

Appeal of actor's \$51 million verdict is a must-see for studios

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LOS ANGELES — Briefing is under way in the appeal of iconic actor Don Johnson's \$51 million verdict against the producers of "Nash Bridges."

The high-value award caught the industry's attention last year, the same day another multimillion-dollar verdict was handed to the producers of hit game show "Who Wants To Be A Millionaire."

Lawyers say an appellate court ruling for or against the studio defendants in the "Nash Bridges" case isn't likely to drive significant changes in the industry because the contract between Don Johnson Productions Inc. and Rysher Entertainment LLC was highly unusual. Most notably, Johnson had negotiated a 50 percent copyright ownership interest in the hour-long cop drama — a rare term in Hollywood contracts and as a result of this case, a scenario unlikely to come about again. Still, the intricacies of Johnson's unique case and the big-name litigants in an industry that typically settles disputes behind closed doors have attracted a wide array of legal and cultural observers.

At last year's trial, Johnson's lawyers argued their client never saw a dime in profit from the franchise's six seasons on air and in syndication, despite Johnson's co-ownership of the property. A jury agreed in July 2010, awarding Johnson \$23.2 million in unpaid profits.

Rysher Entertainment, along with Qualia Capital LLC and 2929 Entertainment LP, both of which owned and managed Rysher at different times during the production and syndication of "Nash Bridges," unsuccessfully asked Los Angeles Superior Court Judge Michael Stern to reverse the award or order a new trial. Instead, the judge last December added \$28.5 million in pre-judgment interest to the defendants' outstanding debt and assigned liability to all three companies.

Rysher, Qualia and 2929 each appealed that decision this past February, and both sides filed their opening briefs in California's 2nd District Court of Appeal last week. *Don Johnson Prods. Inc. v. Rysher Entertainment LLC*, B227304 (Cal. App. 2nd Dist. Feb. 16, 2011).

In Rysher's opening brief, the company argues that the lower court misinterpreted the contract provisions and that Johnson's claims should have been barred by the statute of limitations anyway. Rysher argued the contract contained a 50-50 revenue participation formula based on adjusted gross receipts — and that that formula was followed. The copyright provision, Rysher added, was a separate matter and didn't affect Johnson's share of profits from the show.

"For over 10 years — until this lawsuit was filed in 2009 — neither DJP, nor Johnson personally, nor any of his agents or lawyers ... ever asserted that the copyright

triggered a different or supplemental payment right, and never inquired regarding why DJP was not receiving such payments," the opening brief stated. John A. Taylor Jr. of Horvitz & Levy LLP is representing Rysher.

Qualia and 2929 both argued that any judgment should be Rysher's liability, not theirs, as Don Johnson had not established "a unity of interest" between the companies, according to both briefs. Charles P. Diamond of O'Melveny & Myers LLP is representing Qualia, and Theodore J. Boutros Jr. of Gibson, Dunn & Crutcher LLP is representing 2929.

Mark Litwak, a Beverly Hills-based entertainment lawyer and author who isn't involved in the case, said that on appeal, "The burden is generally on the appellant, so unless the lower court made an error of law, it will not be reversed."

A ruling for or against the studio defendants isn't likely to drive changes in the industry because Don Johnson's contract was unusual.

In Johnson's opening brief, attorney Mark Holscher of Kirkland & Ellis LLP took issue with two of Stern's evidentiary rulings — the court's exclusion of evidence affirming Johnson's interpretation of the contract and an allowance the court made to include testimony from the defendants' damages expert, even though their notice was late.

"DJP believes that this court can and should affirm the judgment below," Johnson's brief stated. "Nevertheless, DJP presents its challenges to the two rulings described above out of an abundance of caution, to ensure that it will not be hobbled by the same errors in the event of a retrial."

Michael Plonsker, an entertainment litigator with Robins, Kaplan, Miller & Ciresi LLP whose firm represented the "Who Wants To Be A Millionaire" plaintiffs, said that the "Nash Bridges" case will be an interesting one to watch because of the complexity of the legal issues at stake.

"The issues that the parties have raised are technically interesting regarding the interpretation of Johnson's agreement, the applicability of agreements tolling the statute of limitations, alter ego issues regarding loan out companies and the timing of disclosure of expert witnesses," he said. "But for the entertainment industry as a whole, the actual result — who wins or loses — will be more interesting than the reasoning behind the result."

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