July 2013 Bar Examination

Question 1

St. Mary's Island is an island off the Georgia coast. For many years it was owned by the East family. In 2004, the last surviving member of the East family sold the island to a development group named St. Mary's Development Group, LLC ("SMDG"). SMDG ran into difficulties getting the necessary permits to allow a bridge to be constructed from the mainland. By the end of 2006, some of the SMDG members began to want out, so a few of the members who still wanted to develop the island obtained other investors and formed a second LLC, Beachfront Development, LLC ("Beachfront").

Disputes arose between the members of Beachfront and the remaining SMDG members who did not join Beachfront over which LLC would end up with the right to develop the island. Those members of SMDG who did not join the Beachfront group felt that those who had were acting in bad faith and were violating their fiduciary duty to SMDG. In addition, it appeared that the remaining SMDG members who had not joined Beachfront had failed to disclose a potential problem with the title that could require an action to quiet title. A majority of the remaining members of SMDG authorized a lawsuit against the SMDG investors who had also formed Beachfront.

To resolve the dispute and eliminate any threat of a lawsuit, SMDG and Beachfront entered into a contract on March 1, 2008, with these pertinent provisions:

(1) SMDG would sell the island to Beachfront for the price of $12,000,000.00.

(2) The sale would close on or before March 1, 2009.

(3) SMDG and all unit holders agreed to forever waive and mutually release any right to sue any member of either LLC for any action arising out of the acquisition of the island, the title issue, the formation of the LLCs, or any other related cause of action.

(4) As part of the sale, SMDG would assign to Beachfront all of its rights in any permits and would hold Beachfront harmless for any indebtedness or costs incurred in SMDG's efforts to develop the island.

(5) No earnest money would be required; in addition to Beachfront's agreement to pay the sales price and SMDG's agreement to convey the property, additional consideration for the contract would be SMDG's promise to forego the right to sue the members of Beachfront and the other promises made therein.

(6) Both parties had the right to seek specific performance should either party refuse to consummate the closing.

Over the summer of 2008, the area real estate market collapsed, placing many members of Beachfront in financial jeopardy and leaving them unable to obtain the anticipated financing for the $12,000,000.00 sale. As the closing date approached, the Beachfront members knew they would not be able to close and advised SMDG of that fact. SMDG offered to extend the closing date in the contract, but Beachfront refused, saying that additional time wouldn't cure their problems – they were financially unable to close.

Shortly thereafter, SMDG sued Beachfront and its members for specific performance, or alternatively, money damages for breach of the sales contract.

You are an associate in the law firm hired to represent Beachfront. Please prepare a memo to the partner in charge of the file that answers these questions:

1. What are all of the possible defenses that Beachfront can raise to the lawsuit? Discuss the merits and likelihood of success of all possible defenses as they pertain to both the claim for specific performance and the claim for breach of contract.

2. If Beachfront loses the lawsuit, what is the measure of damages that will be applied by the court? Discuss the nature of the damages and how they will be computed.

Question 2

One of your clients, John James, has come to your law office seeking advice with respect to the estate of his recently deceased aunt, Sally Smith. He gives you a copy of her Last Will and Testament and tells you that he has received notice as an heir at law that the Will has been filed for probate in the Probate Court of Carter County, Georgia.

Mr. James relays the following additional facts, all of which are undisputed:

(1) Aunt Sally's husband predeceased her, and neither of her parents is still living. She never remarried or had children. Her only siblings were three sisters, and only one of them is still living. One of her deceased sisters, Abby, has two surviving sons, Terry and Berry. Her other deceased sister, Brenda, was your client John's mother, and he was an only child. Sally's surviving sister, Cindy, has five children, all living.

(2) John understands that Sally's Preacher convinced her to see his good friend and attorney, C. Lee Zee, to have a Will prepared as well as a financial Power of Attorney. The Preacher and Mr. Zee, neither of whom is related to Sally, visited her at the hospital about a week before she died and discussed her Will and the Power of Attorney. No one else was present. They returned a few days later and presented the Will and Power of Attorney for her execution. Although she was taking a high dose of painkillers, Sally signed both documents from her hospital bed, with two of Mr. Zee's secretaries serving as witnesses. Sally, who declared that she had never before signed a Will, died three days later.

(3) Sally had a gross estate of about $4,000,000.00, which included a $400,000.00 home, a $600,000.00 life insurance policy (which was payable to her estate), and $1,000,000.00 in checking and savings accounts at her local bank. The rest of her assets had been invested in marketable securities.

(4) The day after Sally signed the Will and the Power of Attorney, the Preacher went to Sally's bank and used the Power of Attorney, which named him as Sally's agent and attorney in fact, to add his name to Sally's bank accounts, thereby making them joint accounts with rights of survivorship.

(5) Sally's Will contains the following provisions:

(a) Forty percent (40%) of Sally's net probate estate is to be distributed to John, with the remainder being left in equal shares to Sally's (and the Preacher's) church, to the Preacher himself, and to Mr. Zee.

(b) The Will names the Preacher and Mr. Zee as co-executors. It contains no provision about an executor's commission. It does have an *in terrorem* clause which states that anyone challenging the Will will lose any bequest or devise given him or her under the Will. However, if a beneficiary were to caveat the probate of the Will and lose, the Will does not state what would happen to that beneficiary's forfeited interests under the Will.

John believes there was undue influence in the preparation of the Will and wants you to file a caveat to it.

Questions:

1. Which of Sally's assets would pass under the terms of her Will were it found to be valid and was probated?

2. To whom, and in what amounts, would Sally's $4,000,000.00 estate be distributed if John's caveat were to be successful in voiding his aunt's Will? How would this influence your advice with respect to the desirability of John's filing a caveat?

3. If John was unsuccessful with his caveat and Sally's Will was probated, how would the *in terrorem* clause affect his inheritance under the Will?

4. How would John's surviving aunt and seven cousins be affected by a successful caveat of the Will compared to what they would receive if the Will were probated?

5. What ethical concerns, if any, did Mr. Zee have as a Georgia attorney in drafting a Will for a non-relative that named him as well as a good friend and client, as co-executors and beneficiaries? If there are any special steps he should have taken, please describe them.

6. Are there any problems with the Preacher using the Power of Attorney to add his name to Sally's bank accounts as a joint tenant with rights of survivorship? What would have been the effect if, instead, the Preacher had added his name to her accounts as her attorney-in-fact? Please discuss.

7. If Sally's Will were admitted to probate, is the charitable bequest to the church valid under Georgia law? Why or why not?

Question 3

In 1983,Troll purchased land with a cabin on it in Buckeye Valley in the Georgia mountains. A nonnavigable and nontidal mountain stream, Buckeye Creek, meanders through Troll's property.

In 1992, Troll purchased a contiguous two-acre vacant lot from Gnome. The Gnome/Troll property borders a tract of improved property owned by Elf. The Elf property has a particularly steep driveway that accesses a county-maintained dirt road, Hobgoblin Road. Elf's driveway borders the Gnome lot. The lay of the land where the driveway joins Hobgoblin Road is so steep that it is impossible for Elf to turn left onto Hobgoblin Road (the direction to the nearest paved road). Elf can negotiate this left-hand turn only by swinging wide to the right and encroaching on Gnome's property. Gnome took exception to Elf doing this and told him to "stay off his land." Gnome drove a large metal rebar partially into the ground at this corner to keep Elf from encroaching on his land.

In 1992, after Troll purchased the Gnome lot, Elf asked Troll if Elf could purchase this corner of the lot to facilitate his left-hand turns onto Hobgoblin Road. Troll did not want to sell Elf the small corner of the lot because to do so could impinge on the minimum road front footage requirements for later development of the lot. In the interest of good neighborly relations, Troll told Elf to pull up Gnome's old rebar and to use the corner to make left-hand turns on Hobgoblin Road until Troll told Elf otherwise. Elf and his guests have continuously used this corner of Troll's lot since 1992 to make their left-hand turns onto Hobgoblin Road.

For many years before Troll's1983 purchase of the land in Buckeye Valley, almost everyone in Buckeye Valley crossed what later became Troll's property to access Wilscot National Forest (National Forest). National Forest also borders Troll's land. In addition to hiking into National Forest, those accessing National Forest also used off-road vehicles and horses to access National Forest.

In October of 1995, the winds from Hurricane Opal toppled hundreds of trees on Troll's property and thousands of trees in National Forest adjacent to Troll's property. When Troll cleaned up the property, so many trees had been knocked down that Troll decided to build a horse pasture. The pasture was fenced, and unlocked gates were placed on either side of the pasture over the trail that had been used by everyone accessing National Forest through Troll's land. Troll made no effort to clear the trail from his land into National Forest other than to cut two-foot sections out of logs crossing these trails. Since the fences and gates were erected in 1995, no off-road vehicles and very few horseback riders or hikers access National Forest through Troll's land. Since the year 2000, the government has forbidden the use of off-road vehicles and horses in National Forest adjacent to Troll's land.

In recent years during the summer months, members of the public frequently use tire inner tubes and rafts to float down Buckeye Creek through Troll's property. Some people fish for trout as they float through Troll's property. Troll stocks the creek with trout and has installed and maintains fish feeders to entice the trout to stay in this section of Buckeye Creek running through his land.

Your firm has been contacted by Troll. Troll wants to know the following:

1. (a) What interests do Troll and Elf have in the corner of Troll's land that is being used by Elf to make left-hand turns onto Hobgoblin Road?

   (b) Is it possible for Elf to independently convert his use to a different interest in Troll's land? If so, how?

   Explain your answers.

2. (a) Describe the land interests, if any, that Troll and those accessing National Forest through Troll's property had to the access trail to National Forest in1990.

   (b) Describe the land interests, if any, that Troll and those accessing National Forest through Troll's property have to the access trail to National Forest now.

   Explain your descriptions and the legal bases supporting your conclusions.

3. (a) What interest does Troll have in Buckeye Creek? Also discuss the title to Buckeye Creek and the land under and adjacent to it.

   (b) May Troll prevent the public from floating through his property on Buckeye Creek?

   (c) May Troll prevent people from fishing in Buckeye Creek where it passes through his land?

   Explain your answers.

Question 4

Plaintiff frequently shopped for groceries and necessaries at a Big Mart located near his home in Georgia. During such a shopping trip while picking out meat from the meat counter, Plaintiff slipped and fell on the floor in front of the meat counter. The store Manager came over and asked if he was okay, to which Plaintiff replied, "I was talking with the butcher and slipped." The Plaintiff then continued shopping.

The store Manager noticed a piece of banana on the floor and a similar substance on the Plaintiff's shoe. The Butcher told the Manager that he did not see the banana because it was on the floor immediately in front of the meat counter. The Manager then filled out Big Mart's standard incident report and gave a copy to Plaintiff as he continued shopping.

One week later Plaintiff spoke with the Manager while again shopping at Big Mart. He told the Manager that he had been in pain since the fall and had scheduled a future appointment with a doctor. He told the Manager that he was worried about being able to pay his medical bills. That same day, the store Manager faxed the incident report to the Big Mart corporate risk management office.

Some time prior to Plaintiff's fall, Big Mart had installed three high definition digital cameras in its store that recorded all day every day. Once the hard-drive is filled, the video cameras record over the previously recorded material. If the recording is not saved elsewhere before the hard drive is filled, then the video is permanently lost. It takes three weeks for this process to fill the hard drive.

Plaintiff timely filed and served his complaint and summons in the proper State of Georgia trial court with proper jurisdiction and venue. Along with the complaint and summons, the Plaintiff served discovery requests upon Big Mart asking for all documentary evidence in Big Mart's possession related to Plaintiff's injury, including, but not limited to, reports, internal memoranda, and surveillance video.

Big Mart filed a timely answer, and contemporaneously filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Georgia Civil Practice Act. Big Mart's motion asserted that Plaintiff assumed the risk. Big Mart argued that Plaintiff was responsible for his injuries because he had paid no attention to the floor and if he had paid attention, he would have seen the banana. In support of this motion, Big Mart attached affidavits of the Manager and the Butcher.

In response to Plaintiff's discovery requests, Big Mart stated under oath that all surveillance videos of the incident and area of the fall were permanently lost.

A few days after Big Mart's response to discovery, Plaintiff filed a motion alleging that Big Mart had engaged in spoliation of evidence and requested sanctions. Plaintiff also filed a Notice to Take Deposition of the store Manager. The deposition was scheduled for a date prior to the hearing on the pending motions.

At his deposition, the store Manager testified that none of the cameras had been moved or re-aimed since the Plaintiff's fall. Big Mart produced exemplar video taken from each camera showing that none of the cameras pointed directly at the place where Plaintiff fell. Plaintiff's counsel then asked to view a live feed from each camera. Big Mart's attorney initially objected, but then relented and when the live feed was shown, it was discovered that one of the cameras was pointed directly at the location of the Plaintiff's fall. The deposition was transcribed and filed with the record. Plaintiff utilized the deposition transcript during the hearing on the motion to dismiss and the spoliation motion.

After argument of all pending motions, the trial court ruled as follows:

(1) The trial court found Big Mart had engaged in spoliation, but denied sanctions;

(2) The trial court treated the motion to dismiss as a motion for summary judgment; and,

(3) The trial court granted the motion for summary judgment based upon the findings that Plaintiff should have seen the banana and that the Plaintiff assumed the risk of his fall because he failed to look at the floor as he walked upon it.

Your senior partner has asked you to prepare a memorandum for her use in determining whether to pursue an appeal on behalf of the Plaintiff. You have located the following excerpt from a recent appellate opinion to use in your analysis:

> *Spoliation refers to the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation. Such conduct creates the presumption that the missing evidence would have been harmful to the spoliator. Proof of spoliation raises a rebuttable presumption against the spoliator that the missing evidence favored the spoliator's opponent, a fact rendering summary judgment inappropriate.As a sanction, the trial court may exclude the spoliator's evidence regarding the subject matter covered by the missing evidence, deny the spoliator's motion for summary judgment, charge the jury that a rebuttable presumption has arisen that the missing evidence favored the spoliator's opponent, or dismiss the spoliator's pleadings and place the spoliator in default.*
>
> *There must be a meaningful link between the spoliation and the claims of the spoliator's opponent. For example, a grant of summary judgment to a spoliator is proper when the moving party cannot establish a meaningful link between the underlying claims and the spoliation.*

Address the following:

1. Did the evidence in the record at the motion hearing support the finding that Big Mart committed spoliation? Explain your response.

2. Should the trial judge have treated the motion to dismiss as a motion for summary judgment? Explain your response.

3. Considering the spoliation issue, did the trial court properly apply the summary judgment standard? Explain your response.

Applicant Number

MPT-1
713

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Monroe v. Franklin Flags Amusement Park

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Monroe v. Franklin Flags Amusement Park

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Teasdale, Gottlieb & Lasparri, P.C.

111 S. Jefferson Street
Cooper City, Franklin 33812

TO: Examinee
FROM: Rick Lasparri
DATE: July 30, 2013
RE: Monroe v. Franklin Flags Amusement Park

We are defending our client, Franklin Flags Amusement Park, against a negligence claim made by Vera Monroe, who seeks damages for multiple injuries she suffered at the client's amusement park.

Last Halloween, Ms. Monroe went through the Haunted House attraction at the amusement park, on the attraction's first day of operation. The Haunted House attraction consists of a building, made to replicate a haunted house, and a mock graveyard. Ms. Monroe claims that, as a result of the Park's negligence, she suffered injuries, for which she is claiming damages of $250,000.

Ms. Monroe has made three separate claims of injury due to negligence: 1) she was injured when, frightened by a staff member in costume in one of the rooms of the attraction, she ran into a wall and broke her nose; 2) after exiting the building, and while going through the mock graveyard, she slipped on the muddy path and injured her ankle; and 3) after exiting the graveyard and the attraction, she was again frightened on the way to the parking lot by a staff member in costume, fell, and broke her wrist.

We have concluded discovery and will now move for summary judgment. I am attaching relevant excerpts from the deposition transcripts and case law.

Please prepare the argument section of our brief in support of our motion for summary judgment. Do not prepare a statement of facts, but incorporate relevant facts into your argument. Do not concern yourself with issues of the plaintiff's comparative negligence or damages. Be sure to follow the attached guidelines for the preparation of persuasive briefs.

Teasdale, Gottlieb & Lasparri, P.C.

TO: All Attorneys
FROM: Firm
DATE: June 6, 2012
RE: Guidelines for Persuasive Briefs in Trial Courts

The following guidelines apply to persuasive briefs filed in support of motions for summary judgment in trial courts.

I. Caption

[omitted]

II. Statement of Facts

[omitted]

III. Legal Argument

The body of each argument should analyze applicable legal authority and persuasively argue that both the facts and the law support our position. Supporting authority should be emphasized, but contrary authority should also be cited, addressed in the argument, and explained or distinguished. Courts are not persuaded by exaggerated, unsupported arguments.

We follow the practice of breaking the argument into its major components and writing carefully crafted subject headings that summarize the arguments each covers. A brief should not contain a single broad argument heading. The argument headings should be complete sentences that succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. Examples:

Improper: The Applicable Standard of Care

Proper: Because the applicable standard of care in a professional negligence case is not within the realm of common knowledge, the plaintiff must introduce expert testimony to establish the standard of care allegedly violated by the defendant.

Do not prepare a table of contents, a table of cases, a statement of the case, or an index; these will be prepared, as required, after the draft is approved.

Excerpts of Deposition Transcript of Vera Monroe

Present: Ms. Vera Monroe, Plaintiff; F.J. Wahl, Esq., counsel for Plaintiff; R. Lasparri, Esq., counsel for Defendant

Direct Examination (by Ms. Wahl):

* * *

Ms. Wahl: What did you do last Halloween evening—that would be October 31, 2012?

Ms. Monroe: My husband and I went to the Franklin Flags Amusement Park, around 8:00 p.m. We figured it would be great fun, it being Halloween and all.

Ms. Wahl: Had you been there before?

Ms. Monroe: Oh yes, many, many times.

Ms. Wahl: And what did you do when you got there?

Ms. Monroe: We first went to the go-kart ride, then had a bite to eat at one of the food stands, and then went into the Haunted House they had set up there.

Ms. Wahl: Had you been in that attraction before?

Ms. Monroe: No, we had never seen it there before.

[Discussion off the record]

Mr. Lasparri: We will stipulate that the Haunted House attraction was first opened to the public on that date, October 31, 2012.

Ms. Wahl: What happened when you entered?

Ms. Monroe: Well, you go into this house, which has all these rooms with spooky stuff—spiderwebs and howling sounds and stuff like that. It was kind of scary, and every time something would appear, like an image of a ghost, or a guy dressed like a vampire lying in a coffin, I would let out a little scream, which amused my husband no end. Then we went into this room—it turned out to be the last one before the exit—it was real dark—just a couple of dim lightbulbs and the illuminated "exit" sign—and this woman dressed up as a zombie jumped out of some hiding place, yelling at the top of her lungs, and I just lost it.

Ms. Wahl: What do you mean by that?

Ms. Monroe: Well, she scared me to death—I wasn't expecting anything like that, because none of the other characters had come right up to us like that. So I let out a

real shriek and just ran away from her. I took four or five steps, running like crazy, ran into the wall face-first, and knocked myself silly. It turned out I had a broken nose, and it was bleeding, although I didn't know it at the time. I screamed for my husband, and he grabbed my arm, and I said, "Get me out of here!" So he led me to the exit door and we got out of there.

Ms. Wahl: Did anybody from the park try to help you?

Ms. Monroe: No, this zombie person just kept coming toward us, so we wanted to get out of there as quickly as we could.

Ms. Wahl: Go on, what happened then?

Ms. Monroe: Well, we went out the door, and there was this kind of pathway outside through a mock graveyard. The ground was really muddy, and in my panic, I slipped on the mud and fell down, twisting my ankle.

Ms. Wahl: Was anybody from the park around?

Ms. Monroe: No, the mock graveyard was completely deserted.

Ms. Wahl: And what happened then?

Ms. Monroe: My husband helped me up and supported me, because now I was limping. The graveyard was enclosed by a fence with a gate that led back onto the park grounds. We left the graveyard through the gate, and we were outside heading for the parking lot and our car when another guy in a bizarre outfit and a hockey mask, holding what looked like a chain saw, jumped out from behind the outside of the fence. He so startled us that my husband let go of me, and I fell and felt a crack in my wrist.

Ms. Wahl: Why were you startled at that point?

Ms. Monroe: Once we were out of the graveyard and back on the park grounds, I thought that whatever they might do to scare people was behind us. I was breathing a sigh of relief that we were out of the Haunted House attraction. I mean it was an entirely different situation—there was nothing scary, like in the Haunted House, and I figured we were back to normal surroundings. So the appearance of this guy with a chain saw was completely unexpected and unnerving and really frightening.

Ms. Wahl: What happened next?

Ms. Monroe: My husband picked me up and helped me to our car—I was a wreck, crying and in a lot of pain. We went to the emergency room of Franklin General Hospital, and they told me I had a broken nose, a sprained ankle, and a broken wrist. I needed surgery to repair my wrist.

Ms. Wahl: Mr. Lasparri, we will introduce documentary and expert evidence as to the extent of Ms. Monroe's injuries.

* * *

Cross-examination (by Mr. Lasparri):

* * *

Mr. Lasparri: Ms. Monroe, when you entered the Haunted House attraction at the park, what did you expect?

Ms. Monroe: To have a good time.

Mr. Lasparri: Did you expect to be frightened or scared once you were inside?

Ms. Monroe: Well, I guess, sure, that's part of the fun on Halloween, isn't it? But there's being frightened for the fun of it, and then there's being terrified.

Mr. Lasparri: When you were injured inside the room, did you or your husband ask for help?

Ms. Monroe: No, we wanted to get out of there as quickly as possible. Besides, there was no one to ask.

Mr. Lasparri: You said that the person dressed up as a zombie kept coming toward you. Did you or your husband ask her for help?

Ms. Monroe: No, she was the reason I ran into that wall!

Mr. Lasparri: Do you know why she kept approaching you?

Ms. Monroe: I assume it was to keep playing the part of a scary zombie and frighten us—she was saying something to us, but I was crying and screaming and didn't hear what she was saying.

Mr. Lasparri: You said there was no one else present in the graveyard other than your husband and yourself when you slipped and fell there. Did you ask for help after you left the graveyard?

Ms. Monroe: No, the only person we saw after we left the graveyard was that creep with the chain saw. My husband yelled at him to get away from us, and he backed off.

Then, as I said, my husband helped me up and supported me as we went right to our car and to the emergency room of the nearest hospital.

* * *

Mr. Lasparri: Was the graveyard illuminated?

Ms. Monroe: There were little lights along the pathway.

Mr. Lasparri: How about outside the graveyard fence?

Ms. Monroe: That was lit by lampposts, like the rest of the park, and we could see okay.

* * *

Mr. Lasparri: Do you remember what the weather was like in the days preceding Halloween?

Ms. Monroe: Yes, I remember it had been really raining a lot, without letup, for the previous three days.

* * *

Mr. Lasparri: Do you normally celebrate Halloween?

Ms. Monroe: Sure, we do it every year and, up to now, we've really enjoyed it—you know, seeing people dressed up in costumes and having fun trick-or-treating and trying to scare people and stuff like that.

* * *

Excerpts of Deposition Transcript of Mike Matson

Present: Mr. Mike Matson, called by Defendant; F.J. Wahl, Esq., counsel for Plaintiff; R. Lasparri, Esq., counsel for Defendant

Direct Examination (by Mr. Lasparri):

Mr. Lasparri: Please state your name, occupation, and employer.

Mr. Matson: My name is Mike Matson, and I am General Manager of the Franklin Flags Amusement Park.

Mr. Lasparri: Can you describe the Haunted House attraction at the park?

Mr. Matson: It's a new attraction which we opened this last Halloween. It's a house with a series of rooms with scary interiors, suitable for a haunted house—things like spiderwebs and moving images of ghosts and moaning sounds played over the loudspeakers. It's dimly lit, of course, and we also have people playing the part of zombies and goblins and vampires and devils and stuff like that, who are supposed to scare the patrons who go through the attraction.

Mr. Lasparri: Once a patron exits from the house itself, is that the end of the attraction?

Mr. Matson: No, we rigged it up so that there's a mock graveyard that people have to walk through to exit the attraction, and it's very spooky too; it continues the effect.

Mr. Lasparri: And once a patron exits from the graveyard, is that the end of the attraction?

Mr. Matson: Well, we thought it would be fun if, once people thought they were out of the house and the graveyard, and thought they were safe, we would play one more trick to frighten them. So we set it up so that the graveyard was enclosed with a fence, and when you went through the gate to leave, we'd have a staff member dressed up like a character from a horror movie wielding a fake chain saw jump out from behind the outside of the fence for one last "boo," so to speak.

* * *

Mr. Lasparri: What steps do you take to ensure the safety of your patrons in the Haunted House attraction?

Mr. Matson: Well, we have several individuals stationed around the various points of the attraction to keep an eye on everyone. For example, we have at least one staff

member in every room of the house in case a patron gets into some sort of trouble or needs help. And we have a doctor present at the park at all times.

Mr. Lasparri: Did you have a staff person stationed in the last room of the house?

Mr. Matson: Yes, that function was filled by the individual playing the part of a zombie in that room.

Mr. Lasparri: What about in the mock graveyard?

Mr. Matson: We don't have anyone there, because there's nothing going on there except that patrons are walking through it.

Mr. Lasparri: And what about outside the exit from the graveyard?

Mr. Matson: Again, the employee with the fake chain saw has that responsibility. All our employees are instructed to offer assistance to patrons, and to call the doctor if there's a medical emergency.

* * *

Cross-examination (by Ms. Wahl):

* * *

Ms. Wahl: Mr. Matson, can you describe the grounds of the park—more particularly, what are they made of—are they paved, dirt, what?

Mr. Matson: The overwhelming bulk of the park—where people walk—is paved. We have some landscaping, trees and flower beds and such, which are of course planted in earth covered in grass or flowers, but they are fenced in because we don't want people trampling them.

Ms. Wahl: Was any part of the mock graveyard outside the house paved—the path, for instance?

Mr. Matson: No, it was all left as natural earth, you know, for purposes of verisimilitude—you know, realism.

* * *

Ms. Wahl: Aside from the person with the mock chain saw, were there any other employees on the grounds outside the Haunted House attraction who were in costume and instructed to frighten patrons?

Mr. Matson: No.

Excerpts of Deposition Transcript of Camille Brewster

Present: Ms. Camille Brewster, called by Defendant; F.J. Wahl, Esq., counsel for Plaintiff; R. Lasparri, Esq., counsel for Defendant

Direct Examination (by Mr. Lasparri):

Mr. Lasparri: Please state your name, occupation, and employer.

Ms. Brewster: Camille Brewster. I work for Franklin Flags Amusement Park as a staff member.

Mr. Lasparri: And what are your duties as a staff member?

Ms. Brewster: To do pretty much whatever my boss tells me to do.

Mr. Lasparri: What duties were assigned to you last Halloween?

Ms. Brewster: We had opened this new attraction, the Haunted House, and I was made up to play a zombie. I was told to hide in the last room of the house, and when people came through, to jump out and try to scare them.

Mr. Lasparri: Were you given any guidelines as to what you could and could not do?

Ms. Brewster: We were told that we couldn't touch or make any physical contact with the patrons and to make sure people were having fun in the spirit of Halloween. That was about it.

Mr. Lasparri: And as a general matter, what instructions are you given should a patron need help of any sort?

Ms. Brewster: To help them—and if there's some medical emergency, we're supposed to call the doctor who's on duty in the main office.

Mr. Lasparri: Do you remember any untoward incidents that occurred last Halloween?

Ms. Brewster: Well, there was only one, involving a couple that came through. I did what I had been doing all night—jumping out at people and scaring them. But the woman just seemed to freak out. She let out a shriek and turned and ran away from me like a bolt of lightning. She ran right into the wall—there was an awful crack—and fell down.

Mr. Lasparri: What did you do then?

Ms. Brewster: Her husband was helping her get up, and I went toward them to see if I could help them and said, "Are you okay?", but they just rushed out of the exit door, and that was the last I saw of them.

* * *

Cross-examination (by Ms. Wahl):

Ms. Wahl: Ms. Brewster, how old are you?

Ms. Brewster: Seventeen.

Ms. Wahl: Do you have any training in first aid of any sort?

Ms. Brewster: Well, I do have a junior lifeguard certificate that I got at summer camp two years ago, which included basic first aid stuff like bandaging and all that.

Ms. Wahl: You said that if patrons needed help, you were instructed to help them or call a doctor for a medical emergency. Were you given any more explicit or specific instructions as to what to do in such a case?

Ms. Brewster: No, not really, just to do whatever is necessary to help them.

Larson v. Franklin High Boosters Club, Inc.

Franklin Supreme Court (2002)

Two years ago, the Franklin High Boosters Club decided to run a fund-raiser for the school's cheerleading team on Halloween. They rented a local warehouse and constructed what they called a "House of Horrors" inside. The "House of Horrors" included a path to follow with various stops in rooms along the way. At each stop, the room was appropriately decorated so that some mock "horror" awaited those who entered—including individuals playing headless ghosts, zombies, vampires, werewolves, Frankenstein monsters, and the like. These roles were played by members of the club, made up and dressed appropriately. They were instructed to play the parts to the hilt. Their aim, simply put, was to scare the customers, who had each paid $20 for the privilege of being frightened.

The fund-raiser netted $4,800 for the club and would have been an unqualified success but for one incident. John Larson, a 72-year-old gentleman, entered the "House of Horrors" with his two grandchildren. At one of the stops, when one of the "vampires" came at him suddenly, Larson, startled, reeled backward, tripped over his own feet, and fell, breaking his arm and dislocating his shoulder. He sued the club for negligence, seeking recompense for his medical expenses and pain and suffering.

The trial court granted the club's motion for summary judgment, and the court of appeal affirmed. For the reasons stated below, we reverse and remand.

A court will grant a motion for summary judgment when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. A "material fact" for summary judgment purposes is a fact that would influence the outcome of the controversy.

Larson cites *Dozer v. Swift* (Fr. Ct. App. 1994) as establishing the standard for liability for negligence in cases of this sort. In *Dozer*, the defendant was a coworker of the plaintiff. The defendant knew that the plaintiff was of a frail constitution and had arachnophobia—an inordinate fear of spiders. Solely to play a prank on the plaintiff, the defendant obtained a number of live but harmless spiders and dropped them over the wall of the plaintiff's cubicle while the plaintiff was sitting at his desk eating

lunch. The plaintiff, in utter panic, fell backward from his desk chair and sustained a serious head injury. The defendant was found liable in negligence.

As the courts below correctly held, Larson's reliance on *Dozer* is misplaced. The first question is whether there is a duty. In all tort cases, the duty is to act reasonably under the circumstances and not to put others in positions of risk. In *Dozer*, the defendant did not live up to that duty and therefore negligently caused the injury to the plaintiff, for which the defendant bore liability.

But to say that individuals have a duty to act reasonably under the circumstances—that is, to avoid risk—is only the starting point of a negligence analysis. Once the court has determined that there is a duty, it must next determine 1) *what* duty was imposed on the defendant under the *particular circumstances* at issue, 2) whether there was a breach of that duty that resulted in injury or loss, and 3) whether the risk which resulted in the injury or loss was encompassed within the scope of the protection extended by the imposition of that duty.

The question of the defendant's duty is not whether the plaintiff was subjectively aware of the risk. Rather, the question is whether the defendant acted unreasonably under the circumstances vis-à-vis the plaintiff.[1]

As the courts below also correctly held, the particular circumstances here differ from those in *Dozer*, because they occurred in a different setting. Therefore, the duty that the defendant owed to the plaintiff here must be analyzed in those particular circumstances.

Patrons at an event which is designed to be frightening are expected to be surprised, startled, and scared by the exhibits; the operator does not have a duty to guard against patrons reacting in bizarre, frightened, or unpredictable ways. Patrons obviously have knowledge that they can anticipate being confronted by exhibits designed to startle and instill fear. They must realize that the very purpose of the attraction is to cause them to react in bizarre, frightened, or unpredictable ways. Under other circumstances, presenting a frightening or threatening act might be a

[1] It is well settled that assumption of the risk is no longer a valid defense under Franklin law. The plaintiff's knowledge and conduct may be considered in determining whether, under the particular circumstances at issue, the defendant breached a duty to the plaintiff. If the defendant is found to have breached that duty, then the plaintiff's knowledge and conduct are considered to determine the extent of the plaintiff's comparative negligence.

violation of a general duty not to scare others. *Dozer*. For example, being accosted by a supposed "vampire" in the middle of a shopping mall on a normal weekday in July might indeed be a violation of the general duty. But in this setting, on Halloween, the circumstances are different.

Larson, by voluntarily entering a self-described "House of Horrors" on Halloween, accepted the rules of the game. Hence, Larson's claim—that the club was negligent in its very act of admitting him to the "House of Horrors" because the establishment of the exhibit itself, with features designed to frighten patrons, breached the club's duty to act reasonably—must fail.

The courts below ended their analysis on that point and granted and affirmed the club's motion for summary judgment. But therein lies their error, for the proper analysis does not end there. Here, the further question is what additional duty is owed by a party which invites a patron for business purposes—in this case, what is the duty of the proprietor or operator of an amusement attraction to his patron who is an invitee. The operator impliedly represents that he has used reasonable care in inspecting and maintaining the premises and equipment furnished by him, and that they are reasonably safe for the purposes intended. The operator is not bound to protect patrons from every conceivable danger, only from unreasonably dangerous conditions. More specifically, such proprietors and operators have an obligation to ensure that there are not only adequate physical facilities but also adequate personnel and supervision for patrons entering the establishment.

Larson claims that the record shows that there is a question whether such adequate personnel and supervision existed here—most particularly, whether the role-playing individuals who were part of the experience in the "House of Horrors" were adequately instructed should some unfortunate event occur which injured a patron. Larson raised that question in his brief opposing the club's motion for summary judgment, but neither the trial court nor the court of appeal addressed that claim. We cannot, on the record presented, determine if such adequate personnel, supervision, and instruction existed.

Accordingly, a genuine dispute of material fact exists which precludes granting the club's motion for summary judgment.

Reversed and remanded.

Costello v. Shadowland Amusements, Inc.

Franklin Supreme Court (2007)

This is an appeal from a judgment of negligence against defendant Shadowland Amusements, entered by the Franklin District Court and affirmed by the Franklin Court of Appeal. On May 22, 2005, plaintiff Evelyn Costello had entered a "haunted house" at Shadowland's amusement park and gone into a room which was only dimly lit. In this room, the operators of the amusement park had projected ghoulish apparitions on the wall using laser holograms for realistic effect. Startled by these apparitions, Costello backed up and tripped over a bench that Shadowland had placed in the middle of the room, injuring herself. She sued for damages for both medical expenses and pain and suffering.

Defendant Shadowland cites our decision in *Parker v. Muir* (Fr. Sup. Ct. 2005) as a defense. There, plaintiff Parker sued defendant Muir for negligence, claiming damages for injuries she suffered as a result of her patronage of Muir's cornfield maze. The maze consisted of five miles of paths cut into the cornfield. Parker accompanied the youth group from her church to the maze. She had specifically suggested that the group go to the maze on their outing because she had been through the maze "at least twice" before, by her own admission. While venturing through the maze, she mentioned to the group that the paths were very rocky and that they should be careful. However, she tripped over a large rock in the path, fell, and broke her wrist. She sued Muir for negligence. The record showed that for the entire season during which the maze was open, this was the only reported accident.

As we noted in *Parker*, Franklin law provides that the owner or custodian of property is answerable for damage occasioned by its dangerous condition, but only upon a showing that the owner knew (or, in the exercise of reasonable care, should have known) of the dangerous condition, that the damage could have been prevented by the exercise of reasonable care, and that the owner failed to exercise such reasonable care. We also noted that the fact that an accident occurred as a result of a dangerous condition does not elevate the condition to one that is unreasonably dangerous. The past accident history of the condition in question and the degree to which the danger may be observed by a

potential victim are factors to be taken into consideration in the determination of whether a condition is unreasonably dangerous. Further, the condition must be of such a nature as to constitute a danger that would reasonably be expected to cause injury to a prudent person using ordinary care under the circumstances.

In *Parker*, we concluded that the mere presence of rocks on a path through a cornfield did not meet the standard for imposing liability. The plaintiff there knew of the condition from her prior trips through the maze. She warned the members of her group about it. She voluntarily entered the maze with that knowledge. No prudent person in such circumstances, using ordinary care, would incur injury. Indeed, any reasonable person would not be surprised to find rocks in a dirt path. The otherwise unblemished safety record of the maze prior to the accident bore out this conclusion.

Here, defendant Shadowland's reliance on *Parker* is misplaced. As we noted in *Larson v. Franklin High Boosters Club, Inc.* (Fr. Sup. Ct. 2002), every individual has a duty to act reasonably and not to put others in positions of risk. Shadowland did not act reasonably here. It was obviously aware of the dim lighting, the placement of the bench (it had itself put it there), and the hazard the bench might present. This dim lighting combined with the bench placement was a dangerous condition, one of which visitors were unaware, and the injury which resulted was one that Shadowland could have prevented using reasonable care. Shadowland did unreasonably put plaintiff Costello at risk and is therefore liable for Costello's injuries.

Affirmed.

Applicant Number

[redacted]

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Palindrome Recording Contract

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MORRIS & WESTMAN, LLP
2932 Sheffield Court
Franklin City, Franklin 33026

TO: Examinee
FROM: Levi Morris
DATE: July 30, 2013
RE: Palindrome Recording Contract

We have been retained to represent the members of the rock band Palindrome. The band has had considerable success in the tri-state area of Franklin, Columbia, and Olympia and has received an offer from Polyphon, an independent record label, which wants to sign the band to a long-term recording contract.

The contract submitted by Polyphon is complex and voluminous (it runs over 50 pages of single-spaced type). The band has asked us to negotiate the contract with the record label. There are some key provisions that we must redraft to meet the band's contractual desires. We can then present the redrafted contract to Polyphon, as a step in negotiating with the label. I am attaching the provisions from the contract Polyphon submitted that I would like you to look at. I have also attached other material to give you some background and from which you may glean the band's wishes and the applicable law. For your purposes, assume that the agreement among the various band members is a binding contract and that they have formed a valid partnership.

Please draft a memorandum in which you identify those contract provisions that need to be redrafted to meet the band's wishes and to comply with the law. For each provision that you identify,

1. redraft the provision, indicating your changes from the original text, and

2. explain the reasons for your redraft, including the legal reasons (if any) for changing the provision, to guide me in conducting the negotiations over these points.

Transcript of Interview between Levi Morris and Otto Smyth (July 12, 2013)

Levi Morris: Otto, it's good to see you. How are things going?

Otto Smyth: Great, really great. As I told you over the phone, we've got a mega-offer from Polyphon to sign with them, and the band asked me to take the lead in negotiating.

Morris: Excellent. What's Polyphon's offer?

Smyth: We've had a few offers in the past, but from labels that wanted to take everything we had. We really want to sign with an independent label, because they treat artists like us better, and Polyphon has a reputation for treating artists reasonably and being willing to negotiate terms. They sent our manager this huge contract—here's a copy. We'll need your help to deal with them.

Morris: That's what we're here for. Bring me up-to-date on what's happening with the band.

Smyth: Well, as you may know, about nine months ago, Al, our bass player, was injured by a drunk driver. He's okay now, thank goodness. Abby, our lead guitarist, and Coco, our drummer, are still going strong, and, as leader of the group, I'm still playing rhythm guitar, singing lead vocals, and doing all the songwriting. Our fan base really has grown here in the tri-state area, and that must've gotten the attention of the label, because they really came after us hard.

Morris: How do the members of the band get on as far as business arrangements go?

Smyth: We're fine together—when we first formed 10 years ago or so, we made an agreement among ourselves which I cobbled up out of a music book I read. Here's a copy. We do business as a partnership under the name Palindrome Partners, and everything we make has to go through the partnership into a partnership bank account. We then divide up the money in accordance with our partnership agreement.

Morris: Thanks. We'll look the agreement over. Let's turn to the label's offer, and—first things first—how's the money?

[*Discussion of financial terms of advance and royalties offered by label omitted.*]

Morris: Now, what else do you want us to negotiate with them?

Smyth: Well, I'm not really sure what's in there—I really don't understand this legal stuff. But we're all pretty much in agreement over some things that are important to us. First, we

don't want to be tied up with the label for too long unless they really do a good job for us—maybe for three albums at most, and only for four years.

Second, our artistic integrity is really important—we've got to make all the artistic decisions about the songs that go into our albums, and the recordings, and the producer we want, and what gets released.

Third, since Al nearly died because of that drunk driver, we've become fanatic about drugs and booze—we've sworn off, and we owe it to him to get the message out. We'd hate it if our music didn't get that message across, or worse, if people thought we were the stereotypical drink-and-dope rockers, or if our songs were used in, like, a beer commercial. I never want to see a picture of me in some magazine holding a bottle.

Morris: Understood—we'll try to make sure that you have the right to approve of marketing and promotional efforts. You know, my daughter loves your band and wears a Palindrome T-shirt she got at one of your concerts.

Smyth: Yeah, we make a nice amount from our merchandise sales. At every show we do, and on our website, we sell T-shirts, baseball caps, tank tops, stuff like that.

Morris: Who makes them for you?

Smyth: Our manager found the various manufacturers. We're really careful to treat our fans well and give them good value for their money, using top-quality materials, making sure the merchandise is high quality—like the T-shirts, we could use some cheap cotton blends and make a few bucks more, but instead we always use those thicker Ts, with high-quality fabric. We think that if we treat our fans well, they'll stay loyal to us.

You know, we've been together for almost 10 years now, and we've always been careful of the Palindrome name and what it means to our fans. We've worked really hard to build it up to where it is now, and it means a lot to us. We put our name on every piece of merchandise we have. Our manager even got a registered trademark for us in our name, and she tells us that all of our merchandise deals are nonexclusive, which means we can license our name to more than one manufacturer. And we want to keep it that way. It's really important to us to keep control of everything that has to do with our merchandise, and the money it brings in, because it's a real source of income for us.

We understand that Polyphon is offering us a higher royalty rate for our records in exchange for a piece of our merchandise action, and that's OK with us—we'd be willing to give them a quarter of the revenue for the stuff they produce and sell—but we've got to keep that trademark, and we've got to be able to use it ourselves without cutting Polyphon in on money from products it doesn't make or sell.

Morris: So you wouldn't mind licensing your trademark to Polyphon?

Smyth: Not as long as we own it, can still do our own thing with it, and can control what they do with it.

Morris: We'll see to that. We don't have to itemize the things they can produce; we just have to be sure that you can approve of what they make and the quality of it as well.

[*Discussion of other points omitted.*]

AGREEMENT AMONG MEMBERS OF PALINDROME

AGREEMENT, by and between Otto Smyth, Abby Thornton, Coco Hart, and Al Laurence (collectively, "the Band"), all citizens of the United States of America and the State of Franklin, as follows:

WHEREAS, the individual members of the Band have formed a musical group known professionally as Palindrome; and

WHEREAS, the individual members of the Band wish to set forth the terms of their affiliation;

NOW, THEREFORE, the individual members of the Band agree as follows:

1. All property created by the Band as a collective entity (including both intellectual and material property) shall be jointly owned by all members of the Band. All income earned by the Band as a collective entity for its collective efforts or from that collective property (e.g., from recordings made as a musical group) will be divided equally among the individual members of the Band. Should any individual member of the Band voluntarily or involuntarily withdraw from the Band, that member will receive his or her proportionate share of income earned by the Band as a collective entity from undertakings made before that member's withdrawal from the Band.

2. All actions taken for the Band as an entity will require the unanimous approval of all the individual members of the Band.

3. The Band shall form a partnership and do business under the name Palindrome Partners.

Signed this 15th day of March, 2003.

Otto Smyth
Otto Smyth

Abby Thornton
Abby Thornton

Coco Hart
Coco Hart

Al Laurence
Al Laurence

Excerpts from Contract Presented by Polyphon

1. DEFINITIONS

"Album" shall mean a sufficient number of Masters embodying Artist's performances to comprise one (1) or more compact discs, or the equivalent, of not less than forty-five (45) minutes of playing time and containing at least ten (10) different Masters.

"Artist" or "you" shall mean each member of the band Palindrome, individually, and the band collectively.

"Contract Period" shall mean the term set forth in Paragraph 3.03.

"Master" shall mean any sound recording of a single musical composition, irrespective of length, that is intended to be embodied on or in an Album.

* * *

3. TERM AND DELIVERY OBLIGATIONS

3.01 During each Contract Period, you will deliver to Polyphon commercially satisfactory Masters. Such Masters will embody the featured vocal performances of Artist of contemporary selections that have not been previously recorded by Artist, and each Master will contain the performances of all members of Artist.

3.02 During each Contract Period, you will perform for the recording of Masters and you will deliver to Polyphon those Masters (the "Recording Commitment") necessary to meet the following schedule:

Contract Period	Recording Commitment
Initial Contract Period	one (1) Album
Each Option Period	one (1) Album

3.03 The initial Contract Period will begin on the date of this Agreement and will run for one year. You hereby grant Polyphon eight (8) separate options, each to extend the term of this Agreement for one additional Contract Period of one year per option ("Option Period"). In the event that you do not fulfill your Recording Commitment for the initial Contract Period or any Option Period, that period will continue to run and the next Option Period will not begin until the Recording Commitment in question has been fulfilled.

4. APPROVALS

4.01 Polyphon shall, in its sole discretion, make the final determination of the Masters to be included in each Album, and shall have the sole authority to assign one or more producers who shall collaborate with you on the production of each Master and each Album.

* * *

8. MERCHANDISE, MARKETING, AND OTHER RIGHTS

8.01 Artist warrants that it owns the federally registered trademark PALINDROME (Reg. No. 5,423,888) and hereby transfers all right, title, and interest in that trademark to Polyphon. Polyphon may use the trademark on such products as, in its sole discretion, it sees fit to produce or license, and all income from such use shall be Polyphon's alone.

8.02 Artist hereby authorizes Polyphon, in its sole discretion, to use Artist's, and each member of Artist's, name, image, and likeness in connection with any marketing or promotional efforts and to use the Masters in conjunction with the advertising, promotion, or sale of any goods or services.

Franklin Statute re Personal Services Contracts

Franklin Labor Code § 2855

(a) Except as otherwise provided in subsection (b), a contract to render personal service may not be enforced against the employee or person contracting to render the service beyond five years from the commencement of service under it. If the employee or person contracting to render the service voluntarily continues to serve under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation due the employee or person rendering the service.

(b) Notwithstanding subsection (a), a contract to render personal service in the production of phonorecords in which sounds are first fixed may not be enforced against the employee or person contracting to render the service beyond 10 years from the commencement of service under it. For purposes of this subsection, a "phonorecord" shall mean all forms of audio-only reproduction, now or hereafter known, manufactured and distributed for home use.

Panama Hats of Franklin, Inc. v. Elson Enterprises, LLC

United States District Court (District of Franklin, 2004)

Panama Hats of Franklin, Inc., manufactures hats which it sells to the public. In 2000, it entered into an agreement with the Allied Hat Co., which owned a federally registered trademark in the word "Napoleon" for a style of men's hat. Other than the financial terms, the only operative term of that agreement reads as follows: "Allied owns the federally registered trademark 'Napoleon' for men's hats (Reg. No. 3,455,879). Allied hereby transfers that trademark to Panama for the monetary consideration set forth below." The agreement did not make any other transfer of tangible or intangible property, good will, or business assets to Panama. Two years later, Allied went out of business—all its other assets have been liquidated, and it no longer has any legal (or other) existence.

In 2003, Elson Enterprises, LLC, a company unrelated to Panama or Allied, began manufacturing a style of men's hat, which it marketed as the "Napoleon" style. Panama had never used the mark, but it sued Elson, claiming that it owned the federally registered trademark in the word "Napoleon" for hats by virtue of the assignment from Allied and that Elson had infringed that mark. Elson now moves for summary judgment, claiming that Panama has no interest in that trademark and so has no basis for a claim of trademark infringement against Elson.

The purpose of a trademark is clear from the definition of the term in the federal trademark statute: "The term 'trademark' includes any word, name, symbol, or device, or any combination thereof — (1) used by a person . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." 15 U.S.C. § 1127. Some examples of well-known trademarks are Coca-Cola, Exxon, and Sony.

From this it is apparent that the trademark cannot be divorced from the goods themselves—as the trademark is the assurance to the consumer of the source of the goods, the trademark cannot exist independently of the goods. Hence, if one company purchases the assets of another and becomes the manufacturer of the goods previously manufactured by the purchased company, the trademark that was associated

with those goods may now become the property of, and be associated with, the new manufacturer of the goods, for the trademark is now the new manufacturer's indication of source. Short of a transfer of other assets of a business with the trademark, a trademark cannot be transferred without, at the very least, a simultaneous transfer of the good will associated with the mark, for that good will has developed from the actual product itself and so binds the trademark to the goods or services with which it is associated. In essence, the mark cannot exist in a vacuum, to be bought and sold as a freestanding property. This policy is made explicit in the federal trademark statute: "A registered mark . . . shall be assignable *with the good will of the business in which the mark is used, or with that part of the good will of the business connected with the use of and symbolized by the mark.*" 15 U.S.C. § 1060(a)(1) (emphasis added).

In the parlance of the trademark law, the sale of a trademark without any other asset of the business—without, at the very least, the good will associated with the trademark—is termed an "assignment in gross" or a "naked" assignment of the trademark. Given the policy considerations set forth above, without the necessary inclusion of the assets of the business or the good will associated with the mark, the law holds that a "naked" "assignment in gross" of a trademark is not valid. Further, such a "naked" "assignment in gross" may cause the assignor to lose all rights in the trademark and leave the trademark open for acquisition by the first subsequent user of the mark in commerce.

Because the purported assignment of the federally registered trademark "Napoleon" from Allied to Panama was just such a "naked" "assignment in gross" of the mark, it has no validity—the purported assignment conveyed no rights. Because the assignment was invalid, the mark was free for anyone to acquire, and anyone could acquire the right to the mark by using the mark in commerce, which is precisely what Elson did. (Panama never used the mark.) Therefore, Elson did not infringe on any rights of Panama because Panama had no rights in the "Napoleon" trademark. Elson's motion for summary judgment is granted.

M&P Sportswear, Inc. v. Tops Clothing Co.

United States District Court (District of Franklin, 2001)

The facts giving rise to this lawsuit for trademark infringement, stripped to their essentials, are these: M&P Sportswear designs T-shirts and other items of apparel, and is the owner of the federally registered trademark "Go Baby," which it uses as the brand name of a line of T-shirts. Tops Clothing is an offshore manufacturer of clothing. In 1998, Tops entered into an agreement with M&P, under which M&P licensed the use of its "Go Baby" trademark to Tops. The agreement provided that Tops would pay a specified licensing fee to M&P, which would entitle Tops to manufacture, import into the United States, and sell T-shirts under the "Go Baby" brand. The agreement contained no other substantive provisions, and Tops immediately began the manufacture, importation, and sale of the T-shirts. Tops made the requisite licensing payments to M&P.

In 2000, M&P representatives purchased samples of Tops's "Go Baby" T-shirts at a "99-cent" store in Franklin City; this was the first sample of the Tops T-shirts M&P had obtained. M&P's representatives found that the T-shirts were, in their opinion, of the poorest quality imaginable—according to the deposition testimony of one of M&P's principals, "they were so thin and cheaply made that they would dissolve in a rainstorm." M&P then sent a purported "notice of termination" of the trademark license agreement to Tops (this notwithstanding that the license agreement did not make any specific provision for termination). When Tops continued to manufacture, import, and sell the branded T-shirts, M&P brought this action for trademark infringement against it. Tops now seeks summary judgment against M&P, on the ground that, as the license agreement contained no provisions for quality control, M&P no longer has any rights in the "Go Baby" trademark.

It is a basic tenet of trademark law that a trademark is an indication of the source or origin of goods or services to the public, enabling the public to expect that the goods or services bearing the trademark will comport with a certain uniform standard of quality, whatever that quality may be. A trademark carries with it a message that the trademark owner is controlling the nature and quality of the goods or services sold under the mark. Thus, not only does a

trademark owner have the *right* to control quality—when it licenses, it has the *duty* to control quality.

Accordingly, it is also a basic tenet of the trademark law that any trademark proprietor who licenses the trademark to another must assure, in the license agreement, that the goods or services offered by the licensee meet the standards of quality of the trademarked goods established by the trademark proprietor. Failure to do so causes the mark to lose its significance as an indication of origin. Indeed, many Circuits have held that such action may be seen as an abandonment of the mark itself; the federal trademark act provides, "A mark shall be deemed 'abandoned' if either of the following occurs: . . . (2) when any course of conduct of the owner, including acts of omission as well as commission, causes the mark . . . to lose its significance as a mark." Uncontrolled licensing as a course of conduct is inherently deceptive, constitutes abandonment of all rights in the trademark, and results in cancellation of its registration.

Here, M&P made no quality-control provision whatsoever in its license agreement. Accordingly, by failing to assure the public of any standard of quality of the goods and services manufactured and sold under the mark, M&P has lost its rights to the mark.

Tops's motion for summary judgment is granted.