

FILE

MPT-1: *Jackson v. Franklin Sports Gazette, Inc.*

BENSON & DEGRANDI
Attorneys at Law
120 Garfield Avenue
Franklin City, Franklin 33536

MEMORANDUM

From: Robert Benson
To: Applicant
Date: July 28, 2009
Re: *Jackson v. Franklin Sports Gazette, Inc.*

Our client, the *Franklin Sports Gazette*, has been sued by Richard “Action” Jackson, star third baseman for Franklin City’s major league baseball team, the Franklin Blue Sox. The complaint alleges infringement of Jackson’s right of publicity under Franklin’s recently enacted right of publicity statute. I interviewed Jerry Webster, managing editor of the *Gazette*, and Sandi Allen, its vice president of marketing, and also compiled some background information on Jackson and the team. I have summarized my interview and research in the attached memorandum.

Given that the new Franklin right of publicity statute has not been tested in the courts, this will be a case of first impression. However, there has been considerable case law developed under the prior, and now preempted, common law right of publicity, which may or may not still be relevant precedent.

Please prepare a memorandum analyzing whether Jackson has a cause of action under the right of publicity statute and whether we have any legal arguments to oppose that cause of action under the statute and the relevant case law. You need not include a separate statement of facts, nor address any issue of damages. Rather, analyze Jackson’s claims and our defenses, incorporating the relevant facts into your legal analysis and assessing our likelihood of success on each such basis. Draft the points of your analysis in separate sections using descriptive headings. Be sure to explain your conclusions.

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MEMORANDUM

From: Robert Benson

To: Applicant

Date: July 28, 2009

Re: *Jackson v. Franklin Sports Gazette*—INTERVIEW AND RESEARCH SUMMARY

These notes summarize salient facts from my interview of the *Franklin Sports Gazette's* managing editor, Jerry Webster, and its vice president of marketing, Sandi Allen, as well as background research on the Franklin Blue Sox.

The *Franklin Sports Gazette* is a weekly tabloid published in Franklin City and distributed throughout the state, dealing with Franklin's sports teams and events, including Franklin City's major league baseball team, the Franklin Blue Sox. The *Gazette* reports on Blue Sox games and team news, and is known for its incisive writing and action photography. The *Gazette* is sold by subscription and on newsstands.

Richard "Action" Jackson is the star third baseman of the Blue Sox, the only major league team for which he has played during his 12-year career. Jackson is a much-beloved fixture in the Franklin City sports scene, and is noted for his charitable endeavors and community service. It sometimes appears that the majority of fans at Blue Sox games are wearing apparel with Jackson's name, nickname, or unique double-zero number, "00," and Jackson has earned millions of dollars merchandising his name and likeness for products and services. He is reported to be among the top ten endorsement earners in baseball.

Five seasons ago, the *Gazette* published an account of a regular season Blue Sox game in which Jackson scored on a close play at home plate. The Blue Sox lost the game, which was wholly unmemorable in an unmemorable season—they finished in fifth place, last in the division. The story was accompanied by a photograph of Jackson sliding into home plate (the "Photo"). The Photo showed the opposing team's catcher's feet, and Jackson's back as he slid with one arm

thrown up in the air. A spray of dirt from the slide obscured most of Jackson's body and uniform number, allowing only the second zero to be partially visible. No part of Jackson's face could be seen. The Photo won a third place award from the Franklin City Photographers' Association "Best Sports Photo of the Year" competition. Jackson is Caucasian, and a check of the relevant Blue Sox rosters shows that, at the time, the Blue Sox had three other players (two of whom are also Caucasian) who wore uniform numbers ending in zero—today, they have five other players with such numbers (all Caucasian). The Blue Sox have not changed the design of the team uniforms in 25 years, and their uniform design is one of the few in the major leagues which does not include the player's name on the back.

One month ago, the *Gazette* ran a print advertisement in the *Franklin City Journal*, a daily newspaper, soliciting subscriptions. The ad reproduced the Photo over text and a subscription coupon. Allen chose to use the Photo in the ad, with Webster's approval, for the reasons given in the attached memorandum, which also includes her draft of the ad. The ad was published with the text unchanged from the draft.

In the week following the ad's appearance, the *Gazette's* new subscriptions, which resulted directly from the ad (as shown by use of the coupon in the ad), increased by 18% over new subscriptions during the previous week.

Two days ago, Jackson served a complaint on the *Gazette*, alleging that it had violated Jackson's right of publicity under Franklin's statute and had damaged him by depriving him of the license fee he would have reaped from this use of his image and of his ability to license the use of his image to other sports publications.

FRANKLIN SPORTS GAZETTE

Memorandum

From: Sandi Allen
To: Jerry Webster
Date: June 15, 2009
Re: Subscription ad

We want to liven up the print ad we run every Monday in the *Franklin City Journal*; the old ads, which are text only, are too staid. We've got this award-winning photo of Action Jackson from a few years ago, which conveys excitement, action, and the kind of sports coverage we stand for. Using the photo together with new text copy will, I think, result in a significant increase in subscriptions to the *Gazette*. The draft of the ad is attached. OK?

OK JW 6-15-09

[DRAFT ADVERTISEMENT]

[PHOTO WILL BE REPRODUCED HERE]

GET IN WITH THE ACTION!!!!

SUBSCRIBE NOW TO THE *FRANKLIN SPORTS GAZETTE!*

Look at all you get:

Great stories!

Coverage of every Franklin team!!

And award-winning photos like this that put you right in the middle of the action!!!

Use this coupon for our special offer: 26 weeks of the *Gazette* for only \$24.99!

[COUPON WILL BE INSERTED HERE]