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DAILY REPORT

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VERDICTS AND SETTLEMENTS

College gear vendor sees red over judgment

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IN A WIN by an Atlanta lawyer, a federal judge has ordered a Lubbock, Texas, business to pay Texas Tech University at least $3 million for selling unlicensed clothing and novelty items sporting the colors, insignia and slogans of the school and its red-and-black-clad Red Raiders.

Texas Tech was represented by R. Charles Henn Jr. of Kilpatrick Stockton, who said the defendant business, Red Raider Outfitter, continued to sell Texas Tech gear after the school terminated its licensing agreement.

"Red Raider just decided to keep marketing the merchandise, which didn't make sense legally or logically," said Henn.

"They do sell some merchandise purchased though a third-party, licensed vendor along with their own unlicensed products, so maybe they felt they were covered somehow," added Henn, who has won similar cases for longtime client adidas-Salomon.

John Spiegelberg, owner of Red Raider Outfitter, said his business' prospects are bleak as a result of the stinging summary judgment order issued by Judge Sam R. Cummings of the U.S. District Court for the Northern District of Texas.

"If [the judgment] stands, we're out of business; we'll have to shut down," he said. In business since 1975, Red Raider markets Texas Tech-related gear—some of which it manufactures—at two

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stores, including one right across the street from the campus. Until 2003, the merchant was licensed to sell a variety of items emblazoned with Tech logos and such slogans as "Wreck 'em Tech," "Raiderland" and the likeness of Raider Red, a masked, floppy-hatted cartoon cowboy who looks like a close relative of Looney Tunes' Yosemite Sam, right down to the huge twin pistols.

But in 2003, according to the complaint, Tech officials terminated the licensing agreement over "Spiegelberg's failure to account for the University's share of the royalties." But when Spiegelberg continued to market the items, Texas Tech sued last year, charging that the merchant was "passing off" unlicensed merchandise to unsuspecting buyers.

The school also said Spiegelberg was attempting to trademark some of Texas Tech's own long-used slogans—such as "Wreck 'em Tech" as his own.

In his 26-page ruling, Cummings—a 1967 Texas Tech grad—dispatched each of Spiegelberg's defenses. He found that some of the school's slogans date back to the 1930s, and that the university's famed color scheme, while having no "functional" bearing upon the effectiveness of a knit cap or coffee cup, could certainly confuse the public as the whether such items are "official."

Ultimately, the judge found Spiegelberg had engaged in unfair competition, trademark dilution and breach of contract.

In awarding damages, Cummings noted that trademark law allows for the victim of an infringement to "recover the infringer's profits, the plaintiff's damages, and costs." While Spiegelberg was allowed to provide evidence of any deductions—such as profits on licensed sales—his "approximately 350 pages of haphazardly filed material" lacked exhibit numbers, page numbers or necessary citations, so the judge awarded all profits Red Raider made from Jan. 2004 through the present to the plaintiff—

BARTRAM NASON

R. Charles Henn Jr. secured a verdict of at least $3 million for his client, Texas Tech University.

$2.9 million through last October, plus whatever gross profits the company has realized to date, plus attorney's fees, which have yet to be determined.

Spiegelberg's attorney, Houston's Stacey L. Barnes, said he was "surprised and disappointed" by the ruling, arguing that the judge had ignored "what we think are some pretty strong arguments that we own at least two of those marks.

"There were a lot of facts that the judge adjudicated on his own," Barnes said, even though "this wasn't a bench trial." He will be ask for a new trial, and will certainly address the damages issue which, he said, the judge completely miscalculated.

"Our damages expert calculated the reasonable royalties at about $6,000," he said, noting that some 95 percent of Red Raider's inventory is properly licensed. "But instead of taking 5 percent and calculating, he wants to take the gross profits on everything from a piece of candy to a surfboard."

In a prepared statement, Craig Wells, the school's senior associate athletic director, said, "Texas Tech never wants to find itself in the position of suing a local business. ... In this case, however, we believe Red Raider Outfitter forced us to take actions to protect our marks."

Last week, Spiegelberg blasted the judge's order as "outrageous," accusing Texas Tech and Atlanta-based Collegiate Licensing Co. of conspiring to put him and other "mom-and-pop stores that manufacture and sell college merchandise" out of business.

Spiegelberg said his company has about 60 employees, of which "at least 50 or more are Tech students." As he spoke, he said, students were organizing a rally to protest the ruling.

The case is *Texas Tech v. Spiegelberg et al.*, Nos. 5:05-CV-192 and 5:05-CV-276.

Car accident costs Sears $1.6 million

A Columbus man whose neck and shoulder were injured when a Sears, Roebuck and Co. truck rear-ended his small pickup while he was stopped at a traffic signal in Columbus was awarded $1.65 million plus legal fees by a Muscogee County jury last month.

Phenix City, Ala., resident Clemmie Covington, 54, required surgery for a torn rotator cuff and cervical disk replacement after the Aug. 15, 2002, wreck which, according to attorney Ben B. Philips of Columbus' Philips Branch, forced Covington's vehicle into the car ahead of it.

"There was testimony by the police officer that the Sears vehicle was going 35 or 40 miles an hour, and there were no skid marks at all," said Philips. His client's injuries "will certainly require more shoulder surgery, and our expert testified that he'll be in pain for the rest of his life."

During the course of the four-and-a-half day trial before Muscogee County State Court Judge Robert G. Johnston, said Philips, Sears' medical expert testified that Covington's injuries were largely pre-existing.

But Philips said the plaintiff's doctor "proved that that was, shall we say, questionable testimony."

Defense attorneys Rufus D. Sams III and Callie E. Dickson Bryan of Macon's Jones, Cork & Miller could not be reached for comment.

The case is *Clemmie Covington v. Byron Glaser and Sears, Roebuck and Co.*, No. SC04CV1132.

Dentist hit with $140,000 judgment

A Newnan dentist has been hit with a $140,000 judgment by a Coweta County jury that found his unwanted attention drove a dental technician from her job.

The technician, Alice K. Bailey, claimed

Daniel E. Ferman harassed her from shortly after she began working at his dental clinic in October 2003 until Jan. 16, 2004.

On that day, according to Bailey's complaint, she looked out her window to see Ferman's red Corvette pull into her driveway. Bailey claimed when the she let the doctor into the house, he handed her a bottle of vodka, locked the door behind him and began grabbing and kissing Bailey, telling her he "was up all night excited thinking about you."

As she fought him off, Ferman continued to describe exactly what he had in mind:

> **"[The plaintiff's team] brought in so much unrelated stuff, I wasn't sure what they were trying the whole time. And apparently, neither was the jury.**
>
> —Michael G. Kam, Daniel E. Ferman's attorney

"I'm going to kill you," he said, pulling her toward him, according to the complaint. "I am going to grab your ass," he said, proceeding to make good on that promise.

Bailey finally managed to get the door unlocked and to eject Ferman, and the next day she reported the incident to the police, who advised her not to return to the office, the complaint said.

The following month, a Coweta County magistrate issued an arrest warrant for Ferman on charges of assault and battery; he eventually pleaded no contest to those charges, according to Bailey's attorney, Jonathan W. Johnson of Atlanta's Johnson & Benjamin.

In January 2005, Bailey sued, seeking damages for assault, battery, negligent hiring, intentional infliction of emotional distress and—based upon Ferman's efforts to tarnish Bailey's reputation among other dental professionals—slander.

"We were able to put up a number of witnesses who had worked for him before, and one woman who was a patient, who said he'd forcefully kissed them and done other things," Johnson said.

An affidavit from a former employee said Ferman refused to hand over her paycheck unless she got on her knees, and "then suggested that this would be my fantasy and that we should go back to his office alone together."

In another affidavit, a previous patient testified that, after he accidentally cut her lip, Ferman offered to "kiss the blood off my lips."

Ferman had not responded to a message left at his office by press time. His attorney, Michael G. Kam of Newnan's Kam & Ebersbach, said the case was unusual, but added that he would definitely appeal. "They brought in so much unrelated stuff, I wasn't sure what they were trying the whole time," said Kam. "And apparently, neither was the jury."

He noted that the jury "found no assault, no battery, but they did find for intentional infliction of emotional distress, based on a rather unflattering picture of the plaintiff that my client had," he said.

"I don't think, as a matter of law, that can be used to state a claim," said Kam. "There's no basis for lost wages, for attorneys' fees. I don't know what they based the judgment on."

After what Johnson described as a five-day trial and more than five hours of deliberations, the jury awarded Bailey $25,000 in damages, $4,072 in lost wages, $65,000 in attorneys' fees and $46,000 in punitive damages, for a total of $140,072.

The case, presided over by Coweta County State Court Judge John H. Cranford, is *Bailey v. Ferman*, No. 05SV037.

Land's value at issue

When the state Department of Transportation decides it needs piece of property, it frequently goes to court seeking a condemnation order and offers to pay "just and adequate compensation" to the property owner. But, as a Taylor County case illustrates, just what constitutes "adequate" is decidedly open to interpretation.

According to the petition for condemnation filed early last year, the DOT needed a one-third acre parcel and another quarter-acre easement for a sedimentation basin as part of a road-widening project along U.S. 19 south of Butler, which lies about halfway between Macon and Columbus in southwestern Georgia.

Attached to the DOT's petition was an appraisal for the property's worth: $2,600.

But a Taylor County jury felt otherwise and, on Nov. 2, awarded the Lawrenceville couple who own the property $46,137—almost 18 times the amount proffered by the state.

"[The DOT] always tries to come in and lowball you," said Nicholas Papleacos of Atlanta's Chamberlain, Hrdlicka, White, Williams & Martin, who handled the case for Henry and Lisa Holman. In this case, he said, the property owners were particularly upset because the 37-foot-long rectangle of heavily wooded property being sought by the DOT separated the highway from a hunting lodge.

"Now they've lost all the trees, and their lodge is completely exposed; it's not much of a hunting lodge anymore. ... I think the jury took that into consideration," said Papleacos.

After a five-day trial, the jury deliberated about two-and-a-half hours before awarding $19,800 for the actual value of the condemned property and easement, and added another $26,338 in consequential damages for the impact on the remaining property.

While the hefty award "is pretty significant for this type case," said Papleacos, his clients were angling for even more.

"The jury didn't buy our argument, which was that this should have been valued as commercial property worth $100,000 an acre," he said. "They went with the highest-rated residential property rates for property in the area."

The DOT is unlikely to appeal, said departmental spokesman Barry Hancock of the District Three office in Thomaston.

"We felt like we had made a fair offer, but the Holmans felt otherwise," he said. "That's why you go to a jury."

Hancock said the large difference in the DOT's appraised value and that demanded by the jury "is unusual," but the award "was still closer to our price than it was to what they wanted."

The case, from Taylor County Superior Court, is *Department of Transportation v. 0.341 acres of land*, No. 05-CV-057. DR