University of Baltimore Law Forum

Volume 23
Number 2 *Fall, 1992*

Article 14

1992

Recent Developments: Banks v. State: Statements Made by Victim Expressing Fear of Killer Not Admissible to Rebut Evidence of Battered Spouse Syndrome

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in a requirement of proving secondary meaning. Emphasizing that protection would be given initially only if the trade dress were inherently distinctive and capable of identifying the source of the product, the Court noted that the termination of protection would occur merely because the business was not successful enough in the market. *Id.* Denying protection to a unique trade dress for this reason was unacceptable to the Court, which opined that a business in this situation should be afforded protection of its unique trade dress while it enhances its recognition in the market. *Id.*

Rejecting the attempted distinction between trade dress and trademarks, the Court stated that there is no persuasive reason to apply different analyses to the two. The Second Circuit allowed protection for suggestive, inherently distinctive trademarks, without proof of secondary meaning, but denied protection to trade dress without such proof. *Id.* (citing *Thompson Medical Co. v. Pfizer Inc.*, 753 F.2d 208 (2d Cir. 1985)). Recognizing that proof of secondary meaning would not be required if trademarks were inherently distinctive, the Fifth Circuit held, contrary to the Second Circuit, that such a rule should also apply to trade dress. *Id.* at 2760 (citing *Chevron Chemical Co. v. Voluntary Purchasing Groups, Inc.*, 659 F.2d 695, 702 (5th Cir. 1981)). Agreeing with the Fifth Circuit, the Court further emphasized that protection of trademarks and trade dress serves the same end, which is to prevent deception and unfair competition. *Id.* at 2760. Moreover, the Court noted that section 43(a) of the Lanham Act does not mention either trademark or trade dress, and it also does not mention secondary meaning. Although section 1052 of the Lanham Act mentions secondary meaning, the Court pointed out that the section only applies to descriptive marks, not to inherently distinct trade dress. *Id.* at 2760.

In further support of its holding that secondary meaning was not required, the Court expressed concern that a secondary meaning requirement for inherently distinct trade dress would undermine the purpose of the Lanham Act. *Id.* The Court noted that the primary purpose of the Lanham Act is to protect the goodwill established by the owner of a unique trademark and the ability of customers to distinguish among competing businesses. *Id.* Trademarks also enhance competition and quality by securing to businesses the benefits of a good reputation. *Id.* (citing *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 198 (1985)). Requiring proof of secondary meaning would deny businesses the security of knowing their trade dress was protected while they improved their market standing. *Id.*

The Court also rejected the contention that a business which used a certain design first would preclude competition by products of similar design. Clarifying the status of the law, the Court stated that only nonfunctional, distinctive trade dress would be protected by section 43(a) of the Lanham Act. *Id.* A functional design that is only one of a few options for competitors would not be protected, because it would hinder free competition. *Id.* However, the Court emphasized that if secondary meaning was required, competition could be unduly burdened, particularly for small businesses. Such a requirement would have allowed a competitor the opportunity to use the trade dress of the original business in new markets, thereby hindering the originator's ability to expand. *Id.* at 2761.

In holding that secondary meaning is not a required element of protection for inherently distinctive trade dress, the *Two Pesos* decision will protect small business owners who have created a unique image to distinguish their business from all others and will guard against replication before the business is able to establish an association between the trade dress and its business in the market. Consequently, competitors will not be permitted to create a business with an atmosphere and appearance similar to an existing business on the basis that the trade dress of the original business has not yet established a secondary meaning.

- Susan L. Oliveri

Banks v. State: STATEMENTS MADE BY VICTIM EXPRESSING FEAR OF KILLER NOT ADMISSIBLE TO REBUT EVIDENCE OF BATTERED SPOUSE SYNDROME.

In *Banks v. State*, 92 Md. App. 422, 608 A.2d 1249 (1992), the Court of Special Appeals of Maryland held that statements made by a victim prior to his death expressing fear of his killer were inadmissible to rebut evidence of the battered spouse syndrome. The court found that the statements at issue were hearsay and did not fit into any of the hearsay exceptions.

In the early evening hours of August 14, 1990, Thelma Jean Banks ("Banks") called the Baltimore City Police and reported that her boyfriend, James McDonald ("McDonald"), had been stabbed. When the police arrived, McDonald was dead. Banks initially told police that she had been upstairs when intruders broke into the house and stabbed McDonald, but she eventually admitted that she stabbed the victim.

Banks was convicted of second degree murder by a jury in the Circuit Court for Baltimore City and was sentenced to a term of twenty years in prison. At trial, Banks maintained that she suffered from battered spouse syndrome when she stabbed McDonald. In support of this defense, Banks testified that the victim drank heavily and often physically abused her. Five other witnesses also testified that the victim had abused Banks.

In an attempt to rebut the evidence supporting the battered spouse syndrome defense, the state offered the victim's mother and sister who testified that McDonald told them he was afraid of Banks because she physically abused him. Lucille McDonald, the

victim's mother, testified that on the day before the stabbing, McDonald telephoned her and told her that Banks was trying to attack him with a "sickle." The victim's sister, Ilene Muse, testified that on the day of the stabbing, McDonald told her that he wanted to move out of the house because he was tired of arguing with Banks. Additionally, two police officers testified that they had previously investigated reports of domestic disputes at the home. Officer Braxton testified that on three occasions, the victim stated to him that he had been assaulted by Banks. Officer Carter testified that each time he responded to complaints at the Banks' home, McDonald told him they were arguing and that he was trying to leave the house to avoid a fight.

The trial court admitted all of the statements over objection, finding that the statements were "verbal acts" and thus, not inadmissible hearsay. The trial court explained that the statements were not admitted for their truth as to whether Banks attacked the victim, but rather to show McDonald's state of mind and his fear of Banks.

Banks appealed to the Court of Special Appeals of Maryland and argued that the alleged statements were irrelevant and inadmissible hearsay. The state insisted the statements were properly admitted and relied on three alternative theories to support the holding of the trial court.

The Court of Special Appeals began its analysis by determining whether the statements were verbal acts. *Id.* at 432, 608 A.2d at 1254. The court defined verbal acts as "out-of-court statements [that] are operative legal facts which constitute the basis of a claim, charge, or defense." *Id.* (quoting Lynn McLain, 6 *Maryland Evidence* § 801.7 at 278 (1987)). The court recognized that verbal acts are nonhearsay and explained that bequest language in a will, and language of offer and acceptance in a contract are typical examples of verbal acts. *Banks* at 432, 608 A.2d at 1254. The court noted that because verbal acts take on a legal effect, the reliability of the declarant is unimportant, and only the fact that the statement was made is relevant. *Id.*

The state argued that the statements were verbal acts because they expressed the victim's "fear" and "conflict avoidance." *Id.* The court, however, concluded that the statements were not verbal acts. The court explained that "fear" and "conflict avoidance" carry no legal significance when establishing the elements of murder or manslaughter; more importantly, they carry no significance in rebutting evidence of battered spouse syndrome or self defense. *Id.* The court emphasized that if the statements were relevant to the state's case, the truth of the statements must have been relevant since the state was trying to prove that Banks had abused the victim in the past. *Id.* at 433-34, 608 A.2d at 1255. Consequently, the court determined that the statements were not verbal acts because their relevance depended on their truth. *Id.*

Next, the state argued the statements were not hearsay because they were not being offered for their truth, but rather to show the victim's state of mind when he was stabbed. *Id.* at 434, 608 A.2d at 1255. In rejecting this argument, the court cited several cases which have recognized that even if statements are not offered for their truth, they still must be relevant and not unduly prejudicial. *Id.* at 435, 608 A.2d at 1255-56. The court emphasized that only Banks's state of mind was relevant to the commission of the crime, not the victim's. *Id.* at 435, 608 A.2d at 1255-56. Furthermore, the probative value of the victim's state of mind was outweighed by the extremely prejudicial nature of the evidence on the jury. *Id.* at 435, 608 A.2d at 1256.

Finally, the state argued that McDonald's mother's statements were admissible under the present sense impression exception to the hearsay rule. *Id.* at 436, 608 A.2d at 1256. The exception, codified in the Federal Rules of Evidence and adopted by Maryland in *Booth v. State*, 306 Md. 313, 508 A.2d 976 (1986), provides that "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is not excluded by the hearsay rule. *Banks*, 92 Md. App. at 436, 608 A.2d at 1256.

In *Booth*, a witness telephoned the victim on the day of his murder. The victim stated to the witness that he was going to ask his company, a woman named Brenda, to leave. The witness then heard the victim's door open and the witness asked the victim who was there. The victim replied that Brenda was talking to someone behind the door. *Id.* (citing *Booth*, 306 Md. at 316, 508 A.2d at 976). The *Booth* court allowed the statement into evidence as a present sense impression, explaining that in order to fall within the exception, the time interval between the declarant's observation and utterance must be very short. *Id.* Furthermore, if in considering the surrounding circumstances there was sufficient time to permit reflection, then the statement will not fall within the exception. *Id.*

The state argued that the victim's statement to his mother was similar to that made in *Booth*, and therefore, fell within the present sense exception to the hearsay rule. The court, however, noted several differences between *Booth* and the present case. *Id.* at 437, 608 A.2d at 1256. The *Booth* court found the contested statement reliable because there was no reason for the victim to lie about someone being at the door. *Id.* (citing *Booth*, 306 Md. at 317, 508 A.2d at 976). However, the court distinguished *Booth* because in the instant case, the victim's alcohol problem, frequent fights with appellant, and the fact that the witness was the victim's mother, all supplied potential reasons for the victim to lie. *Banks*, 92 Md. App. at 437, 608 A.2d at 1256. Furthermore the court reasoned that nothing in this case indicated that a short period of time existed between the victim's observance of the event in question and his utter-

ance pertaining to it. Accordingly, the court rejected the State's argument concerning the mother's statements and similarly rejected application of the present sense impression excep ... to the other three out-of-court statements made to the victim's sister and to the police officers.

The court of special appeals thus rejected each of the state's theories on admitting out-of-court statements made by a victim about his killer to rebut the battered spouse syndrome defense. Moreover, the highly prejudicial nature of the statements contributed to the court's conclusion. Overall, the opinion may be helpful to defense attorneys who raise the defense of battered spouse syndrome, self-defense, or hot-blooded provocation and must prevent the state from admitting out-of-court statements of the victims in rebuttal to such defenses. Most importantly, however, the opinion clarified the hearsay rules regarding verbal acts, state of mind, and present sense impression, and thus, sought to prevent their misuse by practioners and trial judges in the future.

- Heather L. Ashbury

Morgan v. Illinois: TRIAL COURT'S REFUSAL TO INQUIRE WHETHER A POTENTIAL JUROR WOULD AUTOMATICALLY IMPOSE THE DEATH PENALTY UPON CONVICTION WAS INCONSISTENT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In *Morgan v. Illinois*, 112 S. Ct. 2222 (1992), the United States Supreme Court held that during *voir dire* in a capital offense case a defendant is entitled to challenge for cause and have removed a juror who would automatically impose the death penalty, irrespective of the facts of the case or the trial court's instructions. In so holding, the Court proposed a due process review standard which requires a trial court to question venire panels about their position on capital punishment.

In the state of Illinois, capital offense cases are tried in two phases. The same jury may determine both a defendant's guilt and the sentence, or the defendant may elect to waive sentencing by the jury. Upon conviction for a capital offense, a separate sentencing hearing is held to determine if aggravating and mitigating factors existed. A unanimous jury must find, beyond a reasonable doubt, that at least 1 out of 10 aggravating factors were present in order to sentence the defendant to death. The defendant is given the death penalty if the defendant is eligible and the jury unanimously finds no mitigating factors.

In 1990, Derrick Morgan was paid $4,000 by an inner-city gang to kill a narcotics dealer who was also his friend. Morgan lured the victim into an abandoned apartment and shot him in the head six times. After weighing the aggravating and mitigating circumstances, an Illinois jury convicted the petitioner of first degree murder and sentenced him to death.

At trial in the Circuit Court for Cook County, State prosecutors invoked their rights under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), in which the United States Supreme Court held that a state may excuse for cause any venire members whose strong opposition to the death penalty would render them unable to impose death regardless of the circumstances. Consequently, the trial judge asked those eventually empaneled whether any would automatically vote against the death penalty, irrespective of the facts.

The trial judge denied a similar request by the defense for a "reverse-*Witherspoon*" inquiry, which would have asked whether any juror would automatically vote to impose the death penalty regardless of the facts. Because the trial judge asked questions concerning the jurors fairness and impartiality during *voir dire*, the court found that the *voir dire* was of the same general nature as the "reverse-*Witherspoon*" inquiry. *Morgan*, 112 S. Ct. at 2226.

The Illinois Supreme Court affirmed and held that the "reverse-*Witherspoon*" inquiry was not constitutionally required. It also found the *Morgan* jury fair and impartial because each juror had sworn to uphold the law and none expressed partial views. The United States Supreme Court granted certiorari to decide whether, during *voir dire* for a capital offense, the Due Process Clause of the Fourteenth Amendment requires a trial court to refuse to ask whether a potential juror would automatically impose the death penalty upon conviction.

The Court first confirmed the impartiality requirement imposed upon a jury during the sentencing phase of a capital offense case. *Id.* at 2228. The Court invoked its decision in *Turner v. Louisiana*, 379 U.S. 466 (1965), in which the Supreme Court held that the Fourteenth Amendment's Due Process Clause required impartiality to the same extent required under the Sixth Amendment of any jury empaneled to decide a case. *Morgan*, 112 S. Ct. at 2229.

Next, the Court determined, in accordance with the holding in *Wainwright v. Witt*, 469 U.S. 412 (1985), that when a juror's views on capital punishment would impair the performance of her duty to follow instructions, such a juror is not impartial and must be removed for cause. *Morgan*, 112 S. Ct. at 2229. In support of its conclusion, the Court cited its decision in *Ross v. Oklahoma*, 487 U.S. 81 (1988), in which a juror who would have automatically voted for the death penalty was removed by preemptory challenge. The Court determined that the failure to remove the juror for cause was error under the standard set forth in *Witt*. *Morgan*, 112 S. Ct. at 2229.

The Court next addressed whether a trial court must inquire into a juror's views on capital punishment upon a defendant's request. *Voir dire*, the Court stated, is a critical method of effectuating the criminal defendant's right to an impartial jury. *Id.* at 2230. Only with the proper *voir dire* can a trial judge fulfill the responsibility of