California Polytechnic State University

June 20, 2003

** Note: below is a copy of the ruling from the Court of Appeal received by Cal Poly June 19. While a public document, the appellate court noted that the ruling is not to be "published" for legal purposes -- meaning it can not be cited as a precedent in other cases under specific legal codes.*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,
Plaintiff and Appellant,

v.

BELLO'S SPORTING GOODS,
Defendant and Respondent.

2d Civil No. B151626
(Super. Ct. No. CV990272)
(San Luis Obispo County)

The Board of Trustees of the California State University (CSU) brought this action to enjoin Bello's Sporting Goods (Bello's) from selling articles of clothing and other items that have the words "Cal Poly" applied to them. The trial court denied CSU's request for injunctive relief. But the trial court granted a limited injunction requiring Bello's to attach a disclaimer that the product is not sponsored by or connected with California Polytechnic State University, San Luis Obispo.

CSU appeals. We conclude that Education Code section 89005.5, 1 as recently amended, requires reversal with instructions to enjoin Bello's from using "Cal Poly" for commercial purposes.

FACTS

California Polytechnic State University, San Luis Obispo (University) was founded in 1901. The University, its students and the community refer to it as "Cal Poly," among other names. The University has sold banners, clothing and other items bearing the words "Cal Poly" at least since 1940.

Bello's was established in 1945, and has been at the same location in the City of San Luis Obispo since then. There is only one store. In 1949, Bello's began selling articles of clothing bearing the words "Cal Poly." Those articles of clothing have included letterman's jackets, baseball caps, sweatshirts and T-shirts. Bello's continues to sell similar items. Other stores in the area also sold Cal Poly clothing over the years.

No one objected until 1993. In that year, a foundation affiliated with the University opened a clothing and gift store in downtown San Luis Obispo. The foundation demanded that Bello's and other stores stop selling Cal Poly goods. Only Bello's refused to comply.

CSU brought this action claiming the words "Cal Poly" as its trademark and that section 89005.5 prohibits Bello's from commercially exploiting the words without its permission. The trial court found that the words "Cal Poly" were generic and thus not entitled to trademark protection. The court also concluded that section 89005.5 does not prohibit Bello's from using the words "Cal Poly." It only prohibits use of the words in ways that create the impression a product is endorsed or connected with one of the CSU campuses.

DISCUSSION
I

At the time the trial court rendered judgment, section 89005.5 did not expressly protect CSU's interest in the same California Polytechnic State University or in the abbreviation Cal Poly. Nor did the section expressly prohibit commercial use of the names without CSU's consent. 2

After the trial court rendered judgment, the Legislature amended section 89005.5. 3 As amended, section 89005.5, subdivision (a)(1)(C)(i) expressly provides that the name "California Polytechnic State University, San Luis Obispo" is the property of the state. Section 89005.5, subdivision (a)(1)(D)(viii) provides that abbreviations of the name, including but not limited to "Cal Poly," are the property of the state. In addition to prohibiting the implication or suggestion that a product is endorsed by or connected with one of the CSU campuses, section 89005.5, subdivision (a)(2)(B) now provides in part, "The permission of the Trustees [of CSU] is required before any name listed in this subdivision may be used for any commercial purpose."

There is no dispute that Bello's is using the name "Cal Poly" for commercial purposes without the permission of the trustees. As amended, section 89005.5 clearly prohibits Bello's from continuing to do so. Bello's argues, however, that the amendments to section 89005.5 should not be applied retroactively. It relies on the long established rule that an amended statute applies prospectively unless the Legislature plainly intended it to apply retroactively. (Citing *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207.)

CSU replies that it is not seeking retroactive application of the amended statute. All it seeks is prospective injunction to prevent Bello's from continuing to use the name "Cal Poly" for commercial purposes.

Indeed, all injunctions are prospective in nature. A court cannot stop what has already happened. CSU seeks no damages or other sanctions arising from previous conduct. It is not seeking a retroactive application of the statute.

When the law changes after judgment in the trial court, but before the appeal is determined, "the rule is well settled that on appeals involving injunction decrees, the law in effect when the appellate court renders its opinion must be applied. [Citation.]" (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 527-528.) Thus we must apply section 89005.5 as amended.

Bello's argues the rule requiring an appellate court to decide its opinion under current law applies only when the injunction has been granted. In such a case, enforc ement of the judgment may require further supervision by the court. Bello's distinguishes this case in that here the injunction was denied.

The only authority Bello's cites in support of its argument is *Mendly v. County of Los Angeles* (1994) 23 Cal.App.4 th 1193, 1212. But *Mendly* does not support Bello's argument. There the court discussed the

Legislature's power over a final judicial decision. Here we are not concerned with a final judicial decision, the matter is under appeal. (See *Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 489 ["If the judgment is not yet final because it is on appeal, the appellate court has a duty to apply the law as it exists when the appellate court renders its decision."].)

There is no reason in law or logic for applying on appeal section 89005.5 as it existed at the time of the judgment. It makes no sense to affirm a judgment denying an injunction based on what the law used to be.

Moreover, there is the matter of judicial economy. If we were to hold that the amendments to section 89005.5 do not apply to this case, it would not preclude CSU from filing another case under the amended statute. Because there is a change in the law, prior determination would not be res judicata nor would it collaterally estop CSU from litigating the same question. (*Powers v. Floersheim* (1967) 256 Cal.App.2d 223, 230 [denial of injunction in previous case did not collaterally estop state from litigating the same question in subsequent case following change in applicable law].)

II

Bello's raises a number of constitutional challenges to the application of the amendments to section 89005.5.

Bello's argues the application of the amended statute here is a clear violation of the separation of powers doctrine. (Cal. Const., art. III, § 3.) The separation of powers doctrine prevents the Legislature from rejecting judgments with which it disagrees. (*Mendly v. County of Los Angeles*, *supra*, 23 Cal.App.4th at p. 1212.) But the doctrine is limited to final judgments. (*Ibid*.) A judgment on appeal is no t final. (See *Beckman v. Thompson*, *supra*, 4 Cal.App.4th at p. 489.)

Bello's argues the amended section violates free speech protections of the United States and California Constitutions. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 2.) But section 89005.5 only affects commercial speech. Commercial speech receives a limited form of First Amendment protection. (*San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee* (1987) 483 U.S. 522, 535.) "[W]hen a word acquires value 'as the result of organization and the expenditure of labor, skill, and money' by an entity, that entity constitutionally may obtain a limited property right in the word. [Citations.]" (*Id*. at p. 532 [the First Amendment does not prohibit Congress from granting exclusive use of the word "Olympic" where Congress could reasonably conclude the word has acquired value as a result of organization and the expenditure of labor, skill and money].) Here the Legislature could reasonably conclude that the words "Cal Poly" have acquired value as a result of organization and the expenditure of labor, skill and money by CSU. Bello's has no constitutional right to commercially exploit the value of the university's hard-won reputation. For this reason, we need not decide whether the words "Cal Poly" are generic under trademark law. These words are no less specific than the word "Olympic."

Bello's argues section 89005.5 violates due process in that it is indefinite and vague. (U.S. Const., 14th Amend.; Cal. Const., art I, § 7.) Due process does not require statutory language so precise that its application is entirely free from doubt in every circumstance. All that is required is statutory language reasonably free from uncertainty. (*Wingfield v. Fielder* (1972) 29 Cal.App.3d 209, 219.)

Here Bello's does not suggest in what way the statute is indefinite and vague. The statute prohibits the commercial use of the name "Cal Poly" without the consent of CSU's trustees. There is nothing indefinite or vague about that.

Finally, Bello's contends that section 89005.5 is preempted by federal trademark law, the Lanham Act of 1946 (15 U.S.C., § 1051 et seq.). Bello's provides no supporting analysis. It cites *Gibson v. World Savings*

& Loan Assn. (2002) 103 Cal.App.4th 1291. But *Gibson* concerns only whether the California unfair competition law (Bus. & Prof. Code, § 17200) is preempted by the federal Home Owners' Loan Act (12 U.S.C., § 1461 et seq.) *Gibson* does point out, however, the well settled rule that a federal statute will not preempt a state statute unless there is a clear manifestation of the intention to do so. (*Gibson, supra*, at p. 1296.) Here Bello's points to no such clear manifestation of the intention to preempt section 89005.5.

The judgment is reversed and remanded for the superior court to issue injunctive relief barring use of the "Cal Poly" logo. Costs are awarded to appellant.

1 All statutory references are to the Education Code unless otherwise stated.

2 Prior to the amendment, section 89005.5 provided in part: "The name 'California State University' is the property of the state. No person shall, without the permission of the Trustees of the California State University, use this name, or any abbreviation of it or any name of which these words are a part, in any of the following ways: [¶] []To imply, indicate or otherwise suggest that any such organization, or any product or service of such organization, is connected or affiliated with, or is endorsed, favored, or supported by, or is opposed by the California State University."

3 (Amended by Stats. 2001, ch. 219, § 1 (Assem. Bill No. 1719).)

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