

19 U.S.P.Q.2D (BNA) 1470 printed in FULL format

JOSEPH FRAZIER and SMOKIN' JOE, INC. V. SOUTH FLORIDA CRUISES, INC., et al.

FRAZIER V. SOUTH FLORIDA CRUISES, INC.

Civil Action No. 89—7765

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1991 U.S. Dist. LEXIS 2121; 19 U.S.P.Q.2D (BNA) 1470
JUD

February 21, 1991, Decided OPINIO
February 22, 1991, Filed

Plaintiff, Joseph Frazier, is the former world heavyweight boxing champion. Plaintiff Smokin' Joe, Inc. is a corporation owned and controlled by him. In combination, the individual and corporate plaintiffs own the trade names "Smokin' Joe, Inc." and "Smokin' Joe Frazier" and all rights associated with the image and public persona of Mr. Frazier. Plaintiffs are citizens of Pennsylvania.

The defendant South Florida Cruises organizes and promotes group—travel arrangements. Typically, the defendant reserves a group of rooms on a cruise ship or at a resort and then, through extensive advertising, seeks to interest groups of travelers to sign up for the cruise or joint vacation. Defendant is a citizen of Florida.

In March of 1988, defendant began organizing [*2] a cruise which would attract customers interested in the sport of kings; the concept was that several former boxing champions would personally participate in the cruise, would sign autographs and otherwise be available for socializing with the paying customers. Beginning in June 1988, defendant began publicizing the

proposed tour through a fairly extensive advertising campaign. Defendant placed a full-page advertisement in Ring Magazine, a magazine with national circulation, inviting the public to "cruise with some of boxing's greatest aboard the world's longest and widest ship, NCL's S/S Norway," and represented that "among some of the invited guests are 'Smokin' Joe Frazier, Rocky 'Dead End Kid' Graziano, Jake 'Bronx Bull' LaMotta, Carlos Palamino, Danny 'Little Red' Lopez". The advertisement promised "photo sessions with the boxers . . .

COUNSEL:

Jacquelyn Frazier-Lyde, Esq., Philadelphia, Pennsylvania, Michael Stephen Jackson, Esq., BROWN, VANCE, JACKSON & SMITH, Philadelphia, Pennsylvania, Robert T. Vance, Jr., Esq., BROWN, VANCE, JACKSON & SMITH, Philadelphia, Pennsylvania.

SOUTH FLORIDA CRUISES, INC., by: Michael J. McCaney, Jr., Est., GORDON McCANEY AND GORDON, Philadelphia, Pennsylvania.

JUDGES: John P. Fullam, Senior United States District Judge

OPINIONBY: FULLAM

OPINION: MEMORANDUM AND ORDER
mingle and talk to the boxers . . . autographed photos . . . talks."

The cruise was also promoted on nationwide cable television programs.

Unfortunately for defendant, Mr. Frazier had not agreed to participate in the cruise – indeed, had flatly rejected the proposal when it was advanced by another promoter who was working with defendant on the [*3] project – and had not authorized the use of his name or trade name.

Eventually, the proposed cruise was canceled – only two lesser-known boxers had agreed to participate, and only a small number of customers had purchased tickets – and this action for damages followed.

Defendant moved to dismiss for lack of personal jurisdiction and for improper venue. The motion was denied, and the case proceeded to trial on October 29 through 31, 1990. The jury found in favor of the plaintiff, and awarded \$ 45,000 in compensatory damages and \$ 32,000 in punitive damages, for a total of \$ 77,000. Defendant's post-trial motions renew the jurisdictional and venue challenges, seek judgment n.o.v. as to punitive damages, and alternatively seek a new trial because the verdict was contrary to the weight of the evidence.

Defendant's jurisdictional and venue arguments will again be rejected. The tortious conduct in an infringement or unfair competition case takes place where the passing-off occurs, i.e., in any state in which the infringing advertising occurs, Scott Paper Co. v. Scott's Liquid Gold, Inc., 374 F.Supp. 184 (D. Del. 1974) (Stapleton, J.). Plaintiff has

shown that at least one national [*4] magazine circulated in Pennsylvania carried the tortuous advertisement. Defendant solicited and obtained customers through its toll-free telephone number advertised in Pennsylvania. Defendant derives some of its income from Pennsylvania business activities. Finally, and most important, the impact of defendant's infringement occurred in Pennsylvania, since both plaintiffs are located here. *Concord Labs, Inc. v. Ballard Medical Products*, 701 F.Supp. 272, 275 (D.N.H. 1988); *Allen Organ Co. v. Elka Spa*, 615 F.Supp. 328, 330 (E.D. Pa. 1985). Pennsylvania extends personal jurisdiction to the "fullest extent" allowed under the United States Constitution, 42 Pa. | 5322(b), and specifically authorized exercise of jurisdiction "over a person . . . who act directly or by an agent, as to a cause of action or other matter arising from such person: causing harm or tortuous injury in this Commonwealth by an act or omission outside this Commonwealth." 42 Pa. C.S.A. | 5322(a)(4). In short, there is specific jurisdiction over the defendant since plaintiffs' claims arise from defendant's contacts with this forum, and the required minimum contacts are plainly present. See e.g., *Mesalic [*5] v. Fiberfloat Corp.*, 897 F.2d 696, 699 (3d Cir. 1990).

Venue in this district is proper under 28 U.S.C. | 1391(b) and (c), since this is a district in which plaintiffs' claims arose. This is not an inconvenient district from defendant's point of view, see *Leroy v. Great Western United Corp.*, 443 U.S. 173, 185 (1979); defendant's witnesses at trial came from such divergent locations as Florida, Wisconsin and Connecticut. Indeed, there is no claim that trial in this venue was significantly less convenient than any other.

On the merits, the issues were primarily factual, and the jury has spoken. There was no objection at trial to the manner in which the case was submitted to the jury, nor does defendant now assert any trial errors.

Since the evidence makes it quite clear that defendant's use of plaintiff's trade name and persona was entirely unauthorized, the principal issues at trial concerned the appropriate measurement of damages. Both sides presented expert testimony on that subject. Plaintiff was unable to show any actual loss of money as a result of defendant's activities, in the form of lost bookings from other sources; and plaintiff was also unable to show any actual diminution [*6] in the promotional value associated with plaintiff's name and public persona. Accordingly, plaintiff's damages were measured by the value of what the defendant appropriated: what the "going rate" would have been if plaintiff had been willing to participate in the proposed cruise venture. This is an acceptable measure of damages in these circumstances, and although reasonable minds might differ as to the

persuasiveness of plaintiff's expert testimony, the jury's finding of compensatory damages is adequately supported by the evidentiary record.

And, while reasonable minds could also differ as to whether defendant's conduct was so egregious as to warrant imposition of punitive damages, there is no basis for disturbing the jury's finding on that issue, either. The evidence establishes rather clearly that the defendant commenced its advertising campaign without any genuine belief that the plaintiff had granted, or would grant, permission to use his name to promote the venture. The jury had the opportunity to see and hear defendant's principals and their explanations, and was entitled to conclude not only that they acted with willful disregard for plaintiffs' rights, but also that punitive [*7] sanctions were justified to deter repetition of similar conduct in the future.

Defendant's post-trial motions will be denied.

ORDER

AND NOW, this 21st day of February, 1991, it is ORDERED:

1. Defendant's motion for judgment n.o.v. is DENIED.
2. Defendant's motion for a new trial is DENIED.