

WRITING SAMPLE

This sample of my legal writing is excerpted from my Open Research Memorandum written for Legal Writing and Research Class last semester. The memorandum discussed a potential claim under the Visual Artists Rights Act for the destruction of various sculptures. This excerpt excludes the portion of the memorandum discussing whether or not the sculptures in question were “works of visual art” as defined by VARA.

QUESTION PRESENTED

Does A.J. Kornblith have a claim under the federal Visual Artists Rights Act for the removal and destruction by the building’s manager Ben Roethlisberger of the “chair art” (including the four large chairs and the two model chairs), the metal sculpture and/or the oversized coffee mug stored outside of the building?

BRIEF ANSWER

Yes. To have a claim under the Visual Artists Rights Act, a work of art must fit the statutory definition of “work of visual art”, have “recognized stature”, and be destroyed with “gross negligence”. A sculpture satisfying the claim (a) must be either in a single copy or in multiple cast, carved or fabricated in a set of 200 or fewer sculptures, that are consecutively numbered by the author and bear his signature or other mark; (b) must not be a model or applied art (c) must not be promotional; and (d) must be copyrightable. Furthermore, a work of art (e) must be viewed as meritorious; and (f) must be recognized by art experts, other artists or some other cross-section of society. In addition, it must have been destroyed intentionally or through gross negligence. The metal sculpture is a sculpture in single copy that is not applied art, is not in any way promotional and is copyrightable. There is admissible evidence that its stature is recognized by people involved in the field of art. Assuming that it bears Kornblith’s signature or mark, and that Roethlisberger showed intentional or gross negligence in its destruction, the metal sculpture satisfies a claim for violation of integrity under the Visual Artists Rights Act. However, Kornblith does not have a claim for either the “chair art” or the coffee mug, as the “chair art” lacks “recognized stature” and the coffee mug is excluded as promotional.

II. THE METAL SCULPTURE AND THE COFFEE MUG HAVE “RECOGNIZED STATURE” AS THEY ARE MERITORIOUS AND ARE RECOGNIZED AS HAVING STATURE BY EXPERTS

The metal sculpture and the coffee mug have “recognized stature” as they are meritorious and are recognized as having stature by experts. “Recognized stature” is not defined explicitly in the Visual Artists’ Rights Act as Congress desired that courts should decide this on a case by case basis to ensure fairness,

especially to less well-known artists. *See* H.R. Rep. No.101-514 (1990) *reprinted in* 1990 U.S.C.C.A.N. 6915, 6921, 1990 WL 258818. Federal courts have attempted to clarify this term, most significantly by using a two-part test implicitly acknowledged by the 2nd Circuit:

(1) that the visual art in question has “stature,” i.e. is viewed as meritorious, and; (2) that this stature is “recognized” by art experts, other members of the artistic community, or by some cross-section of society. In making this showing, plaintiffs generally, but not inevitably will need to call expert witnesses to testify before the trier of fact.

Carter v. Helmsley-Spear Inc., 861 F.Supp. 303, 325 (S.D.N.Y. 1994) *aff’d in part, vacated in part, rev’d in part*, 71 F.3d 77 (2d Cir. 1995). *Accord Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999); *Phillips v. Pembroke Real Estate Inc.*, 288 F.Supp.2d 89, 97-98 (D.Mass 2003) *aff’d Phillips v. Pembroke Real Estate Inc.*, 459 F.3d 128 (1st Cir. 2006); *Scott v. Dixon*, 309 F.Supp.2d 395, 400 (E.D.N.Y. 2004).

Writing for the Supreme Court, Justice Oliver Wendell Holmes warned judges of the law not to view themselves as judges of the merits of art, stating “It would be a dangerous undertaking for persons trained only in law to constitute themselves final judges of the worth of pictorial illustration...” *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903). With respect to considering merit in order to satisfy the first part of the *Carter* test, judges have obeyed Holmes’ advice, recognizing that preferences in art are subjective. The threshold past which a work of art’s “stature” is “recognized” has required expert testimony or other evidence to be met in other jurisdictions. *See, e.g. Carter*, 861 F.Supp. at 326 (considering a piece of art to have “recognized stature” on the basis of the testimony of “credible” experts). Evidence such as articles about and written testimonials to a piece of art’s recognition are admissible to support a piece’s “recognized stature”. *See Martin*, 192 F.3d at 612 (deeming a letter from a university art director and a newspaper article lauding artwork to be admissible to support that a sculpture is of “recognized stature”). Furthermore, awards earned can help a piece of art to be considered to have “recognized stature”. *See Id.* (admitting as evidence a program from an exhibition where a sculpture won “Best in Show” to demonstrate that the sculpture is recognized); *See also Hanrahan v. Ramirez*, 2:97-CV- 7470 RAP RC, 1998 WL 34369997 at *4 (C.D. Cal. June 3, 1998) (deeming mural to have “recognized stature” on the basis of proof of a national award for youth-inspired, anti-drug and alcohol artwork

admitted as evidence). In the majority of potential cases, the fact that other work of the artist is deemed to have “recognized stature” by experts does not prove “recognized stature” for the particular artwork that the litigation concerns. *See Scott*, 309 F.Supp.2d at 400 (holding that possessing only “local notoriety” is not sufficient to give a piece not responsible for that notoriety “recognized stature”).

Here, all pieces of art destroyed are meritorious, satisfying the first step of the *Carter* test. As in *Carter*, the precedent of judges not asserting their own opinions on the merits of art, set by the court’s opinion in *Bleistein*, is likely to be followed by courts. The metal sculpture can be recognized as having “stature” by Fu’amatu-Ma’afala’s testimony as he called it “wonderful” in the preliminary interview, implying that he will do so once again in court. Memorandum from Mindy Merris to Junior Associate (Sep. 17 2012) (on file with author). Fu’amatu-Ma’afala will play the same role supporting “recognized stature” that art experts called to testify by the plaintiffs did in *Carter*. Furthermore, the coffee mug’s mention in a newspaper article about the victory awarded in the Cup of Roses’ competition will be admitted as evidence to support the cup’s having “recognized stature”, as in *Martin*, where letters and articles celebrating the work were admitted. This article proves that the piece won an award, which was held to be evidence of “recognized stature” in *Martin* where a brochure highlighting a “Best in Show” performance was admitted to demonstrate that that piece was recognized by a section of the public, and in *Hanrahan*, where a mural had won a national award for youth-inspired, anti-drug and alcohol artwork. However, there is no evidence in the memorandum that suggests that any potential expert witness or document recognizes the “chair art” as having “stature”. While possible witness Bradshaw mentioned the “chair art”, he did not indicate that he had seen it personally or was familiar enough with it to recognize it as having stature. The validity of the written and oral testimony in both *Martin* and *Carter* show that no evidence of stature in this case would bar recovery. As in *Dixon*, the stature of Kornblith’s other works alone cannot be the basis for conferring recognized stature on the “chair art”. Only the metal sculpture and the coffee mug can be shown to have recognized stature because they are meritorious and are recognized by experts as having stature. As the metal sculpture fits the statutory definition of a “work of visual art”, can be shown through expert testimony to have “recognized stature”, and was destroyed intentionally or with gross negligence, Kornblith has a claim for it under the federal Visual Artists’ Rights Act.

