JULY 2009
MULTISTATE PERFORMANCE TEST (MPT)

The MPT Question administered by the State Board of Law Examiners for the July 2009 bar examination was ***Jackson v. Franklin Sports Gazette, Inc.*** Two representative good answers selected by the Board are included here, beginning at page 2.

The National Conference of Bar Examiners (NCBE) publishes the MPT Question and the "point sheet" describing the issues and the discussion expected in a successful response to the MPT Question. The "point sheet" is analogous to the Board's Analysis prepared by the State Board of Law Examiners for each of the essay questions.

The NCBE does not permit the Board to publish the MPT Question or the "point sheet" on the Board's website. However, the NCBE does offer the MPT Question and "point sheet" for sale on its website.

Materials for an unsuccessful applicant: An applicant who was unsuccessful on the July 2009 Maryland bar examination may obtain a copy of the MPT Question, his or her MPT answer, representative good answers selected by the Board, and the "point sheet" for the July 2009 MPT Question administered as a component of the Maryland bar examination. This material is provided to each unsuccessful applicant who requests, in writing, a copy of the answers in accordance with instructions mailed with the results of the bar examination. The deadline for an unsuccessful applicant to request this material is January 5, 2010.

Materials for anyone other than an unsuccessful applicant: Anyone else may obtain the MPT Question and the "point sheet" only by purchasing them at the NCBE Online Store.

Use the following link to access the **NCBE Online Store**: www.ncbex2.org/catalog/

MULTISTATE PERFORMANCE TEST (MPT)

REPRESENTATIVE ANSWER 1

From: Applicant

To: Robert Benson

Date: July 28, 2009

Re: Jackson v. Franklin Sports Gazette, Inc.

1. Right of publicity in Franklin under Common Law and Recently Enacted Statutory Law.

Prior to 2008, common law governed the right of publicity in Franklin. At common law, there were four elements to the right of publicity cause of action:"(1) the defendant's use of the plaintiff's persona, (2) appropriation of the plaintiff's persona to the defendant's commercial or other advantage, (3) lack of consent, and (4) resulting injury." According to Committee Report 94-176 (herein, "Legislative History"), Franklin's legislature's goal in adopting Franklin Statute Section 62 Right of Publicity (herein, "Section 62") was to codify the common law elements with additional clarifications. These clarifications focused on the extent to which the individual must be identifiable in the photography and the exception to the statute for news reporting organizations. The Legislative History indicates that common law decisions should be continued to be considered good law to the extent that they are in compliance with the legislation. Therefore, on many of the factors, the judicial decisions will be binding on the case at hand.

Under Section 62(a, the current elements of the statute (in relevant part) are the (1) knowing use of (2) another's photograph (3) for purposes of advertising or selling (4) without such person's prior consent (5) will be liable for damages sustained by the person as a result.

2. Jackson's claim may be unsuccessful for failure to establish that he is readily identifiable in the photograph.

A. Statutory Elements of Section 62

At the first reading of the newly enacted statute, it appears that Jackson's claim will be successful. The memo from Sandi Allen to Jerry Webster (with Mr. Webster's "ok" and initials) establishes that the Sports Gazette knowingly used the photograph of Mr. Jackson for advertising purposes. There is no suggestion by either Ms. Allen or Mr. Webster that they believed that they had Mr. Jackson's prior consent to use the photograph. Therefore, it appears that Mr. Jackson will be able to satisfy the elements of Section 62.

B. Definition of Readily Identifiable from Case Law and Application to Jackson v. Franklin

However, the Legislative History indicates that one of the motivations for codifying the common law on the right of publicity was due to unclear meaning of when an individual is identifiable from his or her photographic image. Therefore the Legislature provided that a person shall be deemed identifiable for a photograph when one who vies the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use. Two cases provide guidance as to when the individual will identifiable by the naked eye. Although these cases were decided prior to the recent legislation, they will continue to be binding to the extent that they are consistent with the newly provided definitions.

In 2001 the Franklin Supreme Court in *Holt v. JuicyCo.* stated that whether or not the public could identify the individual in a commercial as the individual challenging the use of his image was a question for the trier of fact. Although the Court remanded *Holt* to the lower court for such a factual determination, there appears to be more reason in that case to suggest that the individual in question's image was being used than in the case at hand. In *Holt*, the plaintiff wore clothing that was unique in both color and design to the plaintiff Although the defendant had removed some patches on thesuit, and the plaintiff's name and bib number, the Court held that the trier of fact could find the color and design of the outfit to be sufficient for the public to identify the plaintiff. Thus, so long as Mr. Jackson is able to provide sufficient evidence that a trier of fact could find that he was clearly identifiable in the photograph, the matter will be decided by the jury. However, given the facts, it does not seem likely that Mr. Jackson will be able to provide such sufficient evidence based on the limited view of his body and uniform, as discussed below.

The Franklin Court of Appeals provided a contrast to *Holt* in 2003 in *Brant v. Franklin Diamond*. In that case the Court directed the District Court to dismiss the claim for failure to state a cause of action. Although the defendant admitted to using the plaintiff's image, the plaintiff was unable to establish that the image contained sufficient identifying characteristics for the jury to find that the public could conclude that it was clearly a picture of the plaintiff, as opposed to another athlete in the competition. In the photograph at issue, the plaintiff was only seen from the waist down and was wearing a uniform that was identical to all other participants. The Court noted that the plaintiff did not have any distinguishing features from the waist down. Therefore, the case was dismissed.

Mr. Jackson's claim as to the public's ability to identify him in the photograph used by the Sports Gazette appears to fall in between the two cases discussed above. As in both earlier cases, M. Jackson's face could not be seen and, as in *Brant*, only a small portion of Mr. Jackson's body as visible in the photograph. Additionally, although Mr. Jackson was not wearing the same uniform as all other participants in the event, he was wearing the same uniform as all of his teammates and his uniform did not display his name. Finally, only the second "0" in Mr. Jackson's number can be seen. Although the "00" number is unique, there were three

other players at the time the photograph was taken and five other players today who could have been in the photo instead of Mr. Jackson. Additionally, the same uniforms have been worn for 25 years, increasing the number of potential players who could have been the subject of the photograph.

C. Conclusion: Mr. Jackson is not clearly identifiable

Thus, Mr. Jackson is not as clearly identifiable from the photograph as the plaintiff was in *Holt*, yet may be slightly more identifiable than the plaintiff was in *Brant*. The Sports Gazette may not be able to successfully move for dismissal. Yet, such a motion would be taken in good faith and has a reasonable chance of success.

3. Affirmative Defense: Newsworthiness Exception may provide Defense for Sports Gazette.

A. Case Law on "Endorsement"

If Mr. Jackson is able to sufficiently establish that he is readily identifiable to the public in the photograph, then the Sports Gazette may be able to use the affirmative defense. The second major concern of the Franklin Legislature that lead to the adoption of Section 6 was that it was unclear when news reporting organizations could be held liable under the common law cause of action. In the Legislative History, the committee members stressed that the statute was not intended to interfere with the right of freedom of the press in either the Franklin Constitution or the First Amendment of the United States Constitution. Therefore, the legislature included Section 62 (d) as an affirmative defense for news, public affairs, sports broadcasting and accounts, and political campaigns to use photographs or likenesses without consent. Again the Franklin Court of Appeals decided a case, *Miller v. FSM*, under common law in 1988. In *Miller*, the court upheld the District Court's refusal to dismiss a case under a similar exception at common law. In *Miller*, the defendant, a sports magazine, used the image of the plaintiff, a professional athlete, in an advertisement aimed at increasing subscriptions. Clearly, that fact pattern is very similar to the case at hand. The case allowed an exemption from the violation of a right of publicity in news media advertisements that clearly link the photograph to the quality and content of the magazine and are not an implied endorsement of the publication by the individual photographed. In Miller, the Court found that there was no explicit tie between the individual's photograph and the solicitation for subscriptions (such as featuring the plaintiff's name) and, therefore, there was no implied endorsement. Accordingly, the Court dismissed the case.

B. Endorsement in Jackson v. Franklin Sports Gazette

Because the Legislature has now provided an explicit affirmative defense for the media's use of an individual's image that does not include this endorsement connection, it is not possible to predict how the Court will rule. To even reach this affirmative defense, the Court will have found that there is sufficient evidence for the public to identify Mr. Jackson from the

photograph (as discussed in Section I). Therefore, based on precedent, the Court may consider whether the use of Mr. Jackson's photograph suggests that he is endorsing subscriptions to the newspaper or the use of the photograph is merely evidence of the stories, coverage, and photographs that are provided in the newspaper. If the Court considers this issue it is likely that they will find that the language of the advertisement is sufficient to establish that the photograph is not an endorsement by Mr. Jackson. The memo from Ms. Allen suggests that the photo was being used to "convey the excitement, action, and the kind of sports coverage [the newspaper] stand[s] for." Additionally, the language in the ad focuses on the stories, coverage, and photographs that are provided in the newspaper. Therefore, if the Court considers a claim by Mr. Jackson that the photo is meant to serve as his endorsement for the newspaper, the claim will probably fail.

C. Exclusion of Media Advertisement from Affirmative Defense

However, the Court may not even consider such a claim. Instead, under the new statute the Court could reasonably interpret it to exclude media advertisements from the affirmative defense. The Court would reason that the statute does not provide for an *advertising* exception and, as the goal of the statute is to create certainty as to when a First Amendment exception exists, there is no exception unless explicitly provided . If the Court takes such an approach, any affirmative defense by the Sports Gazette will fail.

D. Conclusion: Affirmative Defense may or may not be allowed

Therefore, the successfulness or failure of the affirmative defense for Sports Gazette depends on whether or not the Court considers a First Amendment exception at all and, further, whether the Court considers the use of the photograph to be an endorsement of the newspaper by Mr. Jackson.

MULTISTATE PERFORMANCE TEST (MPT)

REPRESENTATIVE ANSWER 2

From: Applicant

To: Robert Benson

Date: July 28, 2009

Re: Jackson v. Franklin Sports Gazette, Inc.

1. Right of publicity in Franklin under Common Law and Recently Enacted Statutory Law.

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Under Section 62(a, the current elements of the statute (in relevant part) are the (1) knowing use of (2) another's photograph (3) for purposes of advertising or selling (4) without such person's prior consent (5) will be liable for damages sustained by the person as a result.

2. Jackson's claim may be unsuccessful for failure to establish that he is readily identifiable in the photograph.

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At the first reading of the newly enacted statute, it appears that Jackson's claim will be successful. The memo from Sandi Allen to Jerry Webster (with Mr. Webster's "ok" and initials) establishes that the Sports Gazette knowingly used the photograph of Mr. Jackson for advertising purposes. There is no suggestion by either Ms. Allen or Mr. Webster that they believed that they had Mr. Jackson's prior consent to use the photograph. Therefore, it appears that Mr. Jackson will be able to satisfy the elements of Section 62.

B. Definition of Readily Identifiable from Case Law and Application to Jackson v. Franklin Sports Gazette

However, the Legislative History indicates that one of the motivations for codifying the common law on the right of publicity was due to unclear meaning of when an individual is identifiable from his or her photographic image. Therefore the Legislature provided that a person shall be deemed identifiable for a photograph when one who vies the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use. Two cases provide guidance as to when the individual will identifiable by the naked eye. Although these cases were decided prior to the recent legislation, they will continue to be binding to the extent that they are consistent with the newly provided definitions.

In 2001 the Franklin Supreme Court in *Holt v. JuicyCo.* stated that whether or not the public could identify the individual in a commercial as the individual challenging the use of his image was a question for the trier of fact. Although the Court remanded *Holt* to the lower court for such a factual determination, there appears to be more reason in that case to suggest that the individual in question's image was being used than in the case at hand. In Holt, the plaintiff wore clothing that was unique in both color and design to the plaintiff Although the defendant had removed some patches on thesuit, and the plaintiff's name and bib number, the Court held that the trier of fact could find the color and design of the outfit to be sufficient for the public to identify the plaintiff. Thus, so long as Mr. Jackson is able to provide sufficient evidence that a trier of fact could find that he was clearly identifiable in the photograph, the matter will be decided by the jury. However, given the facts, it does not seem likely that Mr. Jackson will be able to provide such sufficient evidence based on the limited view of his body and uniform, as discussed below.

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Mr. Jackson's claim as to the public's ability to identify him in the photograph used by the Sports Gazette appears to fall in between the two cases discussed above. As in both earlier cases, M. Jackson's face could not be seen and, as in *Brant*, only a small portion of Mr. Jackson's body as visible in the photograph. Additionally, although Mr. Jackson was not wearing the same uniform as all other participants in the event, he was wearing the same uniform as all of his teammates and his uniform did not display his name. Finally, only the second "0" in Mr. Jackson's number can be seen. Although the "00" number is unique, there were three other players at the time the photograph was taken and five other players today who could have been in the photo instead of Mr. Jackson. Additionally, the same uniforms have been worn for

25 years, increasing the number of potential players who could have been the subject of the photograph.

C. Conclusion: Mr. Jackson is not clearly identifiable

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3. Affirmative Defense: Newsworthiness Exception may provide Defense for Sports Gazette.

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If Mr. Jackson is able to sufficiently establish that he is readily identifiable to the public in the photograph, then the Sports Gazette may be able to use the affirmative defense. The second major concern of the Franklin Legislature that lead to the adoption of Section 6 was that it was unclear when news reporting organizations could be held liable under the common law cause of action. In the Legislative History, the committee members stressed that the statute was not intended to interfere with the right of freedom of the press in either the Franklin Constitution or the First Amendment of the United States Constitution. Therefore, the legislature included Section 62 (d) as an affirmative defense for news, public affairs, sports broadcasting and accounts, and political campaigns to use photographs or likenesses without consent. Again the Franklin Court of Appeals decided a case, ***Miller v. FSM,*** **under common law in 1988. In *Miller,* the court upheld the District Court's refusal to dismiss a case under a similar exception at common law**. **In *Miller***, the defendant, a sports magazine, used the image of the plaintiff, a professional athlete, in an advertisement aimed at increasing subscriptions. Clearly, that fact pattern is very similar to the case at hand. The case allowed an exemption from the violation of a right of publicity in news media advertisements that clearly link the photograph to the quality and content of the magazine and are not an implied endorsement of the publication by the individual photographed. In Miller, the Court found that there was no explicit tie between the individual's photograph and the solicitation for subscriptions (such as featuring the plaintiff's name) and, therefore, there was no implied endorsement. Accordingly, the Court dismissed the case.

Endorsement in Jackson v.Franklin Sports Gazette

Because the Legislature has now provided an explicit affirmative defense for the media's use of an individual's image that does not include this endorsement connection, it is not possible to predict how the Court will rule. To even reach this affirmative defense, the Court will have found that there is sufficient evidence for the public to identify Mr. Jackson from the photograph

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Exclusion of Media Advertisement from Affirmative Defense

However, the Court may not even consider such a claim. Instead, under the new statute the Court could reasonably interpret it to exclude media advertisements from the affirmative defense. The Court would reason that the statute does not provide for an *advertising* exception and, as the goal of the statute is to create certainty as to when a First Amendment exception exists, there is no exception unless explicitly provided . If the Court takes such an approach, any affirmative defense by the Sports Gazette will fail.

1. Conclusion: Affirmative Defense may or may not be allowed

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