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Case Law From the Crypt

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The Law of Halloween

By Daniel B. Moar

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The scariest part of Halloween for most people might be having their car toilet-papered or getting a little egg in the face. For lawyers, however, All Hallows' Eve presents its own unique legal challenges.

To start, Halloween presents legal cases that simply do not exist at any other time of the year. For example, in one recent case, a plaintiff alleged that her neighbor's Halloween lawn decorations were defamatory, harassing, and caused emotional distress. The decorations included an "Insane Asylum" directional sign pointed towards the plaintiff's house and a homemade Halloween tombstone purporting to reference the plaintiff, which read:

At 48 She had
No mate No date
It's no debate
She looks 88
She met her fate
in a crate
Now We Celebrate
1961–2009.[1]

In another recent case, an appellate court considered whether a hospital violated state labor law by ordering union nurses to remove the black t-shirts they had worn for Halloween. The shirts depicted a skeleton with the words "Skeleton Crew" on the front and complaints about staffing levels being "cut to the bone" on the back.[2]

In addition to such factually unique cases, the substantive law actually changes to reflect expectations of "normal" Halloween behavior. One court aptly noted the distinction as applied to the duty of care in the tort context:

> On any other evening, presenting a frightening or threatening visage might be a violation of a general duty not to scare others. But on Halloween at trick-or-treat time, that duty is modified. Our society encourages children to transform themselves into witches, demons, and ghosts, and play a game of threatening neighbors into giving them candy.[3]

This article provides an overview of these issues with a detailed discussion of the intersection between the law and Halloween.

Haunted Houses

Perhaps the most infamous haunted house case is *Stambovsky v. Ackley*, where a New York appellate court held that a house was haunted as a matter of law.[4] The plaintiff had commenced an action to rescind a real estate purchase after he discovered that the house he bought was possessed by ghosts. Believing that it could not award the buyer a remedy, the trial court dismissed the complaint.[5]

The appellate court disagreed, finding that the "unusual facts . . . clearly warrant a grant of equitable relief to the buyer."[6] The seller had repeatedly reported to the media the presence of ghosts roaming the house. As a result, the appellate court found that the seller was "estopped to deny their existence and, as a matter of law, the house is haunted."[7] Additionally, instead of acknowledging that ghosts simply do not exist, the court noted that even "the most meticulous inspection" would not have discovered their presence and put the buyer on notice.[8]

While courts might be willing to find a house to be haunted in real estate disputes, courts are less indulgent where a criminal defendant tries to claim that a house was haunted as a "defense" against vandalism. For example, in *Hayward v. Carraway*, the court rejected the argument that children were justified in damaging a home because they believed it to be haunted.[9] In that case, a group of children entered the home and broke windows, tore up floorboards, and caused other extensive damage. Rather than being haunted, the house was actually a historic plantation home undergoing extensive renovation. In holding that the children's belief was "of no consequence," the court noted that "the intention of a party committing vandalism does not affect the right of recovery of the injured party."[10]

The most common context of haunted house cases are personal injury cases involving patrons injured while attending seasonal haunted houses. Haunted house personal injury cases are exceptional because the courts recognize that haunted houses are intended to scare people, and that limited lighting and startling surprises are necessary to accomplish this intent. This in turn modifies the duty of care owed to haunted house patrons.

For example, in *Mays v. Gretna Athletic Boosters, Inc.*, the plaintiff was so startled by a haunted house "monster" that she ran straight into a cinder block wall, crushing her nose.[11] The plaintiff argued that the lack of lighting and darkened wall presented an unreasonably dangerous condition that the defendant owed a duty to protect her from. The court disagreed, noting that the conditions complained of were the very attributes of a haunted house:

> The very nature of a Halloween haunted house is to frighten its patrons. In order to get the proper effect, haunted houses are dark and contain scary and/or shocking exhibits. Patrons in a Halloween haunted house are expected to be surprised, startled and scared by the exhibits but the operator does not have a duty to guard against patrons reacting in bizarre, frightened and unpredictable ways.[12]

Similarly, in *Bonanno v. Continental Casualty Co.*, the court noted that a haunted house patron "had to realize that the very nature of the attraction was to cause patrons to react in bizarre, frightened and unpredictable ways."[13] There, the plaintiff claimed that she was injured by other patrons trying to get away from a make-believe devil. The court rejected the plaintiff's claim that the haunted house owners were negligent in failing to supervise, noting that "[i]t would be inconsistent in this case for this court to allow plaintiff to recover for damages which resulted from her being frightened, precisely the effect that the 'Haunted House' was calculated to produce."[14]

The court reached the same result in *Galan v. Covenant House New Orleans*, where the plaintiff was so startled by a chainsaw-yielding "Jason" that she fell down and struck her head.[15] The plaintiff tried to distinguish her case from the prior haunted house precedent by arguing that the defendants were negligent because Jason had been placed after the exit door of the haunted house in an alleyway where patrons would believe the scares were over. In rejecting this argument, the court noted the similar refrain that "the very purpose of a haunted house is to frighten its patrons."[16]

While haunted house defendants may avoid liability for injuries caused by patrons becoming scared, liability

can still be imposed for injuries occurring for other reasons. For instance, in *Holman v. Illinois*, the court awarded damages to a grandmother who was injured when she walked into a misplaced low-seated bench while following her grandson around a darkened haunted house.[17] Similarly, in *Fairchild v. Drake*, the court found a triable issue of negligence where the plaintiff tripped over a low-hanging rope guardrail at a haunted house.[18] Finally, two trial court judgments were affirmed in favor of the plaintiffs injured by defective slides within haunted houses.[19] Notably, in each of these cases the injuries that occurred were not due to the scary nature of the haunted house but instead due to physical defects.

Chainsaw Maniacs

In the "real world," courts quite naturally tend to show little regard for people who menace others with chainsaws. For instance, in one recent case, a court affirmed an assault conviction against a defendant who escalated a violent domestic confrontation with his girlfriend by menacing her with a chainsaw while she was trapped inside his car.[20] Another court confirmed an assault conviction against a stepfather who startled his sleeping stepson by starting a chainsaw and holding it one foot above the boy.[21] In a third case, dealing with a confrontation between neighbors over a land dispute, a court affirmed a finding of civil assault against the plaintiff who brought a pair of chainsaw-bearing friends to his neighbor's property and yelled for them to "[b]ring on the chainsaws!"[22]

In contrast, on Halloween, when chainsaw wielding is the norm even for people not engaged in intimidation or lumberjacking, courts show far more indulgence to chainsaw maniacs – particularly those dressed as the horror-movie icon Jason Voorhees.

For instance, in addition to the *Galan v. Covenant House New Orleans* decision noted above, another court absolved a chainsaw-wielding Jason of liability in *Durmon v. Billings*.[23] There, the plaintiff encountered Jason when she was taking her church youth group to a corn maze.[24] While walking through the maze prior to her encounter with Jason, the plaintiff had heard the sound of a chainsaw running. Nonetheless, when Jason approached her with the running chainsaw above his head, the plaintiff turned to run but fell and broke her leg.[25]

The plaintiff alleged the maze owners were negligent both for the muddy condition of the maze and for allowing Jason to utilize an instrument that could have injured her.[26] The court, however, found that the muddy condition was obvious to all and that the plaintiff had paid to be scared – therefore, the defendants owed no duty to protect her from Jason.[27]

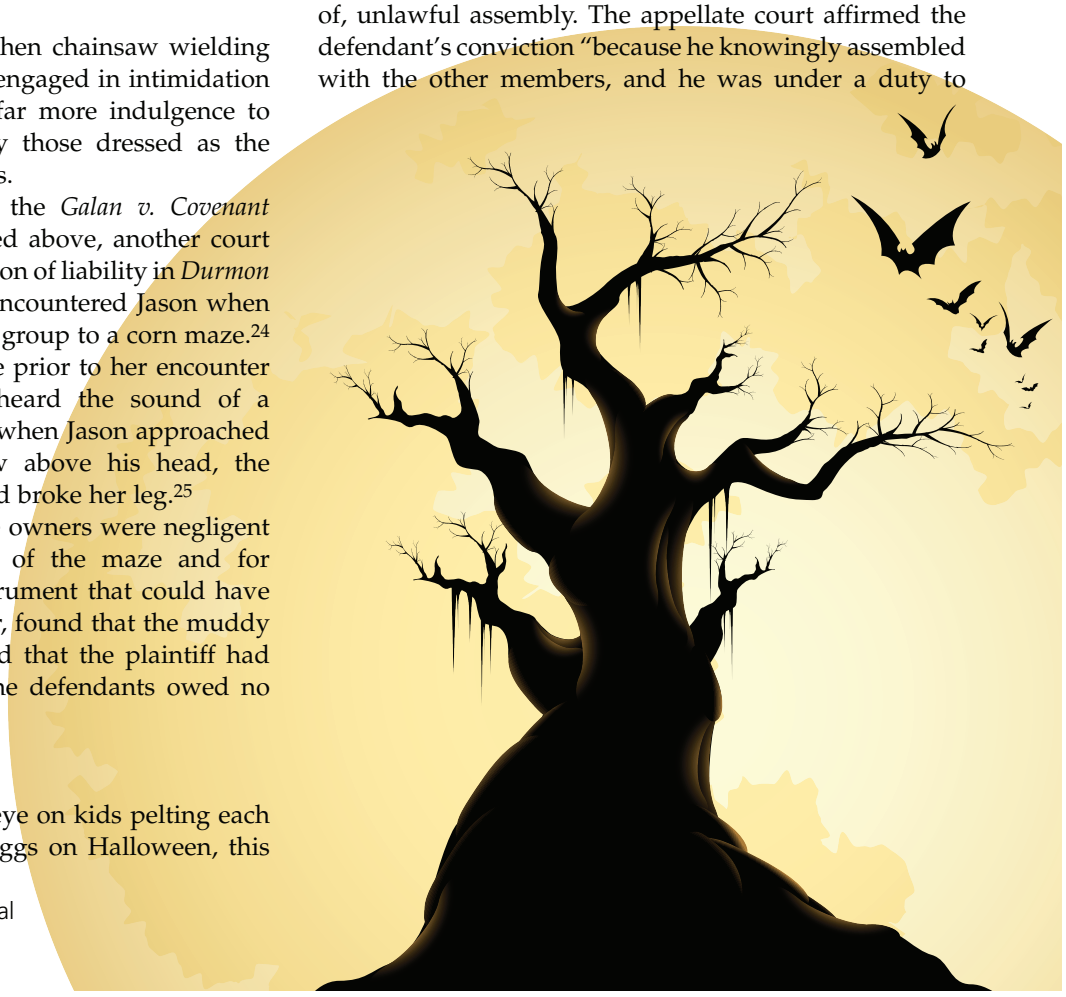
Shaving Cream and Eggs

While many adults cast a blind eye on kids pelting each other with shaving cream and eggs on Halloween, this conduct has not gone unnoticed by the courts.[28] Indeed, in one recent case, a court found questions of fact as to whether the parents were liable for negligent supervision for providing kids with shaving cream and socks filled with talcum powder at a Halloween party, where one child was punched following a shaving cream melee.[29]

Courts have also imposed civil and criminal liability on egg throwers. For example, in one case a married couple made the ill-advised choice to ignore trick-or-treaters that visited their house, with the inevitable result that their house was then pummeled with eggs.[30] However, the couple identified one of the egg throwers as a neighborhood child (specifically, the child who lived directly next door to them).[31] The child was convicted of felony vandalism and ordered to pay civil restitution.[32]

Courts have even cracked down on defendants who may not have actually thrown eggs, but were instead parts of groups engaged in Halloween horseplay.[33] For example, in one case, the defendant was part of a group that had thrown eggs, firebombs, and M-80s at houses and had placed a stop sign on one homeowner's front porch. The police had repeatedly broken up the group and ordered them to disperse, which they would, briefly, until the police left the area. The group, however, continued to engage in such conduct and even struck a police officer with an egg.[34]

The defendant was arrested even though he was not directly accused of any of the unlawful conduct. Instead, the defendant was charged with, and convicted of, unlawful assembly. The appellate court affirmed the defendant's conviction "because he knowingly assembled with the other members, and he was under a duty to



disassociate himself from the group after other members of the group committed unlawful acts."[35]

Court cases are not limited to prosecutions against people who throw eggs. A number of personal injury suits have been filed by people struck by eggs.

For example, in one case a bus patron was struck in her eye by an egg thrown through the bus window.[36] The patron sued the bus authority, arguing that it was negligent in failing to warn her of the foreseeable risk of eggs flying through the open bus windows on Halloween. The court, however, disagreed, finding that the bus authority owed no duty to warn of such an unanticipated and unforeseeable act.[37]

A number of insurance cases have also addressed coverage disputes arising from Halloween hooliganry. For example, in one case, a court found that an automobile insurance policy covering injuries arising out of "the use of" the automobile provided coverage where one of the car's occupants tossed an egg into a pedestrian's eye while the car drove by at 40 miles per hour.[38] In another case, however, the court held that a homeowner's insurance policy did not provide coverage because of the intentional injury exception, which applied when the homeowner's son shot an egg thrower in the eye with a paintball gun.[39]

Little Bo Peep and Her Flammable Sheep

Courts have also encountered tort cases arising from costume-related injuries. This has led to the development of a split of authority on the duty to warn people of the flammability of cotton balls used to make sheep costumes.

In *Ferlito v. Johnson & Johnson*, the plaintiff attended a Halloween party dressed as a sheep while his wife dressed as Little Bo Peep.[40] The plaintiff's costume was covered with Johnson & Johnson's cotton batting product. When the plaintiff attempted to light a cigarette, his costume caught fire and he was engulfed in flames.[41]

The plaintiff brought suit against Johnson & Johnson on a failure to warn theory. While the jury found the plaintiff to be 50% at fault, he was still awarded $550,000 in damages while his wife received $70,000. The district court, however, granted the defendant's motion for judgment notwithstanding the verdict.[42]

On appeal, the Sixth Circuit affirmed the district court's decision to set aside the jury verdict, finding that the failure to warn was not the proximate cause of the plaintiff's injuries. The Sixth Circuit noted that the plaintiff was aware that the product was flammable and that neither he, nor his wife, testified that they would not have used the cotton had they been warned.[43] The court expressly avoided deciding whether a warning was required, though it noted in dicta that cotton "is a simple product with all its essential characteristics apparent, including flammability."[44]

In contrast, a New York appellate court found a triable issue of fact in a negligence case premised on defendant's failure to warn of the flammability of its cosmetic puffs.[45] In that case, the plaintiff glued cosmetic puffs all over her eight-year-old daughter's pajamas to create the appearance of white fur. The girl later leaned over an electric stove and was set aflame.[46]

Perhaps the most infamous haunted house case is *Stambovsky v. Ackley*, where a New York appellate court held that a house was haunted as a matter of law.

While the appellate court acknowledged that the plaintiff's use of the cosmetic puffs was not intended by the manufacturer, the court found that it was not unforeseeable as a matter of law. The court concluded that if the jury found that the misuse was reasonably foreseeable, the defendant would have a duty to warn of its cosmetic puffs' flammability.[47]

The court also found significant the fact that, contrary to the plaintiff's initial belief, the cosmetic puffs were not made of cotton but were instead made from rayon.[48] The court's emphasis on this issue appears largely to be its way of sidestepping the defendant's argument that it had no duty to warn because the plaintiff had believed the puffs were made of cotton, and the flammability of cotton is open and obvious. This sidestep, however, seems to avoid the proximate cause issue because the court offers no explanation for why the specific composition of the cosmetic puffs would matter if the plaintiff already believed that they were flammable.

Sexy Kittens, Naughty Nurses and Other Provocative Halloween Costumes

Lawsuits arising from Halloween costumes are also prevalent in employment law disputes. A number of suits have arisen from people wearing risqué Halloween costumes to work.

In *Devane v. Sears Home Improvement Products, Inc.*, a female sales employee filed a sexual harassment lawsuit based in part on comments made by a male manager regarding her doctor costume.[49] Specifically, upon seeing the employee's costume, the manager unbuckled his pants and while pointing to his groin, said "here Doctor. It hurts here."[50] The Court of Appeals of Minnesota affirmed the district court's judgment against the employer for sexual harassment and hostile work environment.

Other cases have also dealt with sexual harassment arising from supervisor comments about employee costumes. For example, in *Taylor v. Renfro Corp.*, the plaintiff alleged that she was fired in retaliation for complaints she made about a manager's comments, including telling one female employee in a cat costume about "liking her tail."[51] The court found a triable issue of fact on the plaintiff's Title VII retaliation claim.

While costumes normally can be trouble for employers, in one case an employer actually successfully defended against the plaintiff's claims by pointing to her provocative Halloween costumes. In *Dahms v. Cognex Corp.*, the plaintiff brought sexual harassment and hostile work environment claims against her employer.[52] The employer argued, however, that the plaintiff's seductive dress, including a Halloween costume described as "a see-through Empire State Building," was probative to show that the plaintiff was not subjectively offended by her work environment or by an officer's comments.[53] The court rejected the plaintiff's argument that this was inadmissible character or propensity evidence and affirmed the judgment against her.

Additionally, the Halloween costume cases where employers have been found liable generally involve significant conduct beyond the Halloween costume incidents.

Courts are unlikely to find liability for isolated costume-related incidents.

For example, in *Baker v. Pro Floor, Inc.*, the plaintiff alleged that she was fired for complaining about sexual harassment.[54] Specifically, the plaintiff complained about the posting at her workplace of "a picture of a man in a Halloween costume feigning sex with a sheep."[55] The court, however, dismissed her allegation as relating to "boorishness in the workplace," not sexual harassment.[56]

Finally, courts have been less dismissive of public officers wearing racially insensitive costumes even outside of the workplace. For example, in one case a court suspended a Louisiana judge for six months for dressing in a prison uniform, blackface and an afro.[57] In another case, a court affirmed a 30-day suspension of a police officer for wearing blackface, overalls, a black, curly wig, and carrying a watermelon.[58]

The Constitutional Right to Insult Your Neighbors With Tombstone Displays

In addition to litigation involving inappropriate or offensive costumes, courts have also litigated cases involving unsettling Halloween decorations. For instance, in *Purtell v. Mason*, the Seventh Circuit considered a homeowner's First Amendment right to display tombstones meant to insult his neighbors.[59]

Purtell started as a petty dispute among neighbors. After the husband and wife plaintiffs parked a 38-foot RV in the front yard of their suburban Chicago home for a year, their neighbors petitioned for an ordinance to ban homeowners from maintaining campers on their property. The plaintiffs retaliated against the petition, however, by placing six tombstones along the front of their property.[60] As expected, the tombstones caused further acrimony between the plaintiffs and their neighbors.

The tombstones referenced the petitioning neighbors by name, and each contained a date of death based on that neighbor's address. For example, one tombstone referencing a neighbor named Betty Gargarz stated:

Bette wasn't ready,
But here she lies
Ever since that night she died,
12 feet deep in this trench,
Still wasn't deep enough
For that wenches stench!
1690

Another tombstone referencing a neighbor who owned a crimping shop stated:

Old Man Crimp was a
Gimp who couldn't hear.
Sliced his wife from ear to ear
She died . . . He was fried.
Now they're together
Again side by side!
1720

One tombstone even referenced the woman who lived directly next door to the plaintiffs.[61]

When the plaintiffs did not remove the tombstones after Halloween, neighbors called the police to complain. While an officer was speaking with the husband, the next-door neighbor arrived at his home. Clearly angry about his wife's name appearing on a tombstone, the next-door neighbor confronted the husband and, in a display of machismo, the men chest-butted.[62]

The officer then separated the men and directed the husband to remove the tombstones or be arrested for disorderly conduct. While the husband initially refused, upon being handcuffed, he agreed to dismantle the display. The plaintiffs then sued the police officer under 42 U.S.C. § 1983 for violation of their constitutional rights.[63]

The Seventh Circuit recognized the validity of the plaintiffs' First Amendment claim. While the court noted that the tombstones were intended to elicit "an emotional response" from the neighbors, they were not "the sort of provocatively abusive speech that inherently tends to incite an immediate breach of the peace" such that they would be considered unprotected speech under the "fighting words" doctrine.[64] However, the court also held that the issue was a close call such that the officer did not violate "clearly established rights" and was therefore entitled to qualified immunity.[65]

Finally, the court took a parting shot at the plaintiff's counsel for burdening the court with a case of such trivial significance:

> In closing, a few words in defense of a saner use of judicial resources. It is unfortunate that this petty neighborhood dispute found its way into federal court, invoking the machinery of a justice system that is admired around the world. The suit was not so wholly without basis in fact or law as to be frivolous, but neither was it worth the inordinate effort it has taken to adjudicate it – on the part of judges, jurors, court staff, and attorneys (all, of course, at public expense). We take this opportunity to remind the bar that sound and responsible legal representation includes counseling as well as advocacy. The wiser course would have been to counsel the plaintiffs against filing such a trivial lawsuit. . . . Not every constitutional grievance deserves an airing in court. Lawsuits like this one cast the legal profession in a bad light and contribute to the impression that Americans are an overlawyered and excessively litigious people.[66]

Scary indeed.

1. *Salama v. Deaton*, 10-CA-00310 (Fla. 13th Cir. Ct.), Amended Complaint; Jessica Vander Velde, *Tombstone Maker Denies Harassment*, St. Petersburg Times, Mar. 12, 2010, at 8. Notably, the plaintiff was born in 1961. *Id.*
2. *Massachusetts Nurses Ass'n v. Commonwealth Emp't Relations Bd.*, 77 Mass. App. Ct. 128 (Mass. App. Ct. 2010).
3. *Bouton v. Allstate Ins. Co.*, 491 So. 2d 56, 59 (La. Ct. App. 1986).
4. 169 A.D.2d 254 (1st Dep't 1991).
5. *Id.* at 256.
6. *Id.*
7. *Id.*
8. *Id.* at 259.
9. 180 So. 2d 758 (La. Ct. App. 1965).
10. *Id.* at 763.
11. 668 So. 2d 1207, 1208 (La. Ct. App. 1996).
12. *Id.* at 1209.
13. 285 So. 2d 591, 592 (La. Ct. App. 1973).
14. *Id.*
15. 695 So. 2d 1007, 1008 (La. Ct. App. 1997).
16. *Id.* at 1009.
17. 47 Ill. Ct. Cl. 372, 376–77 (Ill. Ct. Cl. 1995).
18. 1991 Ohio App. LEXIS 5327 (Ohio Ct. App. Oct. 29, 1991).
19. *See Downs v. E.O.M. Entm't, Inc.*, 997 So. 2d 125 (La. Ct. App. 2008); *Burton v. Carroll Cnty.*, 60 S.W.3d 829 (Tenn. Ct. App. 2001).
20. *Washington v. Shores*, 2010 Wash. App. LEXIS 405, 2010 WL 703268 (Wash. Mar. 2, 2010).
21. *United States v. Brooks*, 2007 CCA LEXIS 166, 2007 WL 1704348 (N.M. Ct. Crim. App. May 16, 2007).
22. *Sides v. Cleland*, 648 A.2d 793 (Pa. Supr. Ct. 1994).
23. 873 So. 2d 872 (La. Ct. App. 2004).
24. *Id.*
25. *Id.* at 874.
26. *Id.* at 878 n.3.
27. *Id.* at 879.
28. Nor have the victims of Halloween eggings always reacted rationally. For example, in one case a man was convicted of aggravated assault for pulling a shotgun on a 15-year-old who pelted his car with eggs, *see South Dakota v. Waters*, 529 N.W.2d 586 (S.D. 1995), while a number of criminal defendants actually shot people who threw eggs at them. *See, e.g., Connecticut v. Sotomayor*, 765 A.2d 1 (Conn. App. Ct. 2001); *Johnson v. State*, 380 So. 2d 1017 (Ala. Ct. Crim. App. 1980). Perhaps the most infamous reaction to being egged was that of former baseball all-star Albert Belle, who attempted to drive down two youngsters with his car. *See* Bonnie DeSimone, *Unwrapping Belle's Rap Sheet*, Chicago Tribune, Nov. 19, 1996, at 4; *Judge Fines Belle $100*, N.Y. Times, Nov. 29, 1995, at B20.
29. *See Fairbanks v. Kushner*, 2009 N.Y. Misc. LEXIS 5537 (Sup. Ct., Suffolk Co. Oct. 7, 2009).
30. *See In re Brittany L.*, 99 Cal. App. 4th 1381 (Cal. Ct. App. 2002).
31. *Id.* at 1384.
32. *Id.*
33. *Missouri v. Mast*, 713 S.W.2d 601 (Mo. Ct. App. 1986).
34. *Id.* at 603.
35. *Id.* at 604.
36. *Daniels v. Manhattan & Bronx Surface Transit Operating Auth.*, 261 A.D.2d 115 (1st Dep't 1999).
37. *Id.* at 116.
38. *Nat'l Am. Ins. Co. v. Ins. Co. of N. Am.*, 74 Cal. App. 3d 565 (Cal. Ct. App. 1977).
39. *Alarco v. N.Y. Cent. Mut. Fire Ins. Co.*, 2008 NY Slip Op. 30882U (Sup. Ct., Nassau Co. Mar. 18, 2008).
40. 983 F.2d 1066 (table) (6th Cir. 1992).
41. *Id.* at *2.
42. *Id.* at *1.
43. *Id.* at *6.
44. *Id.* at *4 n.3.
45. *Trivino v. Jamesway Corp.*, 148 A.D.2d 851 (3d Dep't 1989).
46. *Id.* at 852.
47. *Id.*
48. *Id.* at 853.
49. 2003 Minn. App. LEXIS 1514 (Minn. Dec. 23, 2003).
50. *Id.* at *7.
51. 84 F. Supp. 2d 1248, 1250 (N.D. Ala. 2000).
52. 914 N.E.2d 872 (Mass. 2009). Also significant was the conduct of the defendant's CEO during his depositions. The CEO showed up at his depositions each day wearing a different Halloween costume, including a priest costume with a garlic necklace and a Mr. Peanut costume, complete with top hat. *See* Zach Lowe, *Ropes, Eckert Lawyers Remember Strange Halloween Costume Case*, The Am Law Daily, Oct. 29, 2009, *available at* http://amlawdaily.typepad.com/amlawdaily/2009/10/ropes-eckert-lawyers-remember-strange-halloween-costume-case.html.
53. 914 N.E.2d at 881 n.20, 882.
54. 2005 U.S. Dist. LEXIS 627 (W.D. Wis. Jan. 6, 2005).
55. *Id.* at *3.
56. *Id.* at *14–*16.
57. *See In re Judge Timothy C. Ellender*, 889 So. 2d 225 (La. 2004).
58. *See Tindle v. Caudell*, 56 F.3d 966 (8th Cir. 1995).
59. 527 F.3d 615 (7th Cir. 2008).
60. *Id.* at 617–18.
61. *Id.* at 619.
62. *Id.*
63. *Id.*
64. *Id.* at 625.
65. *Id.* at 626. The court also held that because of the chest-butting incident the officer had probable cause to arrest the husband for disorderly conduct and, therefore, there was no Fourth Amendment violation. *Id.* at 626–27.
66. *Id.* at 627.