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Douglas E. Abrams

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REFERENCES TO BABE RUTH IN ADVOCACY AND JUDICIAL OPINIONS

DOUGLAS E. ABRAMS¹

IN 2015, THE FEDERAL DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DECIDED WEST PALM BEACH POLICE PENSION FUND V. DFC GLOBAL CORP.² THE PLAINTIFFS ALLEGED DEFENDANT DFC GLOBAL, A LEADING PAYDAY LOAN COMPANY, HAD HARMED INVESTORS BY FRAUDULENTLY DISSEMINATING MATERIALLY MISLEADING STATEMENTS CONCERNING ITS LENDING PRACTICES. THE DISTRICT COURT DENIED, AS PREMATURE, MOTIONS TO DISMISS.³

A threshold issue raised in the parties' early submissions concerned whether some challenged statements made by DFC Global were statements of fact or opinion. The district court drew this distinction: "If one were to posit that Babe Ruth's purported hijinks and carousing made him an immoral person, such a position would qualify as an opinion. An argument that Babe Ruth was not one of baseball's greatest power hitters is incorrect and adding the phrase 'I believe' or 'in my opinion' does not alter the analysis."⁴

* * *

By referencing the New York Yankees legend to help focus a legal issue or to add color to the discussion, the Pennsylvania district court joined dozens of other federal and state courts that have accented their written opinions in recent years by citing or quoting well-known cultural markers from sports, popular entertainment, or literature.⁵ Several of my prior "Writing It Right" articles have highlighted recent judicial references to the terminologies, rules, and traditions of baseball;⁶ football;⁷ and other participation and spectator sports that help shape American life, including basketball, golf, and hockey.⁸ Other courts

have referenced classic television shows and classic movies.⁹ Still other courts have invoked literature by referencing well-known children's stories, fairy tales, and Aesop's Fables.¹⁰ More recently, I wrote about recent judicial references to William Shakespeare's plays¹¹ and Charles Dickens' novels.¹²

The common theme of these "Writing It Right" articles is that the courts' use of well-known cultural references in their opinions invites advocates to enhance their briefs and other submissions with references to similar well-known cultural markers. As I wrote in 2019, "advocates should feel comfortable following the courts' lead by carefully referencing [cultural markers] to help sharpen substantive and procedural arguments in the filings they submit."¹³



Douglas E. Abrams

This referencing by advocates is consistent with advice about effective advocacy delivered by leading judges. "Think of the poor judge who is reading . . . hundreds and hundreds of these briefs," says Chief Justice John G. Roberts Jr. "Liven up their life just a bit . . . with something interesting."¹⁴

Justice Antonin Scalia similarly urged brief writers "[m]ake it interesting."¹⁵ "I don't think the law has to be dull." "Legal briefs are necessarily filled with abstract concepts that are difficult to explain," Justice Scalia continued.¹⁶ "Nothing clarifies their meaning as well as examples" that "cause the serious legal points

you're making to be more vivid, more lively, and hence more memorable."¹⁷

Advocates' appropriate references to Babe Ruth, a true cultural icon, fit the bill.

Babe Ruth as a cultural icon¹⁸

In 2018, biographer Jane Leavy wrote that "[m]ore than a century after his major-league debut, and seventy years after his death, Babe Ruth remains the lodestar of American fame. And that star has not diminished."¹⁹ The Sarasota Herald-Tribune calls Ruth "[o]ne of the biggest cultural icons in the history of this country."²⁰ The Boston Globe concurs that he "looms large in American popular culture."²¹ The Portland Oregonian echoes the recognition: Ruth's "cultural impact, ... his hold on the public consciousness as the Sultan of Swat, the Bambino, the exemplar of baseball power, continues ..."²²

Voices such as these know what they are talking about.

Ruth played from 1914 to 1935 (from 1914 to 1919 primarily as a standout pitcher with the Boston Red Sox; from 1920 to 1934 as a slugging right fielder with the New York Yankees; and briefly in 1935 with the Boston Braves). Ruth's glory years were with the Yankees in the 1920s, a decade that saw leading athletes win unprecedented media and popular acclaim. "[T]hrough their pervasive presence in the media," the 6th U.S. Circuit Court of Appeals has written, "sports and entertainment celebrities ... have become valuable means of expression in our culture."²³ The 6th Circuit wrote these words in 2003 but could have written them in the 1920s, when Ruth captivated the media and the public.

Baseball was the unchallenged "national pastime" in the 1920s, a few decades before pro football and pro basketball began to claim growing shares of the national sports stage. On and off the field, Ruth dominated Major League Baseball like no other player then or now. And he dominated as the brightest star on the Yankees, the most storied franchise in sports history. He set two of Major League Baseball's most hallowed records – most home runs in a season (60 in 1927), and most career home runs (714).²⁴

But there is more. "It wasn't that he hit more home runs than anybody else," syndicated sportswriter Red Smith said about Ruth, but that "he hit them better, higher, farther, with more theatrical timing and a more flamboyant flourish."²⁵ Ruth's luster remains untarnished today, even after both records were broken decades after his death in 1948.

A "judicial home run"

In the 21st century, judges continue to acknowledge Ruth's lasting imprint on American culture.²⁶ *DFC Global* is only one recent decision whose opinion cites the Babe in cases that did not raise claims, defenses, or issues concerning the Yankees, baseball, or sports generally.²⁷ Here are three other such recent decisions, which (together with *DFC Global* above) complete a "judicial round tripper."

Vosse v. The City of New York

In *Vosse v. The City of New York*, resident Brigitte Vosse, who lived in upper Manhattan's Ansonia condominium building, challenged an \$800 fine the city imposed on her for placing an illuminated peace symbol in the window of her 17th-floor unit.²⁸ The city sought to enforce its public safety zoning ordinance that prohibited most displays of illuminated signs higher than 40 feet above curb level.

On remand from the 2nd U.S. Court of Appeals, the New York federal district court rejected Vosse's claim that the city ordinance was a content-based restriction that violated her First Amendment speech rights. The district court upheld the ordinance as a reasonable time, place, and manner restriction on speech.

Before resolving the dispositive constitutional issues, the district court offered this dictum about the Ansonia condominium building's pedigree: "The Court feels compelled to note that many legendary members of the New

York Yankees called the Ansonia home in the first half of the twentieth century, including ... most notably, Babe Ruth, who moved in after the Boston Red Sox sold his contract to the Yankees in 1919."²⁹

Smith v. Wakefield, LP


In 2019, the Maryland Court of Appeals (the state's highest court) decided *Smith v. Wakefield, LP*, a suit for unpaid back rent on the lease of a residential unit in a Baltimore City condominium.³⁰ Landlord Wakefield, LP, filed suit seven years after tenant Gregory Smith had vacated the unit and stopped paying rent.

Smith's threshold issue was whether the suit was time-barred. The landlord argued the applicable limitations period was 12 years, the period set by statute for suits for breach of contracts under seal. The court, however, agreed with the tenant that the applicable limitations period was three years, the period set by statute for suits seeking back rent for a residential lease.

Smith explained its resolution this way: "[H]istorically, a residential lease typically was made under seal. Yet an action to collect back rent under that lease was subject to a three-year period of limitations. That remained true if the lease was entered into and the action was brought when the State adopted its first constitution in 1776, when Abraham Lincoln was president in the mid-1800s, when Babe Ruth was born in Baltimore at the turn of the next century, or when humankind first stepped onto the moon 50 years ago."³¹

Vespers Realty Advisors, Inc. v. Binswanger Management Corp.

In 2006, the Massachusetts Superior Court decided *Vespers Realty Advisors, Inc. v. Binswanger Management Corp.*³² The court granted plaintiff Vespers' motion to vacate the sole arbitrator's award in favor of Vespers in an amount the movant considered "wholly inadequate."³³ Over Vespers' objection, the sole arbitrator appointed pursuant to the parties' management agreement was the chief financial officer of a Binswanger agent.

The superior court held that Vespers had not validly waived its right to an impartial arbitrator because "in Massachusetts, a party may not waive its right to an impartial arbitrator and . . . any agreement appointing an evidently partial arbitrator is unenforceable."³⁴ The superior court applied a 1927 state supreme judicial court holding,³⁵ whose age posed no barrier to 21st century application: "[T]his Supreme Judicial Court decision," the superior court explained, "was issued the same year that Babe Ruth hit 60 home runs, but this Court is aware of no case overruling it and still finds it controlling authority."³⁶ 

Endnotes

1 Douglas E. Abrams, a University of Missouri law professor, has written or co-written six books, which have appeared in a total of 22 editions. Four U.S. Supreme Court decisions have cited his law review articles. His writings have been downloaded more than 42,000 times (in 153 countries). His latest book is *Effective Legal Writing: A Guide for Students and Practitioners* (West Academic 2d ed. 2021).

2 2015 WL 3755218 (E.D. Pa. June 16, 2015).

3 *Id.* 1.

4 *Id.* 13.

5 Other recent decisions citing Babe Ruth include *Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1374 n.1 (11th Cir. 2019); *Hughes v. Judd*, 108 F. Supp.3d 1167, 1174 (M.D. Fla. 2015); *Serco Inc. v. U.S.*, 81 Fed. Cl. 463 (U.S. Ct. Fed. Cl. 2008); *Encarnacion-Montero v. U.S.*, 34 F. Supp.3d 202 (D.P.R. Feb. 10, 2014); *In re Schuessler*, 386 B.R. 458, 485 n.14 (Bankr. S.D.N.Y. 2008); *In re IBP, Inc.*, 2001 WL406292, 1 (Del. Ct. Chan. Apr. 16, 2015); *People v. Thompson*, 118 N.Y.S.3d 383, 5 (N.Y. Sup. Ct. 2019).

For complete discussion and analysis of earlier decisions citing Babe Ruth, see Robert M. Jarvis, *Babe Ruth as Legal Hero*, 22 FLA. ST. U. L. REV. 885, 891-94 (1995).

6 Douglas E. Abrams, *References to Baseball in Judicial Opinions and Written Advocacy*, 72 J. Mo. Bar 268 (Sept.-Oct. 2016).

7 Douglas E. Abrams, *References to Football in Judicial Opinions and Written Advocacy*, 73 J. Mo. Bar 34 (Jan.-Feb. 2017).

8 Douglas E. Abrams, *References to Spring's Championship Sports in Judicial Opinions and Written Advocacy*, 73 J. Mo. Bar 168 (May-June 2017).

9 Douglas E. Abrams, *References to Television Shows in Judicial Opinions and Written Advocacy (Part 1)*, 75 J. Mo. Bar 25 (Jan.-Feb. 2019); Douglas E. Abrams, *References to Television Shows in Judicial Opinions and Written Advocacy (Part 2)*, 75 J. Mo. Bar 85 (Mar.-Apr. 2019); Douglas E. Abrams, *References to Movies in Judicial Opinions and Written Advocacy (Part 1)*, 75 J. Mo. Bar 222 (Sept.-Oct. 2019); Douglas E. Abrams, *References to Movies in Judicial Opinions and Written Advocacy (Part 2)*, 75 J. Mo. Bar 297 (Nov.-Dec. 2019).

10 Douglas E. Abrams, *References to Children's Stories and Fairy Tales in Judicial Opinions and Written Advocacy*, 76 J. Mo. Bar 212 (Sept.-Oct. 2020); Douglas E. Abrams, *References to Aesop's Fables in Judicial Opinions and Written Advocacy*, 77 J. Mo. Bar 24 (Jan.-Feb. 2021).

11 Douglas E. Abrams, *Shakespeare in the Courts*, 77 J. Mo. Bar 132 (May-June 2021).

12 Douglas E. Abrams, *Charles Dickens' Novels in the Courts*, 78 J. Mo. Bar 29 (Jan.-Feb. 2022).

13 Douglas E. Abrams, *References to Television Shows in Judicial Opinions and Written Advocacy (Part 1)*, 75 J. Mo. Bar 25, 25 (Jan.-Feb. 2019).

14 Bryan A. Garner, *Interviews with Supreme Court Justices: Chief*

Justice John G. Roberts, Jr., 13 Scribes J. Legal Writing 5, 18 (2010).

15 Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 112 (2018).

16 *Id.* at 111, 122.

17 *Id.*

18 For complete discussion and analysis of Babe Ruth's impact on American culture, see JANE LEAVY, *THE BIG FELLA: BABE RUTH AND THE WORLD HE CREATED* (2018).

19 *Id.* at xix.

20 *Most Famous Person Who Ever Visited Here? It Takes a Genius*, SARASOTA HERALD TRIB., Oct. 28, 2021. See also, e.g., Holiday Mathis, *Horoscopes: Porcine New Year's Resolutions*, NASHUA TELEGRAPH, Feb. 6, 2019 (calling Ruth "one of the greatest sports heroes of American culture"); *Elvis Presley and Babe Ruth Among Trump's First Medal of Freedom Honorees*, N.Y. TIMES, Nov. 10, 2018 (calling Ruth a cultural and athletic luminary).

21 Glenn C. Altschuler, *Clean living? Not quite, but Ruth was a force of nature*, THE BOSTON GLOBE, June 4, 2006.

22 Douglas Perry, *Roger Federer's tennis records are being wiped away, one by one. Does it matter?*, THE OREGONIAN, Mar. 2, 2021. See also, e.g., Paul Doyle, *In His Own League: No Surpassing Babe Ruth as Baseball Icon*, HARTFORD COURANT, May 13, 2006 ("Ruth remains an iconic figure in American history, an enduring source of fascination and perhaps the biggest personality in the history of athletics.").

23 *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 937-38 (6th Cir. 2003).

24 NATIONAL BASEBALL HALL OF FAME, BABE RUTH, <https://baseballhall.org/hall-of-famers/ruth-babe>.

25 *Id.* (quoting Smith).

26 For other recent decisions citing Babe Ruth, see *supra* note 5.

27 For discussion of litigation that did involve Ruth, see Jarvis, *supra* note 5 at 886-91.

28 *Vosse v. The City of N.Y.*, 144 F. Supp.3d 627 (S.D.N.Y. 2015).

29 *Id.* at 629 n.1.

30 462 Md. 713 (Md. 2019).

31 *Id.* at 1247.

32 21 Mass. L. Rptr. 77 (Mass. Super. Ct. 2006).

33 *Id.* at 1.

34 *Id.* at 4.

35 *Patton v. Babson Statistical Org., Inc.*, 259 Mass. 424, 426 (1927).

36 *Vespers, supra* 4.

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