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.

-Brian L. Oliferi

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 sister, Ilene Muse, they had previously investigated re­
telephoned her and told her that Banks 
tired of arguing with Banks. Addition­
ally, two police officers testified that 
McDonald told her that he wanted to 
move out of the house because he was 
tired of arguing with Banks. Addition­
ally, two police officers testified that 
they had previously investigated re­
ports 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. Offi­
cer 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 vic­
tim, but rather to show McDonald’s 
state of mind and his fear of Banks.

Banks appealed to the Court of Spe­
cial Appeals of Maryland and argued 
that the alleged statements were irre­
levant and inadmissible hearsay. The 
state insisted the statements were prop­
erly admitted and relied on three alter­
native 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 de­
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 accep­
tance 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 unimpor­
tant, 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 avoid­
ance.” Id. The court, however, con­
cluded 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 man­
slaughter; 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. Conse­
quently, the court determined that the 
statements were not verbal acts be­
cause 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 empha­
sized 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.2d976 (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 ex­
cluded 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 evi­
dence 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. Fur­
thermore, if in considering the sur­
rounding circumstances there was suf­
icient 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 appel­
lant, and the fact that the witness was 
the victim’s mother, all supplied po­
tential reasons for the victim to lie. 
Banks, 92 Md. App. at 437, 608 A.2d 
at 1256. Furthermore the court rea­
soned that nothing in this case indi­
cated that a short period of time ex­
isted between the victim’s observance 
of the event in question and his utter­
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