THE MPT

MULTISTATE PERFORMANCE TEST

July 2013
MPTs and Point Sheets

www.ncbex.org

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Contents

Preface

The Multistate Performance Test (MPT) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the items and Point Sheets from the July 2013 MPT. Each test includes two 90-minute items; user jurisdictions may select one or both items to include as part of their bar examinations. (Jurisdictions that administer the Uniform Bar Examination [UBE] use two MPTs as part of their bar examinations.) The instructions for the test appear on page iii. For more information, see the *MPT Information Booklet,* available on the NCBE website at www.ncbex.org.

The MPT Point Sheets describe the factual and legal points encompassed within the lawyering tasks to be completed. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions to assist graders in grading the examination by identifying the issues and suggesting the resolution of the problems contemplated by the drafters.

Description of the MPT

The MPT consists of two 90-minute items, one or both of which a jurisdiction may select to include as part of its bar examination. (UBE jurisdictions use two MPTs as part of their bar examinations.) It is administered by participating jurisdictions on the Tuesday before the last Wednesday in February and July of each year.

The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the examinee is to complete is described in a memorandum from a supervising attorney. The File might also include transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer's notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or a supervising attorney's version of events may be incomplete or unreliable. Examinees are expected to recognize when facts are inconsistent or missing and are expected to identify potential sources of additional facts.

The Library may contain cases, statutes, regulations, or rules, some of which may not be relevant to the assigned lawyering task. The examinee is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task. The MPT is not a test of substantive law; the Library materials provide sufficient substantive information to complete the task.

The MPT is designed to test an examinee's ability to use fundamental lawyering skills in a realistic situation. Each test evaluates an examinee's ability to complete a task that a beginning lawyer should be able to accomplish. The MPT requires examinees to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints.

These skills are tested by requiring examinees to perform one or more of a variety of lawyering tasks. For example, examinees might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.

Instructions

The back cover of each test booklet contains the following instructions:

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

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▶ *FILE*

MPT-1: *Monroe v. Franklin Flags Amusement Park*

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.

July 2013 MPT

▶ *LIBRARY*

MPT-1: *Monroe v. Franklin Flags Amusement Park*

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.

July 2013 MPT

▶ *FILE*

MPT-2: *Palindrome Recording Contract*

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.

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▶ *LIBRARY*

MPT-2: *Palindrome Recording Contract*

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.

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▶ *POINT SHEET*

MPT-1: *Monroe v. Franklin Flags Amusement Park*

Monroe v. Franklin Flags Amusement Park

DRAFTERS' POINT SHEET

In this performance test, examinees work for a law firm representing Franklin Flags Amusement Park. Franklin Flags is being sued in negligence by Vera Monroe, a patron who was injured at the Park last Halloween. She claims three acts of negligence on the part of the Park:

- First, Ms. Monroe was injured when, frightened by a staff member playing the role of a zombie in the Park's Haunted House attraction, she ran into a wall, breaking her nose.
- Second, Ms. Monroe was further injured when, after exiting the Haunted House, she slipped on a muddy path in a mock graveyard that was part of the Haunted House attraction, and sprained her ankle.
- Third, Ms. Monroe was again injured when, after leaving the mock graveyard, she was confronted by a costumed staff member wielding a fake chain saw, fell again, and broke her wrist.

The task from the supervising partner is to draft the argument section of a persuasive brief in support of a motion for summary judgment; the brief must deal with each of the three injuries claimed by Ms. Monroe to have been caused by the Park's negligence. The legal analysis of each of these issues involves application of the facts, as determined in discovery, to the law as set forth in prior Franklin cases. Examinees are instructed not to address issues of comparative negligence or damages.

The File contains 1) the instructional memorandum; 2) the law firm's Guidelines for Persuasive Briefs in Trial Courts; 3) excerpts from the deposition transcript of Vera Monroe, the plaintiff; 4) excerpts from the deposition transcript of Mike Matson, the General Manager of the Park; and 5) excerpts from the deposition transcript of Camille Brewster, the staff member who played the zombie in the room of the Haunted House where the plaintiff was first injured. The Library contains two Franklin Supreme Court cases with embedded cases.

The following discussion covers all the points the drafters intended to raise in the problem. Examinees need not cover them all to receive good grades.

I. FORMAT AND OVERVIEW

Examinees must, first, master the facts as revealed by the three deposition transcripts; second, master the law of negligence as set forth by the cases; and third, persuasively apply that

law to the facts so as to convince the court that summary judgment should be granted in favor of the Park. Examinees should address each of the three claims, arguing that in each instance, the Park's acts were not negligent and therefore the Park has no liability for Ms. Monroe's injuries:

1) Ms. Monroe's Injury in the Haunted House: The question is whether the Park's acts (by its staff member, in its instructions to her, and in its supervision of her) in deliberately frightening Ms. Monroe such that she ran into a wall and broke her nose constituted negligence.

2) Ms. Monroe's Injury in the Mock Graveyard: The question is whether the Park's acts (in its maintenance of the grounds and lack of supervisory personnel) in requiring patrons to exit the Haunted House attraction through a muddy path, such that Ms. Monroe fell and injured her ankle, constituted negligence.

3) Ms. Monroe's Injury After Leaving the Haunted House Attraction: Here, the question is whether the Park's acts (by its staff member, in its instructions to him, in its supervision of him, and in arranging the activity outside of the attraction itself) in again deliberately frightening Ms. Monroe such that she fell and broke her wrist constituted negligence.

II. DISCUSSION

A. Facts

Although examinees are instructed not to restate the facts, they must be mastered properly and incorporated into the legal argument.

Vera Monroe's deposition establishes the following facts: She and her husband went to the Franklin Flags Amusement Park on the previous Halloween. They entered the Haunted House attraction, which had opened for the first time on that day (stipulated by the Park). They went through the rooms of the house; in each, when presented with a "scary" tableau, Ms. Monroe let out a little scream, which amused her husband. When they entered the last room, which was dimly lit, a staff member costumed as a zombie jumped out of a hiding place, yelling. At that point, Ms. Monroe "lost it" and ran into a wall, breaking her nose. The staff member approached Ms. Monroe, saying something Ms. Monroe did not hear because she was crying and screaming. She told her husband to get her out of the house, which he did immediately.

Ms. Monroe and her husband then went through the mock graveyard, which had a muddy path. The graveyard was illuminated by little lights on the pathway. Ms. Monroe knew that it had

rained without letup for the three days preceding Halloween. She slipped on the path and sprained her ankle. There was no staff member present.

After exiting the mock graveyard and the attraction through a gate, Ms. Monroe and her husband headed to the parking lot. This area was lit by lampposts, and Ms. Monroe could "see okay." A costumed staff member brandishing a fake chain saw accosted them. They were startled, and Ms. Monroe fell and broke her wrist.

It being Halloween, Ms. Monroe expected to be scared—that being the fun of the holiday—but not unduly frightened or terrified. Neither she nor her husband inquired as to why the staff member dressed as a zombie kept coming toward them after Ms. Monroe had broken her nose. Nor did they ask either of the two staff members they encountered for help.

Mike Matson's deposition establishes the following facts: He is the Park's General Manager. The Haunted House attraction was opened on Halloween. Staff members were in the house to play appropriate roles and frighten people in the spirit of Halloween. After patrons exited the house and mock graveyard, a staff member appropriately costumed was to play a final scary prank on patrons. No staff members other than those in the Haunted House attraction and the employee wielding the mock chain saw were in costume or instructed to frighten patrons.

All staff members, including those playing the parts in the last room of the house and outside the graveyard (but not in the graveyard itself), were instructed to help patrons who might get into trouble. A doctor was on duty in case medical attention should be necessary.

As a general matter, the pathways of the amusement park where patrons walk are paved. No paved path was included in the mock graveyard; it was left as a dirt path for "verisimilitude."

Camille Brewster's deposition establishes the following facts: She played the part of the zombie in the last room. She was instructed to scare patrons in the spirit of Halloween. She also was instructed to help any patrons in distress and notify the doctor if medical attention was necessary. When Ms. Monroe was injured in the last room of the house, Ms. Brewster approached to help her and said, "Are you okay?", but Ms. Monroe and her husband fled before Ms. Brewster could do anything. Ms. Brewster is just 17 years old and has had minimal first aid training.

B. Analysis

As the brief is in support of a motion for summary judgment, examinees should note that, as set forth in *Larson v. Franklin High Boosters Club, Inc.*, summary judgment will be granted when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Additionally, as set forth in the firm's guidelines for persuasive briefs, the brief should include properly crafted headings for each argument. That is, the headings should be a specific application of a rule of law to the facts and not a bare legal or factual conclusion or statement of abstract principle. The headings below are examples meeting the firm's criteria.

1. *The Park Is Not Liable in Negligence for Ms. Monroe's Broken Nose, Because Liability for Negligence Depends on the Circumstances, and Deliberate Frightening of People, Which at Other Times Might Be a Negligent Breach of the Defendant's Duty, Is Not So Within a Haunted House Attraction or on Halloween.*

Examinees should set forth the general rule: Whether the Park is liable in negligence depends on whether it had a duty to avoid risk in the circumstances presented, whether it breached that duty resulting in damage, and whether the risk which resulted in the damage fell within the scope of that duty; in other words, whether the Park acted unreasonably in the circumstances. *Larson.* Thus, while in general it is unreasonable to deliberately scare people, as exemplified by *Dozer v. Swift* (defendant liable for injuries caused when he deliberately scared a coworker who suffered from arachnophobia), there are particular circumstances in which similar conduct by a defendant does not result in liability, specifically on Halloween. *See Larson*.

Examinees would next be expected to set out the rule as it is applied on Halloween and at haunted house attractions: Patrons at an event on Halloween which is designed to be frightening expect to be surprised, startled, and scared. The event operator thus has no duty to protect them from reacting in bizarre, frightened, or unpredictable ways. Patrons know that they can anticipate being frightened, and hence the general duty not to scare others, *see Dozer*, does not apply.

Examinees should then apply the rules to the facts here: Ms. Monroe knew that it was Halloween, and that the very point of the attraction and the goal of Park employees were to scare her. Indeed, until the final room, she and her husband were more amused than truly frightened by the presentations in the attraction. Her reaction—being very frightened—when accosted by the staff member playing the role of a zombie, was not outside the range of reactions to be expected

in such a situation, even if running into a wall was. The fact that this was the only room in the Haunted House in which, in Ms. Monroe's words, a scary character "had come right up to [them] like that," does not change the analysis; Ms. Monroe entered the Haunted House with the expectation of being frightened.

Because it is a business establishment and Ms. Monroe was an invitee, the Park had an additional duty of using reasonable care in inspecting and maintaining the premises so that they were reasonably safe for their intended purpose. The Park's duty to its patrons also included having adequate personnel and supervision such that, should a patron be injured, appropriate aid could be delivered. Here, Ms. Brewster, the "zombie" staff member, who had minimal first aid training and was just 17 years old, nevertheless was so instructed. Indeed, Ms. Brewster attempted to aid Ms. Monroe after she was injured but was prevented from doing so by the hasty departure of Ms. Monroe and her husband. And, as was mentioned in Mike Matson's deposition, the Park keeps a physician on duty at all times in case of emergencies.

And unlike the situation in *Costello v. Shadowland Amusements, Inc.*, in which a bench left in the middle of a dimly lit room was an obviously defective condition of which patrons were unaware (and would not expect on *any* day of the year, even Halloween), there was no impediment or hazard to movement in the last room of the house. The wall that Ms. Monroe ran into was not a defective condition—every room has walls.

In sum, examinees should argue that, as to Ms. Monroe's first injury, the Park acted reasonably under the circumstances and did not breach any duty imposed upon it to prevent undue risk to Ms. Monroe. It is not liable in negligence for Ms. Monroe's broken nose.

2. *The Park Is Not Liable in Negligence for Ms. Monroe's Sprained Ankle in the Mock Graveyard, Because She Was Aware of the Muddy Ground and No Reasonably Prudent Person Would Incur Injury in Such Circumstances.*

Examinees should next argue that the Park is not liable for the sprained ankle incurred when Ms. Monroe slipped on the muddy path in the mock graveyard. They should analyze this claim using the framework in *Parker v. Muir*, cited in *Costello.* A property owner is liable for damage caused by a dangerous condition, but only upon a showing 1) that the owner knew, or reasonably should have known, of the dangerous condition, 2) that the damage could have been prevented by the exercise of reasonable care, and 3) that the owner failed to exercise that care.

Further, every dangerous condition is not *unreasonably* dangerous. Factors to take into account in making that determination include 1) the accident history of the condition, 2) the degree to which the danger may be observed by a potential victim, and 3) whether the condition is of such a nature as to cause a danger which would reasonably be expected to cause injury to a prudent person using ordinary care.

Examinees might first note that, although all the other paths where patrons walked in the Park were paved, the path in the mock graveyard was left unpaved, as paths may be in real graveyards. Hence, the Park did not act unreasonably in leaving the mock graveyard path unpaved. No reasonable person would think that a graveyard path would necessarily be paved, and a reasonable person would assume that a graveyard path might be unpaved. In addition, the path was illuminated by small lights, as Ms. Monroe conceded in her deposition. Thus, the condition of the path should have been readily apparent to a person exercising ordinary care.

Further, examinees should note that Ms. Monroe knew that it had rained without letup for three days, and hence she knew, as any reasonably prudent person would know, that an unpaved path could well be muddy and slippery. Thus, the muddiness of the path did not constitute a dangerous condition which would reasonably be expected to cause injury to a prudent person using ordinary care under the circumstances. *Parker*. Examinees should note that, as in *Parker*, the muddy path was not *unreasonably* dangerous. In *Parker*, the condition at issue (rocks in the path of a corn maze) was known to the plaintiff, was to be expected under the circumstances, and was shown by the otherwise unblemished safety record of the maze not to be dangerous.

Similarly, here Ms. Monroe knew that the ground would be muddy (as shown by her deposition testimony about the rains over the three days before Halloween), and muddy ground is to be expected after a rainstorm. Moreover, the safety record of the attraction is shown by Ms. Brewster's deposition testimony that the only incident occurring on the date in question was Ms. Monroe's unfortunate accident.

Examinees should distinguish *Costello* by noting that the dangerous condition in that case (placement of a bench in the middle of a dimly lit room) was caused by Shadowland's own action when it so placed the bench and that such a condition could not have been foreseen by patrons. Here, no one from the amusement park staff was in the graveyard to scare Monroe—she fell because she slipped in muddy conditions. She could have slipped in mud anywhere. The Park did not *create* the "dangerous condition," nor was the state of the ground (muddy and

slippery) hidden from anyone walking on it. Thus, taking necessary precautions while walking in the mud seems to have been squarely within Monroe's control and responsibility.

3. *The Park Is Not Liable in Negligence for Ms. Monroe's Broken Wrist, Even Though This Injury Occurred Outside the Haunted House Attraction, Because There Is a General Expectation of Being Accosted and Frightened by People Playing Roles on Halloween.*

The third claim of injury may be a more difficult claim to refute than the other two because the injury took place *outside* of the attraction. Examinees should address the fact that Ms. Monroe was frightened *outside* the Haunted House attraction, not in it or in the graveyard. It is less likely that a Haunted House patron like Monroe could have anticipated being frightened once she had left the Haunted House grounds. Her deposition testimony underscores this view of the attraction being "behind" her and thinking that she was safe.

Examinees should argue that notwithstanding the fact that Monroe was injured outside of the attraction, she still was on park grounds and should have had the expectation of being subjected to Halloween-related activities. As the *Larson* court notes, "Under other circumstances, presenting a frightening or threatening act might be a violation of a general duty not to scare others. . . . But . . . on Halloween, the circumstances are different."

Examinees should use Ms. Monroe's own testimony to make the point that she was fully aware, and indeed expected, that, no matter the setting (attraction, graveyard, park grounds), others might very well attempt to frighten her on Halloween. She testified that she and her husband expected their trip to the Park to be "great fun, it being Halloween and all." She testified that her enjoyment in being scared with respect to all but the last frightening apparition in the Haunted House was a source of amusement to her husband, implying that she found it amusing too; in effect, she was getting what she bargained for. Ms. Monroe testified that, on entering the Haunted House attraction, she expected to be frightened or scared, saying "that's part of the fun on Halloween." That expectation should apply equally to events outside the attraction, while still on park grounds. Part of the "fun" is to be surprised. Monroe testified that she normally celebrates Halloween and has "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."

Examinees will have to deal with the fact that, as Mr. Matson testified, no other staff members on the grounds outside the Haunted House attraction were in costume or instructed to frighten patrons. Examinees should note Ms. Monroe's expectation of being frightened on Halloween as a general matter, in that, as she testified, she expected to see people dressed up in costumes trying to scare people. Hence, seeing a costumed staff member acting in a frightening manner could reasonably be expected even outside of the Haunted House, despite her deposition statement that that was not a reasonable expectation, that, having left the Haunted House attraction, she thought she was in "an entirely different situation . . . [and] back to normal surroundings."

In sum, examinees should conclude that the Park did not act negligently in arranging for the staff member with the fake chain saw to accost the Monroes, for, as Ms. Monroe herself testified, "that's part of the fun on Halloween." And, in contrast to the situation in *Dozer*, the Park was unaware of any phobia or other condition or frailty on the part of Ms. Monroe. Whether the Park's action on any other day might have been negligent is irrelevant; on Halloween—inside *or* outside the attraction—it was not.

C. Conclusion

Examinees should persuasively argue that summary judgment should be granted and that the defendant should not be liable in negligence because 1) the circumstances of the plaintiff's injury in the Haunted House were not caused by a breach of the defendant's duty, given the nature of the attraction, the fact that it was Halloween, and the adequate maintenance of the attraction and supervision and instruction of its personnel; 2) the plaintiff was aware of the condition of the path in the mock graveyard, and no reasonably prudent person would have incurred injury in such circumstances; and 3) given the general expectation of being accosted by role-playing persons on Halloween, the defendant did not breach its duty to the plaintiff and so is not liable for her injury outside the Haunted House attraction.

July 2013 MPT

▶ *POINT SHEET*

MPT-2: *Palindrome Recording Contract*

DRAFTERS' POINT SHEET

In this performance test, examinees' law firm represents the four members of the rock band Palindrome, who have retained the firm to negotiate a recording contract with Polyphon, an independent recording label. Polyphon has presented the band with a detailed contract, and examinees are asked to redraft certain provisions of that contract to comport with the band's contractual demands.

Examinees are not only being asked to redraft those provisions, but also to explain why changes are being made to each, and to analyze legal aspects or complications involved with each provision, if there are any.

The File contains 1) the instructional memorandum, 2) a transcript of an interview by the assigning partner with the leader of the band, 3) an agreement among the members of the band concerning the division of income, and 4) selected provisions of the form contract submitted to the band by the record label. The Library contains 1) the text of Franklin's statute concerning contracts for personal services and 2) two cases bearing on legal issues concerning the assignment and licensing of trademarks.

The following discussion covers all the points the drafters intended to raise in the problem. Examinees need not cover them all to receive good grades.

I. FORMAT AND OVERVIEW

The assignment has two parts. For each provision in the given contract which conflicts with the band's wishes, examinees are to 1) redraft the provision and 2) explain why the provision was redrafted, giving the reasons for the language chosen and noting any legal issues presented by the provision or its redrafting, if such issues exist. Examinees thus must, first, discern which provisions need redrafting based on the band's wishes; this necessitates a careful and thorough reading of the contract provisions. Next, examinees must redraft those provisions from a purely contractual point of view for negotiation purposes; and, finally, explain the reasons for the redraft, including any legal issues presented.

Because this item is a drafting exercise, there are many ways of redrafting the relevant provisions to achieve the client's goals. Hence, the standard for grading should depend on the identification of the client's goals and the interaction of those goals with the contract's provisions, as much as on the particular language chosen by the examinee in his or her redraft.

Therefore, examinees should identify four provisions in the contract presented by Polyphon (referenced below by section number from the contract presented in the File) which conflict with the client's goals, should determine the impact (if any) of the statute and case law provided on those provisions, and should then redraft the provisions to comport with the law and achieve the client's goals, as follows:

1) Section 3.03, dealing with the length of the contract and the obligations under it: In the transcript of his interview with the assigning partner, the band leader has indicated that the proposed contract length is unacceptable and that the band wants a shorter length. In addition, Franklin's statute on personal service contracts must be considered.

2) Section 4.01, dealing with artistic control over the recordings: In the transcript of his interview with the assigning partner, the band leader has indicated that the band wants complete artistic control.

3) Section 8.01, dealing with the purported assignment of the band's trademark: Based on the transcript of the band leader's interview with the assigning partner, the band is willing only to grant the record label a nonexclusive license to use the trademark, wants 75% of the revenues from that licensing, and wants to maintain control over the quality standards for the products. In addition, the legal issues raised by the two cases dealing with trademark assignments and quality control of trademark licenses must be considered.

4) Section 8.02, dealing with the use of the band's images and trademarks for marketing purposes: Based on the transcript of the band leader's interview with the assigning partner, the band wants the right of approval over marketing and promotional uses.

Examinees will be expected to redraft each of these provisions and explain the reasons for the changes; further, examinees will be expected to note that those reasons include legal issues for the sections of the contract identified in items 1) and 3) above.

II. DISCUSSION

Given the specific instructions in the call memo, examinees should be able to organize their drafting and analyses easily. The following explanations give examples that are worded as they might be in an examinee's answer, but they are not to be construed as "model answers." New language in the redrafted sections is underlined and deleted language lined through.

Although examinees do not have to use the specific language given under each heading below, all the points that they might cover are listed.

A. SECTION 3.03 (Term of Agreement)

i. REDRAFTED LANGUAGE

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)~~ two (2) 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; but, notwithstanding the above, in all events this Agreement shall terminate four (4) years from its commencement date.

ii. EXPLANATION

Palindrome wants the contract to require the production of three Albums at most. Hence, after the initial Contract Period (for which one Album is due), Polyphon should be granted only two more Option Periods, for a total of three Albums. Further, as Palindrome does not want the Agreement to run for more than four years, a clause limiting the total term of the contract to four years must be added.

This contractual provision involves Franklin Labor Code § 2855. That statute, in subsection (a), generally limits personal service contracts to five years. Polyphon's draft could last for nine years (the initial Contract Period of a year plus eight more Option Periods of a year each). While this seemingly violates subsection (a) of the statute, the exception to the statute in subsection (b) specifically refers to recording contracts such as this one and changes the 5-year limitation to a 10-year limitation. Thus, the negotiator will not be able to argue that, on its face, the provision as drafted by Polyphon violates the statute, but rather will have to make it a purely contractual negotiating point. However, perceptive examinees will also note that, as the contract automatically extends Option Periods beyond their one-year term if the promised Album is not delivered, there is a possibility that the contract will violate the statutory 10-year limitation if delivery of any Album is delayed by more than one year (thus turning the 9-year facial term of the contract to one exceeding 10 years). In addition, perceptive examinees will note that the limitation to an absolute four-year total term the band desires will supersede that automatic extension. Perceptive examinees might also note that if Polyphon accepts the band's term and exercises both options, but the band fails to deliver three Albums before the expiration of four

years, the label might have a claim for damages against the band for the undelivered Albums, perhaps including the return of advances.

B. SECTION 4.01 (Artistic Control)

i. REDRAFTED LANGUAGE

4.01 ~~Polyphon~~ Artist 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.

ii. EXPLANATION

As the band members want complete artistic control over their recordings (including the right to choose their producers), this provision must be changed from giving Polyphon that control to giving Artist that control.

This is a straightforward change to make and should not present problems for examinees, provided they carefully read the contract language and recognize that simply substituting "Artist" for "Polyphon" is the easiest way to effect the client's wishes.

C. SECTION 8.01 (Trademark)

i. REDRAFTED LANGUAGE

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~~ grants a nonexclusive license 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~~ may be approved by Artist, and which will meet standards of quality to be prescribed by Artist. ~~all~~ All income from such uses by Polyphon shall be ~~Polyphon's alone~~ divided as follows: seventy-five percent (75%) to Artist and twenty-five percent (25%) to Polyphon.

ii. EXPLANATION

First, as held by *Panama Hats of Franklin, Inc. v. Elson Enterprises, LLC* (U.S. Dist. Fr. 2004), a "naked" assignment in gross of a trademark (i.e., one without at least an assignment of the good will associated with the trademark) is invalid and can lose trademark protection. Thus, Polyphon's draft provision is unacceptable, as it could be read to be just such a "naked" assignment in gross. (Perceptive examinees might note that it could nonetheless be argued that, given all the other terms of the agreement, the transfer of the trademark does include some substantive assets and good will, and so is not a "naked" assignment in gross.) Second, whether

"naked" assignment or not, the band members are willing only to give a nonexclusive license of the trademark to Polyphon, such as the band has with other manufacturers. The license must be nonexclusive and this must be written into the agreement. Hence, the first sentence should be modified to account for these two points.

Next, the band wants to have the right of approval over the products Polyphon produces under the trademark license to ensure that the products are of the high quality that their fans have come to expect. Thus, that right of approval must be written into the agreement.

As held by *M&P Sportswear, Inc. v. Tops Clothing Co.* (U.S. Dist. Fr. 2001), a trademark license without quality control on the part of the trademark owner-licensor will also be invalid and can lose trademark protection. In *M&P Sportswear, Inc.*, M&P entered into a licensing agreement with Tops Clothing Co. to manufacture "Go Baby" T-shirts. "Go Baby" was a brand name of a line of T-shirts, and the trademark "Go Baby" was federally registered.

M&P's agreement with Tops contained no provisions for quality control in Tops's manufacturing process. M&P discovered that the T-shirts were of the "poorest quality imaginable" and tried to terminate the licensing agreement. Tops continued to manufacture and sell the "Go Baby" T-shirts. M&P sued for trademark infringement. The court granted Tops's motion for summary judgment on the ground that M&P had lost its rights in the "Go Baby" mark when it failed to set any quality control standards for its licensee.

Here, then, the band must be given a right to set the quality standards for any merchandise produced using the Palindrome trademark. If it does not set quality standards, the band could lose control of the trademark. And the band wants to sell only high-quality merchandise to avoid sullying its reputation among its fans.

Finally, Polyphon's draft would give Polyphon all the revenue from its use of the band's trademark, which is unacceptable to the band. As the band is willing to give Polyphon one-quarter of the revenue from such uses (but only from Polyphon's uses of the trademark, not from the band's uses), that revenue division (75% to Palindrome, 25% to Polyphon) should be inserted into the provision and must be limited to revenues from Polyphon's use of the trademark only. Perceptive examinees might seek to refine the broad term "revenues" by inserting the concepts of "gross revenue" or "net income."

D. SECTION 8.02 (Use of Persona in Marketing Efforts)

i. REDRAFTED LANGUAGE

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, subject to Artist's approval.

ii. EXPLANATION

The band is extremely sensitive about the use of its image and songs in ways that it would find offensive because its bass player was seriously injured by a drunk driver and so the members of the band do not want to be depicted as the typical "drink-and-dope rockers." Hence, they want to control uses of their image and music by requiring that the band's approval be given in each instance of marketing and promotion. Examinees might even include language that specifically precludes any alcohol-related marketing efforts.

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