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## Take Me Out to the Metaphor

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## Take Me Out to the Metaphor

PARKER B. POTTER, JR.\*

In the fall of 2003, Judge Smith of the United States District Court for the District of Rhode Island wrote that “[c]ases examining the issue of workplace sexual harassment by women against women are about as common as a baseball post-season that includes the Cubs and the Red Sox . . . .”<sup>1</sup> Judge Smith’s observation was, of course, rooted in the perception among baseball fans, and in the popular culture, that nothing says “futility” quite like a reference to the Chicago Cubs or the Boston Red Sox.<sup>2</sup> Conversely, there can be little doubt that for one in search of a baseball metaphor for success, all roads lead to the Bronx, home of the New York Yankees. This article examines judicial references to the Cubs, Red Sox, and

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\* Adjunct Professor, Franklin Pierce Law Center; Law Clerk to the Hon. John T. Broderick, Jr., Chief Justice of the New Hampshire Supreme Court. This article is dedicated to the late Professor F. Dane Buck, Jr., in whose memory a Boston Red Sox jersey hangs in a building at Pierce Law that bears his name.

1. *Mann v. Lima*, 290 F. Supp. 2d 190, 196 (D.R.I. 2003). *Mann* was the only opinion I found that linked metaphorical references to the Cubs and the Red Sox, but I did find one wonderful instance of parallelism.

In *Gentry v. Rigsby*, No. 01A01-9610-CV00455, 1997 WL 311539 (Tenn. Ct. App. June 11, 1997), the proponent of a will attempted, unsuccessfully, to demonstrate the competence of the testator by testifying that she and the testator “frequently watched baseball up to the time of his death and that [he] knew the names, statistics, and batting averages of the players for his favorite team, the Chicago Cubs.” *Id.* at \*6. However, in *Lombardi v. BJ’s Wholesale Club, Inc.*, No. CV010167187S, 2004 WL 574635 (Conn. Super. Ct. Mar. 5, 2004), a victorious personal injury plaintiff successfully fought off a motion for remittitur based in part on his son’s testimony that the plaintiff “would come to forget names, dates, phone numbers, times of his favorite TV shows, and the players on his beloved Red Sox.” *Id.* at \*2. Based on the foregoing, it would seem that the ability to remember players on the Cubs does not demonstrate mental capacity while the inability to remember players on the Red Sox is a compensable injury. One wonders whether the converse is true. I will be monitoring future slip opinions with an eye toward answering this pressing question.

2. The New York Mets, of course, were spectacularly awful in their first season. *See, e.g.*, JIMMY BRESLIN, CAN’T ANYBODY HERE PLAY THIS GAME? (1963). But the Mets blew their chance to be in this article by winning the World Series in 1969, an accomplishment noted by Judge Motz in his opinion in a trademark infringement action brought against a vendor who sold “Camden Yards” tee shirts outside Baltimore’s Memorial Stadium:

Construction [of Camden Yards] proceeded apace during the long winter months, and on a cold but glorious afternoon in early April, 1992, the park was first opened for an exhibition game between the Baltimore Orioles and the New York Mets (a team last seen, unhappily, in Baltimore in the 1969 World Series). The following day the Orioles’ official season began with a game against the Cleveland Indians (who, even more unhappily, had beaten the Orioles 19 out of 21 times in 1954 when Memorial Stadium, the Birds’ former park, had been opened).

*Md. Stadium Auth. v. Becker*, 806 F. Supp. 1236, 1238 (D. Md. 1992). The Mets’ meteoric rise to success—they won the World Series in their eighth season—has since been eclipsed by the Florida Marlins (who won the Series in their fifth season) and the Arizona Diamondbacks (who won the Series in their fourth season). I guess they just don’t make losers like they used to.

Yankees that are based on the ongoing ninety-eight-year wait for a World Series championship on the North Side of Chicago, the recently ended eighty-six-year drought between titles in Beantown,<sup>3</sup> and the twenty-six World Series trophies won so far by the men in pinstripes.<sup>4</sup>

### I. URSINE FUTILITY

The earliest and perhaps most colorful reference to the ineptitude of the Chicago Cubs came from the pen of Judge Shadur of the Northern District of Illinois, who once wrote:

From this point forward the analysis owes nothing to the efforts of the litigants. All the authorities supporting Triangle's view were uncovered not by its lawyers but by this Court's law clerk, C. Steven Tomashefsky, Esq. (Triangle having made a bald conclusory statement lacking a single supporting authority). Action's non-Chicago counsel were no better. Their two-page Reply Brief simply denied the applicability of UCC § 2-201(3) without citing even one case or treatise, again foisting on this Court's clerk the job of finding all the authorities for this Court's review and analysis. If lawsuits were decided as law school exam papers were graded, the result here would be the same as that predicted by the late sportswriter Warren Brown after watching the wartime Chicago Cubs and Detroit Tigers warm up for the 1945 World Series: Both sides would lose.<sup>5</sup>

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3. Obviously, the value of the Red Sox as a metaphor for futility diminished with the team's victory in the 2004 World Series, but not so much as one might think. Old habits of mind die hard.

4. My Cubs/Red Sox/Yankees triple-play is not entirely unique. In *City of Anaheim v. Superior Court*, No. GO35159, 2005 WL 1523338 (Cal. Ct. App. June 27, 2005), a case in which the City of Anaheim sought to enjoin its local baseball team from changing its name from "California Angels" to "Los Angeles Angels of Anaheim," Judge Aronson explained the custom and practice of naming baseball teams with "the name of a city or geographical region followed by the mascot or moniker name: Boston Red Sox, New York Yankees, Chicago Cubs." *Id.* at \*16.

5. *Triangle Mktg., Inc. v. Action Indus., Inc.*, 630 F. Supp. 1578, 1582 n.7 (N.D. Ill. 1986). As a law clerk myself, I am particularly impressed by Judge Shadur's tip of the cap to his man in the bullpen.

I have also been impressed, on multiple occasions, by Judge Shadur's facility with literary references. See, e.g., Parker B. Potter, Jr., *Ordeal By Trial: Judicial References to the Nightmare World of Franz Kafka*, 3 PIERCE L. REV. 195, 226 n.202 (2005) (noting Judge Shadur's prolific references to Franz Kafka's works); Parker B. Potter, Jr., *Surveying the Serbonian Bog: A Brief History of a Judicial Metaphor*, 28 TUL. MAR. L.J. 519, 550 n.177 (2004) (noting Judge Shadur's use of the Shakespearian phrase "paint the lily"); Parker B. Potter, Jr., *Wondering About Alice: Judicial References to Alice in Wonderland and Through the Looking Glass*, 28 WHITTIER L. REV. 177 n.7 (2006) (noting Judge Shadur's references to the works of Lewis Carroll).

The sad fate of the Cubs has also been recognized at the highest levels of the federal judiciary; in *Waters v. Churchill*,<sup>6</sup> which involved an employee's claim that her termination violated the First Amendment, Justice Scalia noted, in a concurring opinion, that under Justice O'Connor's analysis for the majority, "if the requisite 'First Amendment investigation' disclosed that [the plaintiff] had not been demeaning her superiors, but had been complaining about the perennial end-of-season slump of the Chicago Cubs, her dismissal, erroneous as it was, would have been perfectly OK."<sup>7</sup>

In a case in which the Cubs were themselves defendants<sup>8</sup> in a suit brought by a former ball person aggrieved by the team's decision to eliminate the position of ball person, the plaintiff attempted to meet her burden at the third step of the *McDonnell-Douglas* burden-shifting analysis by "revil[ing] the Cubs for the team's perceived incompetence, both on and off the field, from 1908 to the present."<sup>9</sup> While that strategy was not successful, Judge Zagel did commiserate to a degree, at the start of his opinion:

The current baseball strike is only the latest in a number of indignities recently inflicted upon followers of the Chicago National League Baseball Club, Inc.: the introduction of night games at Wrigley Field; the trading of Lou Brock; the departure of Cy Young Winner Greg Maddux; and, as this lawsuit alleges, the elimination, in 1992, of the position of "ball person."<sup>10</sup>

Given the subject matter and the claims before him, Judge Zagel concluded his opinion in a most appropriate manner:

A fair game requires a clear set of rules, binding on all players equally, which must ultimately be construed by the appropriate authority. This is as true in federal court, where the judge rules on motions, as it is in baseball, where the umpire rules. Ms. Schoe-

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6. 511 U.S. 661 (1994).

7. *Id.* at 688 (Scalia, J., concurring).

8. I recognize that "Cubs" is a singular noun, but the mental image of a counsel table occupied by several juvenile bears is just too hard to resist.

9. *Schoeneck v. Chi. Nat'l League Ball Club, Inc.*, 867 F. Supp. 696, 700 (N.D. Ill. 1994). Sadly, I do not have access to the plaintiff's brief and must, therefore, rely on the judge's characterization of it.

10. *Id.* at 699. Judge Zagel is not the only judge who expressed displeasure over the 1994 baseball strike. See *Hunt's Generator Comm. v. Babcock & Wilcox Co.*, 863 F. Supp. 879, 881 (E.D. Wis. 1994). The author of *Hunt's Generator*, Judge Evans, appears to have had a longstanding concern with baseball strikes, noting in 1985 that: "[bookies] do a greater business in October, during the height of the professional college and football season than they do in August during the dog days of the baseball season, strike or no strike." *Breider v. United States*, 614 F. Supp. 1200, 1202 (E.D. Wis. 1985). In a case involving a different kind of criminal activity, Judge Evans once explained that "we can't expect that drug dealers will keep the kind of meticulous records maintained by the editors of 'Total Baseball.'" *United States v. Medina*, 430 F.3d 869, 881-82 (7th Cir. 2005).

neck has made three claims, each of which would fail before a jury as a matter of law. A federal judge knows, along with everyone else, that in baseball there is only one possible call to be rendered after three successive strikes.

Summary judgement [sic] granted.<sup>11</sup>

In another case involving claims of employment discrimination, Judge Loken of the Eighth Circuit also acknowledged the historic incompetence of the Cubs in his discussion of a *McDonnell-Douglas* pretext analysis:

A prime example of irrelevant pretext evidence are the scraps of newsroom backbiting related at length in the court's opinion. To survive, television stations must focus on a personality's ability to attract audience, not on his age or the bags under his eyes. One of the most beloved sportscasters today is the elderly Harry Caray, whose nationwide broadcasts of Chicago Cubs baseball games have helped make the perennially unsuccessful Cubs one of the most popular teams in the National League. Does the court seriously believe that KARE 11 would have non-renewed a term contract with Harry Caray because some ambitious but unproven underling complained that he was an "old fart" who shouldn't be on the air?<sup>12</sup>

One would think that "old farts" in the air are far more vexing than "old farts" on the air, but that is a discussion for another day.

In a frequently cited opinion in a contract case, Judge Easterbrook of the Seventh Circuit relied upon the incompetence of the Cubs when rejecting the argument that "the presence of a termination clause implies an entitlement to a refund, although the contract lacks any provision for a refund."<sup>13</sup> In Judge Easterbrook's words:

There are of course many other situations in which one side's ability to walk away from a transaction does not establish an entitlement to a refund. . . . Consider . . . the purchaser of season tickets for a baseball team. That the Chicago Cubs turn out to be the doormat of the National League would not entitle the ticket holder to a refund for the remaining games, any more than the star tenor's laryngitis entitles the opera goer to a refund when the understudy takes over the role. In each case, however, the ticket holder has the same right to "terminate" that Seko enjoyed: instead of going

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11. *Schoeneck*, 867 F. Supp. at 703.

12. *Ryther v. KARE 11*, 84 F.3d 1074, 1092 n.5 (8th Cir. 1996) (Loken, J., dissenting).

13. *Seko Air Freight, Inc. v. Transworld Sys., Inc.*, 22 F.3d 773, 774 (7th Cir. 1994).

to the Cubs game, the fan may head south for Comiskey Park and the White Sox, just as Seko may turn to another bill collector. So there is no general rule that a right to terminate implies a right to a refund . . . .<sup>14</sup>

*Dayton Development Co. v. Gilman Financial Services, Inc.*<sup>15</sup> involved a novel theory of standing advanced by a defendant claiming to be a third-party beneficiary of a lease to which it was not a party: “[O]ur standing is kind of like Tinker[] to Evers to Chance, A to B to C, and that Chance has standing to beef about Tinker[’s] throw to the second baseman because he is ultimately going to get the out.”<sup>16</sup> Judge Kyle rejected the defendant’s theory, explaining:

As long-suffering fans of the Chicago Cubs are well aware, shortstop Joe Tinker, second baseman Johnny Evers, and first baseman Frank Chance constituted the Cubs’ legendary (and sometimes infamous) double-play combination, immortalized by Franklin Pierce Adams in a 1910 poem:

These are the saddest of possible words:  
“Tinker to Evers to Chance.”  
Trio of bear cubs, and fleeter than birds,  
Tinker and Evers and Chance.  
Ruthlessly pricking our gonfalon bubble,  
Making a Giant hit into a double—  
Words that are heavy with nothing but trouble:  
“Tinker to Evers to Chance.”

New York Evening Mail (July 10, 1910). Tinker, Evers, and Chance are all in the Hall of Fame on the basis of their inclusion in Adams’s poem. While the Court enjoys counsel’s creativity, it finds that Gilman is out in left field (rather than on first base) with regard to the User Lease.<sup>17</sup>

While there are several more judicial reverences to “Tinker to Evers to Chance,” those venerable teammates played during the Cubs’ early-twentieth-century glory days, which lie outside the scope of an article devoted to references to Cub failures.

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14. *Id.*

15. 299 F. Supp. 2d 933 (D. Minn. 2003).

16. *Id.* at 937 (quoting the transcript of the oral argument).

17. *Id.* at 937 n.2.

In an opinion written after the decision in *Blakely v. Washington*,<sup>18</sup> but before the decision in *United States v. Booker*,<sup>19</sup> Judge Benson of the District of Utah used to great effect a recent episode from the Cubs' unhappy history:

The predictions of the [Federal Sentencing] Guideline's demise are many and they may well be true. It is difficult to read *Blakely* and not see the same wrecking ball heading directly for the sentencing features of the Comprehensive Crime Control Act of 1984. But predictions don't always hold; even sure things sometimes surprise us. Just last October, thousands of Chicago Cubs fans were certain of their team's first World Series appearance in ninety-five years, with a mere five outs to make against the Florida Marlins. Then one of the Cubs' own fans interfered with the catch of a foul ball, and the unraveling began. As Mark Twain observed in 1897 that "the reports of my death are greatly exaggerated," the Sentencing Guidelines may similarly defy present expectations of their impending demise. A distinction, however fine, may be drawn between the Federal Guidelines and the State of Washington's Guidelines. Other issues could become involved. A vote could switch. And so on.<sup>20</sup>

I conclude my discussion of ursine futility with a novel suggestion for improving the Cubs' chances for success that was concocted by Judge Burgess of the Texas Court of Appeals, in a forcible entry and detainer action involving a commercial premises:

It is difficult to improve on Justice Shannon's words in *Meyer* [*v. Young*, 545 S.W.2d 37 (Tex. Civ. App. 1976)], or to be more logical than the Tyler court in *Housing Auth., City of Edgewood* [*v. Sanders*, 693 S.W.2d 2 (Tex. App. 1985)]. However, I can point out the absurdity of the *Academy* [*v. Sunwest N.O.P., Inc.*, 853 S.W.2d 833 (Tex. App. 1993)] holding. A displaced and disgruntled Chicago Cubs fan could file a forcible detainer action in the appropriate justice court in Harris County alleging he had a leasehold on the Astrodome from Harris County, the owner; as landlord he had sublet the Astrodome to a tenant, the Houston Astros Baseball Club and, for whatever reason, the Astros were a holdover

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18. 542 U.S. 296 (2004).

19. 543 U.S. 220 (2005).

20. *United States v. Olivera-Hernandez*, 328 F. Supp. 2d 1185, 1187 (D. Utah 2004). After *Booker* was decided, Judge Benson's colleague, Judge Cassell, quoted the opinion in *Olivera-Hernandez* and called it "[p]erhaps the best (and most colorful) example" of the wait-and-see approach to the logical implications of *Blakely*. *Rucker v. United States*, 382 F. Supp. 2d 1288, 1296 (D. Utah 2005).

tenant or a tenant at will or sufferance. The Astros would defend, alleging they were in direct privity with Harris County and thus a tenant of Harris County, not a tenant of the fan, therefore no landlord-tenant relationship, no jurisdiction. The justice court could, without evidence or against the evidence, render judgment for the fan. Confident justice would prevail, the Astros would appeal to one of the county courts at law of Harris County, once again asserting no landlord-tenant relationship, no jurisdiction. All those jurists, being avid Astro fans, would voluntarily recuse themselves and a visiting judge from Dallas, an avid Rangers fan, would hear the *de novo* appeal. This second court could, without evidence or against the evidence, render judgment for the Cub fan and issue a writ of execution ordering the Astros out. [Note: the Chicago fan has manipulated the time sequence so a four game series between Chicago and Houston, scheduled for the Dome, must now be moved to Wrigley Field]. A virtual army of three-piece, pin-stripe-suited lawyers delve into legal research with all the intensity, vigor and resolve of an at bat by Jeff Bagwell, Astro slugger and first baseman. They expect to find a belt high, middle of the plate, fast ball,—i.e., although Section 24.007 precludes appellate review on the merits in a forcible detainer suit, the statute does not prevent a court of appeals from determining whether the county court had jurisdiction of the cause. Instead, they find a low and outside the strike zone, curve ball,—i.e., proof that a landlord-tenant relationship existed between the parties is just one of the elements required to support a forcible detainer action, but this proof is not jurisdictional; it is required to show who has the greater right of possession and the question of possession is not reviewable by a court of appeals (*Academy Corp. v. Sunwest N.O.P., Inc.*). To add insult to injury, this “curve ball” is out of the very court of appeals they must rely on for relief. However, unlike the great all-star hitter, they will not get an at bat, much less hit one out of the park. The scoreboard:

ACADEMY CORP.1  
ASTROS 0<sup>21</sup>

Somehow, it seems less than accidental that Judge Burgess drafted a Cubs fan rather than, say, a Cardinals fan or a Dodgers fan to make his point.

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21. *A.V.A. Servs., Inc. v. Parts Indus. Corp.*, 949 S.W.2d 852, 857 (Tex. App. 1997) (Burgess, J., concurring) (footnote omitted).

## II. THE CURSE OF THE BAMBINO

From 1918 until they won the 2004 World Series, the Boston Red Sox labored under the so-called “curse of the Bambino.” As famous as that phrase is, at least in New England, it has found its way into only one judicial opinion, in a case involving a bankruptcy trustee’s attempt to sell Red Sox season tickets.<sup>22</sup> However, without invoking the curse, several other courts have taken judicial notice of the tribulations of the “Olde Towne Team.”

In an attempt to define the term “competitive,” Judge Pickard of the Connecticut Superior Court took what appears to be a backhanded shot at the Red Sox: “From 1918 until last season the Yankees and Red Sox teams were said to have been ‘competitive with’ each other (‘the greatest rivalry in sports’) even though the Yankees had won 26 World Series titles and the Red Sox none.”<sup>23</sup> Ouch. Moreover, even after the Red Sox had managed to win the fall classic, their former difficulties were hard for some judges to forget. In ruling that “[t]attoos are not inherently prejudicial,” Justice Carter of the Texas Court of Appeals observed that “[s]ome ardent fans celebrate[d] the long awaited World Series championship by displaying the Boston Red Sox logo as a tattoo.”<sup>24</sup> And in *Washington v. Culotta*,<sup>25</sup> Judge Straniere of the New York City Civil Court went just a bit further: “The Court would have said a closing would never have been scheduled [without a temporary Certificate of Occupancy], but having witnessed the Red Sox winning the World Series the way that they did, and in other liti-

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22. *Grossman v. Boston Red Sox Baseball Club Ltd. P’ship (In re Platt)*, 292 B.R. 12, 17 (Bankr. D. Mass. 2003) (“The ticket holder need only sign his invoice and pay the amount owed, and although he may wait in eager anticipation that this year will be the year the Red Sox win the World Series and shed the ‘curse of the Bambino,’ he need do nothing else.”).

23. *Barber v. Skip Barber Racing Sch., LLC.*, No. CV030090036S, 2005 WL 3509774, at \*9 (Conn. Super. Ct. Nov. 22, 2005). The rivalry between the Yankees and the Red Sox has surfaced in at least one other opinion:

The allocation to the legislative body of responsibility for the design of procedures, rather than the executive branch, would present sound policy reasons when the executive branch is designated with the authority to negotiate with the union. Thus, in order to promote a “harmonious and cooperative” relationship envisioned by the Taylor Law, it would be best served that the executive branch not also dictate the rules and procedures by which the negotiations take place. Otherwise, it would be the equivalent to the Red Sox dictating the rules of the World Series games against the Yankees.

*Mayor of New York v. Council of the City of New York*, 800 N.Y.S.2d 349, 2005 WL 351073, at \*6 (N.Y. Sup. Ct. Jan. 3, 2005) (unpublished table decision). I can only presume, from Judge Ling-Cohan’s reference to a World Series pitting two American League teams against one another, that baseball is not as hot a topic of conversation in her chambers as it is in the chambers I have worked in (or, presumably, the chambers of Judge Evans).

24. *Mason v. State*, No. 06-03-00254-CR, 2004 WL 2952663, at \*3 & n.1 (Tex. App. Dec. 22, 2004) (citation omitted).

25. 9 Misc.3d 1105(A), 2005 WL 2171189 (N.Y. Civ. Ct. July 21, 2005) (unpublished table decision).

gation found legal malpractice when such a closing took place, the improbable is no longer impossible.”<sup>26</sup> Double ouch.

In one of the earlier judicial opinions to recognize the plight of the Red Sox, Justice Kelleher of the Rhode Island Supreme Court had this to say about a majority opinion in which the Court held that automobile insurance hit-and-run coverage was implicated when the policyholder swerved out of the way of an oncoming car (which then drove off), and hit a telephone pole instead:

It is my belief that when the legislators in 1962 opted for protection against the hit-and-run driver, they never imagined that some nineteen years later a judicial body would, with a bit of semantic legerdemain, change the term “hit and run” into “miss and run.” Houdini would certainly appreciate such “sleight of eye,” but the legislators, Class of 1962, who are still possessed of an ability to recall, will, I suggest, shake their heads in disbelief upon learning that when they said “hit” in 1962, they really meant “miss.”

This court has repeatedly said that when the language of a statute is free from ambiguity and expresses a clear, sensible meaning, there is no room for statutory construction, and the court must give the words their plain and obvious meaning. “Hit and run” are words of common, everyday meaning. The word “hit” is defined in Webster’s Third International Dictionary as “1 a: a blow striking an object aimed at contrasted with miss \* \* \* b: an impact of one thing against another: COLLISION.”

It is interesting to note that when the Legislature approved the uninsured-motorist statute in 1962, the approval came from both branches on the sixtieth and last day of the January 1962 session. At that moment, the Boston Red Sox baseball team had just begun another one of the team’s many fruitless pursuits of the American League championship. All of the Red Sox players and just about every legislator were highly aware at that time of the year that before one can have a successful execution of the hit-and-run play in baseball, the batter must hit the ball.

A pedestrian who is struck by an unidentified motor vehicle and then has the misfortune of seeing the automobile leave the scene will tell anyone who inquires about his or her physical welfare that he or she has been involved in a hit-and-run accident.

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26. *Id.* at \*1.

In *The American Heritage Dictionary of the English Language* (1978 ed.), the phrase “hit-and-run” is classified as an adjective which describes “the driver of a motor vehicle who drives on after striking a pedestrian or another vehicle”; or, when used in a baseball sense, describes a play in which a man on base runs with . . . the pitch, and the batter attempts to hit the ball.” It is obvious that my colleagues care little for our American heritage or the publication that bears that title.

With all due deference to my associates, the General Assembly knew exactly what it was doing when it first afforded protection against the uninsured and hit-and-run motorist. If the Legislature ever intended to include protection against the “miss-and-run” motorist, it was perfectly capable of saying so, but it did not. The majority has, under the guise of a liberal construction, amended a statute that, because of its clear, precise prose, needs no such amendment.<sup>27</sup>

In another case from Rhode Island, Superior Court Judge Carrellas did not go so far as to refer to the efforts of the Red Sox as “fruitless,” but introduced the discussion of his final point in the following way: “Like the Red Sox, the Court wants to touch all bases (and hopefully with more success than they’ve attained).”<sup>28</sup> Judge Laurence of the Massachusetts Court of Appeals, in a workers’ compensation case arising out of an employee’s injury while playing for the company softball team, got an assist from the Red Sox in his explanation of the company team’s poor play: “The J & P team’s 1986 season was one of unremitting futility that would have dispirited even hardened Red Sox fans.”<sup>29</sup>

While Judge Laurence was concerned with J & P’s dismal 1986 season, the fate of the 1986 Red Sox was on the mind of Judge Evans of the Eastern District of Wisconsin when he wrote the following footnote:

The year 1975 brought us one of the greatest moments in World Series history. The sixth game of the Series, one of the greatest ever played, saw Boston’s Bernie Carbo hit a three-run pinch hit homer which paved the way for Carlton Fisk’s game

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27. *Pin Pin H. Su v. Kemper Ins. Cos./Am. Motorists Ins. Co.*, 431 A.2d 416, 420 (R.I. 1981) (Kelleher, J., dissenting).

28. *Fidrych v. Inskip Motors, Inc.*, No. C.A. 73-1284, 1982 WL 604065, at \*4 (R.I. Super. Ct. Jan. 6, 1982). And no, the plaintiff in that case was not New England native, and one-time Pawtucket Red Sox pitcher, Mark “The Bird” Fidrych.

29. *Bengston’s Case*, 609 N.E.2d 1229, 1231 (Mass. App. Ct. 1993). Specifically: “Of the scheduled twenty-six games, the team failed to win any, losing several by forfeit because it fielded an insufficient number of players at game time.” *Id.*

winning round tripper in the bottom of the 12th. Red Sox joy faded, however, in game seven, when future Hall of Famer Joe Morgan's bloop single in the ninth gave the Cincinnati Reds the Series. The Red Sox didn't return to the big show again until 1986, and then Mookie Wilson's dribbler through the legs of Bill Buckner multiplied the Series sadness in Beantown.<sup>30</sup>

Judge Evans's opinion, written during the 1994 baseball strike, contains a remarkable compendium of baseball information. He began by noting:

A few months ago, I thought I would, at this time, be getting ready to watch the World Series. As a baseball lover, that was a warm thought indeed. But alas, the World Series is not, this year, meant to be. So my attention is not on baseball today but on this case, brought under 42 U.S.C. § 9601 *et seq.*, The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Please excuse me if, while discussing the case, my mind wanders a bit to things that might have been.

The plaintiffs are an unincorporated association of corporations (much like the owners of major league baseball teams), referred to as Hunt's Generator Committee. They have entered into a consent decree with the United States Environmental Protection Agency for cleanup of a landfill, known as Hunt's Landfill, in Racine County, Wisconsin. The consent decree served the purpose of a salary cap limiting the financial liability of the members of the committee. The committee seeks contribution from the defendants, who are other entities potentially responsible for the cleanup. One of the defendants, Mid-America Steel Drum Co., Inc., has moved for summary judgment, seeking dismissal from the lawsuit on the basis that it is not a successor to the potential liability of Northwestern Drum Company. It is not unlike the situation in 1970 when the Milwaukee Brewers wanted nothing to do with the debts of their predecessor, the Seattle Pilots.<sup>31</sup>

The judge's mind did indeed wander, quite dramatically, as evidenced by his referring to "the Court of Appeals for the Seventh (as in inning stretch) Circuit,"<sup>32</sup> "the Court of Appeals for the Eighth (as in 'dial 8') Circuit"

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30. Hunt's Generator Comm. v. Babcock & Wilcox Co., 863 F. Supp. 879, 882 n.3 (E.D. Wis. 1994).

31. *Id.* at 881.

32. *Id.* at 882.

(“dial 8” is baseball slang for hitting a home run),<sup>33</sup> and “the Court of Appeals for the Ninth (as in bottom of the ninth inning) Circuit.”<sup>34</sup> And then, whenever the recitation of the facts of the case required him to give a date, Judge Evans dropped a footnote mentioning memorable events in baseball history that had occurred on that same date.<sup>35</sup> I would imagine that the opening day of the 1995 baseball season was a happy day indeed in the chambers of Judge Evans.

### III. THE (EVIL) EMPIRE STRIKES BACK

Having surveyed references to futility in Fenway, I now head south down I-95, to the House that Ruth built, and baseball’s preeminent metaphor for success. However, it is worth noting that even for the Yankees, there have been occasional setbacks, as noted by Judge Crawford of the

33. *Id.* at 883 & n.6.

34. *Id.* at 883.

35. Elevation to the court of appeals seems not to have dampened Judge Evans’s ardor for the national pastime. Consider the first paragraph of his opinion in *Rothe v. Revco D.S., Inc.*, 148 F.3d 672 (7th Cir. 1998):

Nineteen fifty-eight, with the possible exception of Uncle Sam’s drafting of Elvis, was a tranquil and simple time. Consider, for example, baseball: no artificial turf, free agency, designated hitters, slick agents, .235 hitting second basemen with multimillion-dollar guaranteed contracts, or domed stadiums, and all seven World Series games (pitching, as it also did in 1957, the New York Yankees against the Milwaukee Braves) played on natural grass under natural light. This case takes us back to that simple time for it was in 1958 that Obed and Mary Ellis leased a small property in Frankfort, Indiana (1990 population 14,754) to Hook Drugs, Inc. for the operation of a drugstore. Today we consider what that old lease had to say, or perhaps more accurately not say, about the duty of the lessee to continue to operate the drugstore in the mid-1990’s.

*Id.* at 673; *see also* *United States v. Cross*, 289 F.3d 476, 478 (7th Cir. 2002) (“There is no dispute that Cross’s criminal activities span 4 presidential administrations and some 15 baseball seasons. Children born in the era of Cross’s earliest recorded cons are now getting dates for the prom.”).

But Judge Evans is not alone in using baseball to tell time in a judicial opinion. For example, there is this from Judge Miller:

It was the year 1962. John Fitzgerald Kennedy was President of the United States. The Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962)] paved the way for the reapportionment of state legislatures. Stan Musial was paid the outrageous salary of \$65,000 a year just because he could hit a baseball better than about anyone who ever picked up a bat. Roger Maris hit 61 home runs for the New York Yankees, but teammate Mickey Mantle beat him out for Most Valuable Player in the American League. The Green Bay Packers beat the New York Giants in the AFL [sic] Championship Game. Lawrence of Arabia won the Academy Award for best picture. Tony Bennett walked away with two Grammy Awards for best song “I Left My Heart in San Francisco” and best male singer. Colonel John Glenn put the U.S. back in the space race and got an old fashioned ticker tape parade. 1962 was also the year that Twinbrook Parkway Project 1166 was authorized by the County Council for the construction of Twinbrook Parkway thus beginning this saga.

*Sulzer v. Montgomery County*, 484 A.2d 285, 286 (Md. Ct. Spec. App. 1984) (quoting the court below).

Court of Appeals for the Armed Forces, who once began a dissent in the following way:

After the seven-game 1960 world series victory by my hometown Pittsburgh Pirates over the heavily favored New York Yankees, that ended when Bill Mazeroski hit a dramatic ninth inning home run over Yogi Berra's head and the left center field wall of Forbes Field, Yogi explained the loss by saying, "We made too many wrong mistakes." Unfortunately, our performance in the arena of implied bias is filled with inconsistency, if not "wrong mistakes," and today's decision only compounds the confusion.<sup>36</sup>

Another judicial "wrong mistake," this one involving the Yankees, at least indirectly, appears in an opinion by Judge Randa, another baseball-savvy jurist from the Eastern District of Wisconsin.<sup>37</sup> In a discussion of the state-of-mind requirement within the statutory standard for awarding punitive damages in a tort case, the judge explained the second prong of the test for intentional disregard of the plaintiff's rights in the following way:

Secondly, for an outcome to be "practically certain," it must be more than "reasonably probable" or "likely," it must approach being inevitable. For example, it is "practically certain" that shouting "Fire!" in a crowded theater will cause panic. It is *not* practically certain (though it is very likely) that the New York Yankees will go to the World Series again this year.<sup>38</sup>

While Judge Randa is no doubt an able jurist, he proved to be a poor prognosticator; the Yankees finished the 2002 season by losing to the Angels (and their seemingly underappreciated rally monkey),<sup>39</sup> three games to

36. *United States v. Wiesen*, 56 M.J. 172, 177 (C.A.A.F. 2001) (Crawford, C.J., dissenting) (quoting YOGI BERRA, *THE YOGI BOOK* 34 (1998)). For a discussion of judicial references to one of the most famous of all Yogi-isms, "déjà vu all over again," see Parker B. Potter, Jr., *A Good Piece of Paper Spoiled: An Eighteen-Hole Round-up of American Hole-in-One Jurisprudence*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 135, 152 n.107 (2004).

37. *Boomsma v. Star Transport, Inc.*, 202 F. Supp. 2d 869 (E.D. Wis. 2002).

38. *Id.* at 881. In *Selig v. United States*, 740 F.2d 572 (7th Cir. 1984), Judge Bauer of the Seventh (inning stretch) Circuit also mentioned a World Series defeat for the Bronx Bombers: "The Braves won the World Series in 1957 (defeating the almost invincible New York Yankees), and repeated as pennant winners in 1958." *Id.* at 574 (affirming district court decision that the taxpayer, who was owner of a major league baseball team, "properly allocated \$10.2 million of the \$10.8 million purchase price of the Seattle Pilots to the value of the 149 players he bought."). The opinion in *Selig* contains a tremendous amount of baseball history, and concludes with a quotation from the poem *Casey at the Bat*, "But there is no joy in Mudville . . ." followed by: "There should be joy somewhere in Milwaukee—the district court's judgment is affirmed." *Id.* at 580.

39. "Some might suggest that sports fans are unsophisticated—witness the "Dog Pound" in Cleveland, the spiked shoulder pad wearing and face-painted fans of the Raider Nation, or the Rally Monkey in Anaheim—[but] I would submit that sports fans are very sophisticated." Don Nottingham, Com-

one, in the first round of the playoffs. At least the judge used fire in a crowded theater rather than a World Series appearance by the Yankees as his example of “practically certain.” And, to be sure, appraisals of Yankee superiority are not without their detractors. In a case that challenged the pro football draft on antitrust grounds,<sup>40</sup> Judge MacKinnon of the D.C. Circuit noted, in a concurring and dissenting opinion, that “baseball instituted a draft when it became clear from the long domination of the New York Yankees that the farm system was not producing competitive balance,”<sup>41</sup> and that “[a]s the New York Yankees have proved, just one free agent added to a strong roster by a free spending owner can assure team dominance and deny it to another team.”<sup>42</sup> In his opinion for the majority, Judge Wilkey took a dim view of Judge MacKinnon’s ludic erudition: “Our colleague has reinforced his own encyclopedic knowledge of football with repeated references to The NFL’s Official Encyclopedia History of Professional Football (1977). . . . One man’s reminiscences of a popular sport should not be confused with a judicial decision.”<sup>43</sup>

Notwithstanding the little bumps in the road mentioned above, the Yankees are, for the most part, held up by judges as the acme of achievement. Sometimes the praise is a bit faint, as in *Farley v. Farley*,<sup>44</sup> where the Ohio Court of Appeals used a reference to the Yankees to criticize a judgment of the Franklin County Court of Common Pleas:

Trial court has muzzled this pro se defendant in pursuit of his Due Process Rights, and the court has erred and abused its discretion by funding the piling on of two plaintiff attorneys with bias and prejudice that seems comparable to the *New York Yankees v. PS # 2 Sandlot Team*. This bias is almost criminal.<sup>45</sup>

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ment, *Keeping the Home Team at Home: Antitrust and Trademark Law as Weapons in the Fight Against Professional Sports Franchise Relocation*, 75 U. COLO. L. REV. 1065, 1096 n.200 (2004).

40. *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1174-75 (D.C. Cir. 1978).

41. *Id.* at 1198 (MacKinnon, J., concurring in part and dissenting in part).

42. *Id.* at 1216.

43. *Id.* at 1186 n.49.

44. No. 02AP-1046, 2003 WL 21405558 (Ohio Ct. App. June 19, 2003).

45. *Id.* at \*3. During his closing argument in a criminal case, a defense attorney referred to the Yankees to make another, less meritorious, procedural objection:

As I close ladies and gentlemen, I am going to ask you to do one more thing for me.

This trial is sort of, we are up against the Yankees in that major league ball game. It is Uncle Sam and if that ain’t the New York Yankees, I don’t know who is.

And even the Yankees when they lead off, they don’t bat last, too.

Well, this game is a little different. They lead off, and they get last licks. Just in case somebody should get a point across. In case that run should score on the bottom of the ninth the Yankees yell it is a good thing there is ten and a half innings in the game, go back out there. They also get their rebuttal, two shots there.

One would think that just about any big league ballclub would have a pretty easy time against the PS #2 Sandlot Team, but still, a reference to PS #2 going against the San Diego Padres would probably raise more questions than it answered.

While the references to Yankee superiority discussed above might sound a bit like bunt singles, the ones that follow have been written by judges who decided to dig in and swing for the fences. The Yankees reference in *In re WRT Energy*<sup>46</sup> is short and sweet; Judge Keenan of the Southern District of New York began his factual background section by noting that “[t]his action . . . has outlasted a New York Yankees dynasty.”<sup>47</sup>

In *Parkland Republican Club v. City of Parkland*,<sup>48</sup> Chief Judge Zloch of the Southern District of Florida denied injunctive relief to a local republican club that challenged a municipal regulation that barred political organizations from participating in a local parade.<sup>49</sup> In rejecting the plaintiff’s position, which was based on the premise that the government does not have the authority to “create a limited public forum out of a traditional public forum,”<sup>50</sup> Judge Zloch explained that under the view of the First Amendment proposed by the plaintiff:

[T]he City [of Parkland] could not sponsor a jazz festival in a park without having to allow a heavy metal, punk rock, or disco group the opportunity to perform as well. Nor could a major metropolitan city, such as New York, hold a parade celebrating a World Series victory by the New York Yankees on the streets of Manhattan without violating the First Amendment if it did not allow all other groups—including political groups—who wished to participate to enter the parade.<sup>51</sup>

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So the Yankees are going to get up now again, and I am not going to have an opportunity to address you. I am not going to have that chance to come up there and say what I would like to say in rebuttal to their rebuttal.

You have got that job.

The first thing I would ask you ladies and gentlemen to do after you select a foreperson, is to go in there and rebut for me. Do that rebuttal for me. Last licks are important. That is a fair game.

And that is what this system is all about.

It is supposed to be fair. We don’t get our last licks.

*United States v. Brazziel*, 609 F.2d 236, 236-37 (5th Cir. 1980). In response, the trial judge interrupted defense counsel and explained the burden of proof and order of trial. *Id.* at 237. On appeal, the court held that the defense counsel’s remarks were improper and that the trial judge’s corrective instructions did not deny the defendant a fair trial. *Id.* at 238.

46. No. 96 Civ. 3610(JFK), 96 Civ. 3611(JFK), 2005 WL 323729 (S.D.N.Y. Feb. 9, 2005).

47. *Id.* at \*2.

48. 268 F. Supp. 2d 1349 (S.D. Fla. 2003).

49. *Id.* at 1350.

50. *Id.* at 1356.

51. *Id.*

It is interesting to note that while his chambers are in Ft. Lauderdale, Florida, Judge Zloch did not use his hometown Florida Marlins as his hypothetical baseball champion, and the interesting becomes downright ironic in light of the fact that four short months after the order in *Parkland Republican Club* came out, the Florida Marlins beat the Yankees in the 2003 World Series.<sup>52</sup>

For anyone who had to endure the analogy section of a standardized test, the next Yankees reference may trigger a nasty memory or two. In *IBP, Inc. v. Tyson Foods, Inc. (In re IBP, Inc. Shareholders Litigation)*,<sup>53</sup> Vice Chancellor Strine of the Delaware Court of Chancery described the failed Tyson/IBP merger in the following way:

IBP is a Delaware corporation with its principal executive offices in South Dakota. It is one of the world's largest manufacturers of beef and pork meat products.

Tyson, meanwhile, is the world's largest purveyor of chicken products and the second-largest maker of tortillas. Tyson is also in the pork products business. Lasso is Tyson's acquisition subsidiary whose sole reason to be is to facilitate the IBP acquisition.

By the Merger, Tyson thus sought to become to meat, what the New York Yankees are to baseball. One suspects that Babe Ruth would have understood Tyson's (now-abandoned) ambition.<sup>54</sup>

In a trademark dilution case, Judge Barry of the Third Circuit used the fame of the Yankees to make a point about the kinds of marks that were intended to be protected by the Federal Trademark Dilution Act: "Little if any analysis, of course, would be required to find marks such as 'Buick,' 'Dupont' or 'Kodak' truly famous or, in the context of sports with which we deal here, that the mark 'New York Yankees' is so famous that even non-sports fans are well aware of it."<sup>55</sup> Not only are the Yankees so well

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52. Judge Zloch, it seems, shares the same view of Yankee superiority that led Judge Randa to erroneously predict an appearance by the Yankees in the 2002 World Series.

53. No. CIV.A.18373, 2001 WL 406292 (Del. Ch. Apr. 18, 2001).

54. *Id.* at \*1.

55. *Times Mirror Magazines, Inc. v. Las Vegas Sports News, L.L.C.*, 212 F.3d 157, 172 (3d Cir. 2000) (Barry, J., dissenting). As a further index to power of the Yankee mystique in realms beyond the playing field, it appears that Yankee apparel has considerable appeal in the world of street gangs. *See, e.g., In re Anthony M.*, No. B152418, 2002 WL 1558622, at \*1 (Cal. Ct. App. July 16, 2002) ("The officer was concerned for his safety because the area was in Rolling 60's Crips territory and appellant was dressed in Rolling 60's gang attire, specifically a New York Yankees baseball hat, a Seattle Mariners baseball jersey, blue shorts, and blue sneakers with blue laces."); *In re Albert H.*, No. B152272, 2002 WL 459724, at \*1 (Cal. Ct. App. March 26, 2002) ("The 'color of choice' of Crips gang members is blue, and they often wear the logos of the Seattle Mariners or New York Yankees baseball teams."); *People v. Fisher*, No. B147724, 2001 WL 1295413, at \*1 n.1 (Cal. Ct. App. Oct. 25, 2001) ("Members of the East Coast Crips sometimes wear New York Yankees hats.").

known for their success on the diamond that their trademark is recognized by non-sports fans, the franchise is so much bigger than life that its owner has become a metaphor, at least in the eyes of Justice Greenfield of the New York Supreme Court who, in a wrongful discharge case, noted that the plaintiff had been informed, prior to his employment, that his future boss was “a difficult man to deal with and could summarily dismiss an employee, not unlike George Steinbrenner of the New York Yankees who insisted on running the show his own way.”<sup>56</sup>

#### IV. THE BOTTOM OF THE NINTH

To paraphrase Joe Nuxhall,<sup>57</sup> it is now time for me to be rounding third and heading for home. Comparatively speaking, a couple of patterns emerge from my examination of judicial references to the Cubs, Red Sox, and Yankees. First, the Cubs and the Red Sox are about even in terms of the raw numbers of references. Both teams trail the Yankees, but by a small margin. References to the Cubs and the Yankees skew a bit up the judicial food chain. Yankees references appear in four opinions from the federal courts of appeals, three federal district court opinions, one opinion from the Court of Appeals for the Armed Forces, one intermediate state appellate court opinion, and two state trial court opinion, while Cubs references appear in a United States Supreme Court opinion, two opinions from the federal courts of appeals, four federal district court opinions, and one intermediate state appellate court opinion. By contrast, Red Sox references appear in two federal trial court opinions, one state supreme court opinion, two opinions from intermediate state appellate courts, and four state trial court opinions. Consequently, about half the Red Sox references appear in unreported decisions, compared with less than a third for the Yankees and none at all for the Cubs.

There are geographic patterns as well. Opinions referring to the Cubs tend to cluster in the midwest. Those referring to the Red Sox tend to cluster in New England. But there are outliers, and, rather remarkably, the Texas Court of Appeals has issued one opinion referring to the Cubs and one referring to the Red Sox, albeit rather tangentially in both cases. On the other hand, references to the Yankees do not tend to cluster in or around New York; rather, they come from courts around the country as if, gulp, the Yankees are somehow “America’s Team.”

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56. *Boyle v. Petrie Stores, Corp.*, 518 N.Y.S.2d 854, 856 (N.Y. Sup. Ct. 1985).

57. Joe Nuxhall was the radio announcer who brought Cincinnati Reds baseball games to my bedside radio when I was growing up, and he always signed off by saying: “This is the ol’ lefthander, rounding thime, heading for home.”

Of all the patterns I was able to discern, the most interesting is the pattern of animosity exhibited by New York judges toward the Boston Red Sox.<sup>58</sup> That attitude is exemplified by Judge Ling-Cohan's misplaced concern over the prospect of "the Red Sox dictating the rules of the World Series games against the Yankees"<sup>59</sup> and by Judge Stranieri's apparent belief that a Red Sox victory in the World Series suggests that anything is possible.<sup>60</sup> The lesson seems to be how briefly the sweet taste of success lingers on the tongue; even after twenty-six world championships, fans of the Yankees seem to find it hard to swallow the fact that one World Series trophy in eighty-six years has come to rest in Fenway Park. Sad. So sad.

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58. Judge Pickard of the Connecticut Superior Court also jumped ugly on the Sox when he objected to characterizing the Red Sox-Yankees rivalry as "competitive," *see* *Barber v. Skip Barber Racing Sch., L.L.C.*, No. CV030090036S, 2005 WL 3509774, at \*8 (Conn. Super. Ct. Nov. 22, 2005), but because Connecticut lies squarely between the Evil Empire and Red Sox Nation, Judge Pickard cannot properly be considered a New York judge.

59. *Mayor of New York v. Council of the City of New York*, 800 N.Y.S.2d 349, 2005 WL 351073, at \*6 (N.Y. Sup. Ct. Jan. 3, 2005) (unpublished table decision).

60. *Washington v. Culotta*, 9 Misc.3d 1105(A), 2005 WL 2171189, at \*1 (N.Y. Civ. Ct. July 21, 2005) (unpublished table decision).