chance to work with Hutch this summer.

Ryan R. Baker

Ryan Baker will clerk for the firm during the second half of the summer. Ryan has completed his second year at the Vanderbilt University School of Law. Ryan received his undergraduate degree in political science (with honors) from Florida State University. You will appreciate Ryan's assistance on your cases.