

# July 2015 Bar Examination

## QUESTION 1

Joe is a Georgia lawyer practicing in Russell. After being admitted to the practice of law in Georgia, Joe moved to Russell four years ago to accept a job as an assistant public defender. After one-year, Joe opened a sole general practice there.

Joe serves on the board of the Russell Domestic Violence Shelter (the Shelter), which relies on charitable contributions to operate. At a recent board meeting, Jane, the executive director of the Shelter, reported that contributions to the Shelter had decreased recently and an increased number of victims have sought protection at the Shelter on multiple occasions because they could not afford a lawyer to get a divorce. Jane reported that these two issues had strained the Shelter's resources.

After the meeting, Joe met with Jane to discuss a proposal that would partially address the two concerns Jane had discussed. Joe proposed that Jane provide a letter to each Shelter resident referring them to Joe for representation. Joe agreed to represent each resident for a \$600 fee. Joe would make a charitable donation to the Shelter of \$100 for each referral who hired him. Joe explained to Jane that the referral and fee arrangement were permissible because it is ethical for a lawyer to accept a referral from a non-profit agency and to pay a reasonable referral fee for the service.

Joe's first referral from the Shelter was Mary. Joe and Mary met to discuss her case. Mary said she was married to Larry.

Joe told Mary that he remembered Larry from his days as a public defender. Joe told Mary that Larry had been arrested in the past for using and distributing methamphetamine. The prosecutor had dismissed the charges against Larry due to a procedural technicality before he was indicted, and before Joe and Larry had established a formal attorney-client relationship, but after Joe had begun investigating the facts surrounding Larry's arrest. At that time Joe had determined that Larry was probably guilty and was facing some serious jail time if he was found guilty.

Even though Mary and Larry were already married at the time, Mary was unaware of Larry's arrest. The drug arrest made Mary even more determined to divorce Larry.

Joe assured Mary she would be granted a divorce due to Larry's drug arrest and domestic violence issues and that she would be awarded at least a total of \$2,000 a month in combined alimony and child support.

Since he knew Larry, Joe said he would talk to him and suggest that Larry not contest the divorce and settlement. He would explain to Larry that by consenting to the divorce, Larry would probably get a better deal than if he contested it.

Because Mary was his first referral from the Shelter, it was important to Joe that Mary hire him. At the end of their meeting Joe told Mary he would return her entire \$600 fee if she did not obtain a divorce and receive at least the settlement he had described.

Mary paid the \$600 fee. Joe deposited the entire fee in his operating account and made the \$100 contribution to the Shelter. He used the rest to pay his expenses.

When Mary left the Shelter, she and Larry reconciled. Mary asked Joe to dismiss the divorce and return the \$600 fee. Joe explained that he would dismiss the divorce petition, but that he had earned the fee and besides, he had already spent it.

Mary and Larry both filed grievances against Joe with the State Bar of Georgia. As part of the grievance screening process, the General Counsel's Office of the Bar sent an inquiry to Joe asking him for further information about: (a) the referral arrangement with the Shelter; (b) Joe's fee agreement with Mary; and (c) Joe's discussion with Larry. Upon receipt of this letter from the Bar, Joe comes to you for ethical advice regarding the following issues. Please evaluate and advise Joe of the professional ethics issues for each of the following.

**Questions:**

1. Evaluate the referral arrangement between Joe and the Shelter under the Georgia Rules of Professional Conduct.
2. Evaluate Joe's fee arrangement with Mary and Joe's disbursement of the fee under the Georgia Rules of Professional Conduct.
3. Evaluate Joe's discussion with Larry under the Georgia Rules of Professional Conduct.
4. Evaluate Joe's duty of confidentiality to Larry regarding his drug arrest under the Georgia Rules of Professional Conduct.
5. Evaluate the conflict of interest that Joe may or may not have as it relates to his former relationship with Larry and his representation of Mary in the divorce.

## QUESTION 2

### **Events In Court Today:**

Your senior partner and you represent the Plaintiffs, who are husband and wife. The Defendants are husband and wife and next door neighbors to the Plaintiffs. This case involves what began as a drainage claim by the Plaintiffs, but escalated to allegations of battery by Defendant wife in the counter-claim. The Defendant wife claims that Plaintiff husband intentionally spat on her face during an argument. The trial started this morning. Plaintiffs have each completed their direct examination and cross-examination.

Your senior partner has called the Plaintiffs' expert as the next witness. Defendants have objected to the expert's testimony and have moved to exclude the expert as a witness. It is late afternoon and the trial judge has stated that she is inclined to grant the motion, but has given Plaintiffs until tomorrow morning to respond to the motion to exclude the expert witness.

In addition to the motion to exclude, the trial judge has indicated that she may grant a directed verdict in favor of Defendant wife on the issue of liability for the Defendant wife's counter-claim of battery, if the testimony before the jury is the same as it was in the depositions that were presented in support of pre-trial motions.

### **Pre-Trial Proceedings:**

During pre-trial proceedings, Defendants filed a motion to dismiss Plaintiffs' complaint as a sanction for Plaintiffs' alleged repeated failure to comply with discovery. The trial court, after conducting a hearing, entered an order declining to dismiss the Plaintiffs' complaint but setting certain parameters for the parties' conduct and instituting specific discovery deadlines ("Discovery Order"). Among other things, the Discovery Order required the Plaintiffs to identify, within a certain time frame, any experts to be used at trial and to provide a summary of each expert's findings and opinions.

Plaintiffs first identified the expert to be used at trial in their portion of the pretrial order, which was served on Defendants weeks after the deadline set forth in the Discovery Order. Plaintiffs did not provide any information about the expert's findings and opinions until two days before the jury trial began.

### **Discovery Depositions:**

In support of the counter-claim, Defendants will present two witnesses who will testify regarding acts of battery by the Plaintiff husband. Defendant wife testified in her discovery deposition regarding the incident when Plaintiff husband stood in her face screaming at her and his spit landed on her face. She testified that she was standing outside in her back yard with the president of the neighborhood homeowners' association when Plaintiff husband approached. Specifically, she testified in her discovery deposition as follows:

**Counsel:** Did he spit on you in the process?

**Defendant wife:** Not the first time he was doing it. And I asked him to step back at least three times. And I kept saying — please, step back, please step back. I don't know where any of this is coming from. I really want to try to work — I don't know what you are talking about . . . .

**Counsel:** Did spit land on you in this process?

**Defendant wife:** The third time . . . when he didn't step back. And then he spit on me.

**Counsel:** Where did it land?

**Defendant wife:** On my face . . . .

**Counsel:** Were you scared?

**Defendant wife:** I — yes, I was scared . . . .

The president of the neighborhood homeowners' association testified in his discovery deposition that while the foregoing exchange took place, Plaintiff husband was "expressing his point of view" and pointed his finger at Defendant wife. However, the president also testified that "there were a number of people there during this discussion" and "it wasn't like Plaintiff husband was one-on-one against Defendant wife."

**Questions:**

1. May the trial judge properly grant the Defendants' motion and prevent the Plaintiffs' expert from testifying? Explain your response.
2. Will the trial court err if it directs a verdict of liability on the battery counterclaim and charges the jury that the spitting on Defendant wife constitutes a battery? Explain your response.
3. If the Defendant wife or the president of the neighborhood homeowners' association change their testimony on the battery issue, can their discovery deposition testimony be used at trial? Explain your response.

### QUESTION 3

Your firm is engaged to represent Dick and Jane Smith, husband and wife, who were injured in a collision while driving southbound on I-95 in Effingham County, Georgia. Their automobile was struck from the rear without warning by a tractor-trailer rig owned by Private Carrier Company and driven by its employee, Truck Driver. The Smiths' vehicle was hit at high speed, the force of which knocked their vehicle over a guard rail and into a bridge abutment.

At approximately the same time, another driver, Sally Jones, was also driving southbound on I-95 when she came upon this collision while texting on her new cell phone. When she finally realized that a collision had occurred in front of her, she swerved to avoid impact and slammed on the brakes, losing control of her vehicle and sliding into the Smiths' car as it rested against the bridge abutment. Both Dick and Jane were severely injured, and Sally Jones was also injured in the collision.

One week before the statute of limitations expired, your firm filed suit on behalf of the Smiths for their personal injuries. The suit named the following as defendants: Private Carrier Company, Truck Driver, and Sally Jones. With venue options of Effingham County (Private Carrier Company's office and where collision occurred), Bryan County, Georgia (Truck Driver's residence), and Chatham County, Georgia (Sally Jones's residence), the decision was made to file the suit in Chatham County, where the Smiths also lived. Personal service was perfected on all defendants, and they filed answers to the Complaint. Along with her answer, defendant Sally Jones also filed a cross-claim for her personal injuries against defendants Private Carrier Company and Truck Driver.

Near the close of discovery, the parties agreed to mediate the case. At the mediation, the plaintiffs settled all their claims against defendant Sally Jones, but were not able to settle their claims as to the other two defendants. As a consequence of the partial settlement of the case, defendant Sally Jones was to be dropped from the lawsuit upon payment of compensation by defendant Jones's insurance carrier.

A few weeks later, as trial began in the Smiths' case against defendants Private Carrier Company and Truck Driver, and after jury selection was concluded, your senior partner announced to the Court and the parties that he was dismissing the action without prejudice and would be refiling it in the future.

#### Questions:

1. Following the mediation and settlement with defendant Sally Jones, what procedure could your firm use to eliminate claims against Sally Jones and why?
2.
  - a. How does the elimination of Sally Jones as a defendant impact venue both as to the Smiths' claim and as to Joneses' cross-claim?
  - b. Also, what venue motion and court procedure would likely follow as a result of the elimination of Sally Jones as a defendant?

**3.** Can your senior partner dismiss the lawsuit after the trial has commenced, and if so, under what restrictions and procedure?

**4.** How do you explain to the Smiths the procedure which must be followed to reinstitute their action following its voluntary dismissal by your senior partner?

## QUESTION 4

Amy Able, owner of Able Events, is an event planner whose business is in high demand. Amy handles all arrangements for special events, including venue rental and set up, coordination of the catering needs, and all other aspects related to the events.

Able Events landed the much sought-after planning of a major fundraising event in Atlanta. Although Amy is frequently asked to supply chairs and tables for the events that she plans, she often is not able to find chairs and tables to rent that are of the quality or in the quantities that she needs. Accordingly, Amy decided that her company would invest in the purchase of chairs and tables to be used in connection with Able Events.

After contacting several furniture manufacturers and distributors and discussing with them her requirements regarding the type of chairs and tables, the quantity that would be needed, and the deadline by which they must be delivered, Amy called Chair Depot. Chair Depot advertised for sale high quality chairs and matching tables at a price that was much lower than other similar businesses in the area.

Amy spoke with Chair Depot on May 1, 2014. Chair Depot offered the chairs at the price of \$10 per chair and \$100 per table, with a table seating up to 10 people, and promised delivery of the chairs and tables by May 9, 2014. This delivery date would be in plenty of time for the fundraising event scheduled for June 6, 2014. Following the telephone conversation with Amy, Chair Depot faxed a form contract to Amy on May 1, 2014, at 2:30 p.m.

The top of the form was captioned "Final Contract" and was dated May 1, 2014. The form stated that Chair Depot would deliver 200 folding chairs and 20 tables to Able Events by May 9, 2014, at a cost of \$10 per chair and \$100 per table. Additionally, the form contained several boilerplate provisions setting forth the time for payment and type of payment that would be accepted. The form also included other provisions, one of which stated the following: "The parties hereto agree that electronic signatures, including via email and facsimile transmission, shall not be denied legal effect or validity solely because they are electronic." The bottom of the form was signed by Chair Depot, contained a signature line for Amy to sign on behalf of Able Events and also included the following statement on a separate line: "Please sign and return this form by close of business on May 2, 2014. If not returned by this time, this offer is no longer valid."

After faxing the form to Amy, Chair Depot received a call from Brian Brown who wanted to purchase 500 chairs and 50 tables. Because of the low price at which Chair Depot was selling its chairs, Chair Depot discovered that it had sold more chairs and tables than it had in its inventory. When Chair Depot told Brian that the company could not fill his order, Brian offered to pay twice the advertised amount or \$20 per chair and \$200 per table if Chair Depot could find the chairs and tables and deliver them to him by May 12, 2014. The only way that Chair Depot could fulfill this order for Brian would be to cancel the order with Amy. Chair Depot decided that Amy's order could be cancelled and the chairs and tables from her order would be used to help fulfill Brian's order. Chair Depot immediately sent a

second fax to Amy at 5:40 p.m. on May 1, 2014, stating the following: "Due to unforeseen circumstances, the earlier offer dated May 1 is hereby revoked and of no further force or effect. Please disregard said offer."

On the morning of May 2, 2014, when Amy got to her office and checked her fax machine, she saw the two (2) faxes from Chair Depot. She ignored the second fax that attempted to revoke the agreement to sell her the 200 chairs for \$10 per chair and the 20 tables for \$100 each. Amy signed the first fax and returned it to Chair Depot via fax at 11:00 a.m. on May 2 and printed off the fax receipt confirmation.

Chair Depot ignored the fax from Amy, did not deliver the chairs to her by May 9, 2014, and did not deliver the chairs to Amy at any time prior to the fundraising event in June. Amy was required to obtain chairs and tables for the event at a price of \$20 per chair and \$200 per table. Amy has decided to sue Chair Depot for breach of contract. Chair Depot, in its defense, states that no enforceable contract existed.

Your firm is representing Able Events. The partner with whom you work has asked you to prepare a memorandum addressing the following issues:

**Questions:**

1. Is there an enforceable contract between Able Events and Chair Depot? Analyze whether the requirements for valid contract formation in Georgia have been met.
2. Was the attempt by Chair Depot to revoke the offer effective? Why or why not?
3. If there is a valid contract, has the contract been breached? If so, what remedies are available under Georgia law?
4. Discuss the general rule regarding damages in contract actions.
  - a. Is Able Events entitled to seek damages?
  - b. What is the appropriate measure of damages?



Applicant Number



MPT-1

715



*In re Bryan Carr*

**Read the directions on the back cover.  
Do not break the seal until you are told to do so.**



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**In re Bryan Carr**

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**FILE**

**Anders, Davis & Waters**  
**Attorneys at Law**  
6241 Lowell Street  
Franklin City, Franklin 33205

**To:** Examinee  
**From:** Miles Anders  
**Re:** Bryan Carr  
**Date:** July 28, 2015

My friend and former college roommate Bryan Carr has consulted me about a credit card problem he is facing. I offered to help him figure out a strategy for responding.

Bryan's mother died last year. Since then his father, Henry Carr, has become more and more dependent upon Bryan. Several months ago, Henry asked Bryan if Bryan could pay the estimated \$1,500 it would take to repair Henry's van. Bryan gave his credit card to Henry and told him that he could charge all the repairs but could not use the card for anything else. Bryan also gave Henry a letter that said Bryan was giving Henry permission to use the card. In the end, the total repair cost was \$1,850, which was charged to Bryan's card.

Bryan forgot to get the credit card and letter back from his father, and Henry used the card to buy several things in addition to the auto repairs. Over several months, Henry charged gasoline, groceries, books, and, most recently, power tools to Bryan's account. Bryan always pays the entire balance on his credit cards each month, and he had already paid for the first three months of purchases without noticing Henry's charges. However, earlier this month, Bryan discovered the unauthorized purchases. He promptly contacted the bank that issued the card to dispute the charges. The bank has notified him that he is responsible for all charges.

Bryan would like our advice about his legal obligation to pay the bank for the charges Henry made in March, April, May, and June, as detailed in the statements for these months. Please draft an opinion letter for my signature to Bryan. This letter should advise Bryan of the extent of his liability for each of Henry's purchases. The letter should follow the attached firm guidelines for opinion letters.

**Anders, Davis & Waters**  
**Attorneys at Law**  
6241 Lowell Street  
Franklin City, Franklin 33205

**OFFICE MEMORANDUM**

**To:** Associates  
**From:** Managing partner  
**Re:** Opinion letters  
**Date:** September 5, 2013

The firm follows these guidelines in preparing opinion letters to clients:

- Identify each issue separately and present each issue in the form of a “yes or no” question. (E.g., Is the client’s landlord entitled to apply the security deposit to the back rent owed?)
- Following each issue, provide a concise one- or two-sentence statement which gives a “short answer” to the question.
- Following the short answer, write a more detailed explanation and legal analysis of each issue, incorporating all important facts and providing legal citations. Explain how the relevant legal authorities combined with the facts lead to your conclusions.
- Bear in mind that, in most cases, the client is not a lawyer; avoid using legal jargon. Remember to write in a way that allows the client to follow your reasoning and the logic of your conclusions.

**Transcript of telephone conversation between Miles Anders and Bryan Carr**  
July 24, 2015

**Anders:** Bryan, I heard your voicemail message. I'm sorry you are having problems, and I'd like to help. Can you tell me what happened?

**Carr:** Well, you know that my mom died late last year. My dad has been devastated. They were married for 40 years. My mom had always organized and maintained their household and paid all the bills. Now my dad is pretty much at a loss for how to cope. Even though this is a busy season for my landscaping business, I've tried to step in to support him as much as I can, including paying some of his bills. It's been tough keeping up with all that's going on.

**Anders:** Can you tell me more about your dad's situation? I'm asking because I understand that this has contributed to your current problem.

**Carr:** About four months ago, my dad came to me after his van broke down. He had gotten a repair estimate for \$1,500, and he didn't have the money on hand to pay for the repairs. I decided to help him out and told him I would pay whatever it cost to have his van repaired. I also told my dad it was a loan, but honestly, I was never going to ask him to pay me back. I love my dad and wanted to help him in his time of need.

**Anders:** How did you give him the money?

**Carr:** I let him use one of my credit cards. It seemed the easiest thing to do at the time. I had a card that had a zero balance on it. It's with Acme State Bank. When I gave my dad the credit card, I told him that he could charge the van repairs, but I also specifically told him that that was the only purchase or charge he should make on the card.

**Anders:** Did you do anything else?

**Carr:** Yes, I wrote a letter that said that my dad was authorized to use my credit card and gave it to him. I think I also wrote the credit card account number and expiration date on the letter. I made a copy of the letter and have it in my desk. I will scan it and email it to you as soon as we get off the phone.

**Anders:** Did the letter say anything about restricting the purchase specifically to the van repairs?

**Carr:** No, it didn't.

**Anders:** Did your dad charge the repairs?

**Carr:** Yes, my dad used my Acme State Bank card to pay for the van repairs. The final bill was somewhat more than the original estimate. Apparently an additional part was needed, making the total repair cost \$1,850. That was \$350 more than the original estimate. My dad charged the total amount to my credit card.

**Anders:** Then what happened?

**Carr:** With all that was going on in my life, I forgot to get my credit card back from my dad until about six weeks ago. When I finally did, I also got back the letter I'd given him. Unfortunately, I subsequently learned that my dad had already used the card to make additional purchases without ever asking my permission or even telling me. In fact, he even used my account information after returning the card and letter.

**Anders:** How did you find out about the additional purchases?

**Carr:** When I was reviewing and preparing to pay my current credit card statement, I noticed a \$1,200 charge to Franklin Hardware Store for power tools. I knew I had not made this purchase. I called my dad to see if he knew anything about the power tools purchase.

**Anders:** What did your dad say?

**Carr:** He admitted he had used my account number to buy the power tools. He told me he wanted to prove to himself and the rest of the family that he could take care of the house, and he impulsively went to buy some tools to make some household repairs. He said he had written the account information on a piece of paper before returning the credit card and my letter to me.

Because my dad had already returned the credit card and my letter to me before he purchased the tools, he said he merely presented the credit card account name, number, and expiration date to the hardware store clerk. The clerk must have been out of his mind, but he accepted the information my dad presented and charged the tools to my account. My dad feels terrible and has apologized profusely. He is so ashamed of himself.

**Anders:** Are these the only other charges your dad made?

**Carr:** I wish. He also admitted that before he returned my card, he had used it to buy gas, groceries, and books over the past few months.

**Anders:** What did you do after you learned of all these transactions?

**Carr:** I pulled out my file with my Acme State Bank credit card statements and reviewed my statements for the past several months. Sure enough, upon review, I noticed that during the past four months, in addition to the van repairs, my dad had charged gasoline on two occasions at Friendly Gas, groceries on one occasion at the Corner Market, books at Rendell's Book Store, and most recently, the power tools at the Franklin Hardware Store. I always pay the entire balance on my credit cards on the due date each month. All the gas, grocery, and book charges made by my dad have already been paid in full. I noted this fact by writing "Paid—BC" on each of the past statements. I never noticed these charges before I paid my statements. The truth is, I usually don't review the bills very carefully, and I didn't notice the gas, grocery, and book charges because he and I both shop at the same places. I probably gave each statement a quick glance, if that. However, I have not yet paid the current credit card statement for June with the \$1,200 power tools charge.

**Anders:** Have you contacted the bank or done anything else?

**Carr:** I called the bank to discuss the problem. They directed me to fill out and send in their form disputing the charges. I did this right away.

**Anders:** What happened?

**Carr:** This morning I received a letter from the bank informing me that I was responsible for all the charges. That's when I called your office.

**Anders:** What would you like to see happen?

**Carr:** I know my dad did something he shouldn't have done; I told him to return the tools if he still could. But he's a senior citizen and in considerable distress. The various vendors should not have allowed him to use my credit card. I know he had the card in his possession for all but the power tools purchase, but it's still not right for the bank to say I'm responsible. I'd like to know whether the bank can hold me responsible for each of the charges my dad made.

**Anders:** Bryan, we'll look into this quickly. Meanwhile, please don't pay your credit card statement until you get further advice from us. I'll be back in touch before the current payment due date.




March 12, 2015

To Whom It May Concern:

I, Bryan Carr, give my father, Henry Carr, permission to use my Acme State Bank credit card: account number 474485AC66873641, expiration date 09/2017. If you have any questions, please feel free to call me at 555-654-8965.

Thank you,

  
Bryan Carr

ACME STATE BANK  
P.O. Box 309  
Evergreen, Franklin 33800

**Billing Statement: March 2015**

Bryan Carr  
6226 Lake Drive  
Franklin City, FR 33244

Account Number 474485AC66873641

**New Charges**

DATE	DESCRIPTION	AMOUNT
March 16, 2015	Schmidt Auto Repair	\$1,850.00
	Total	\$1,850.00

Payment Due Date      Minimum Due  
April 30, 2015      \$55.50

**DIRECT ALL INQUIRIES TO**  
(800) 555-5555

**MAKE ALL CHECKS PAYABLE TO**  
Acme State Bank  
P.O. Box 309  
Evergreen, FR 33800

**THANK YOU FOR YOUR BUSINESS!**

PAID-BC April 29, 2015

ACME STATE BANK  
P.O. Box 309  
Evergreen, Franklin 33800

**Billing Statement: April 2015**

Bryan Carr  
6226 Lake Drive  
Franklin City, FR 33244

Account Number 474485AC66873641

April 30, 2015      Payment Received      \$1,850.00

**New Charges**

DATE	DESCRIPTION	AMOUNT
April 10, 2015	Friendly Gas Station	\$75.00
April 16, 2015	Corner Store	\$55.00
April 21, 2015	Friendly Gas Station	\$76.50
	Total	\$206.50

Payment Due Date      Minimum Due  
May 31, 2015      \$15.00

**DIRECT ALL INQUIRIES TO**  
(800) 555-5555

**MAKE ALL CHECKS PAYABLE TO**  
Acme State Bank  
P.O. Box 309  
Evergreen, FR 33800

**THANK YOU FOR YOUR BUSINESS!**

PAID-BC May 30, 2015

ACME STATE BANK  
P.O. Box 309  
Evergreen, Franklin 33800

**Billing Statement: May 2015**

Bryan Carr  
6226 Lake Drive  
Franklin City, FR 33244

Account Number 474485AC66873641

May 31, 2015      Payment Received      \$206.50

**New Charges**

DATE	DESCRIPTION	AMOUNT
May 16, 2015	Rendell's Book Store	\$45.70
	Total	\$45.70

Payment Due Date      Minimum Due  
June 30, 2015      \$15.00

**DIRECT ALL INQUIRIES TO**  
(800) 555-5555

**MAKE ALL CHECKS PAYABLE TO**  
Acme State Bank  
P.O. Box 309  
Evergreen, FR 33800

*THANK YOU FOR YOUR BUSINESS!*

PAID-BX June 29, 2015

ACME STATE BANK  
P.O. Box 309  
Evergreen, Franklin 33800

**Billing Statement: June 2015**

Bryan Carr  
6226 Lake Drive  
Franklin City, FR 33244

Account Number 474485AC66873641

June 30, 2015      Payment Received      \$45.70

**New Charges**

DATE	DESCRIPTION	AMOUNT
June 21, 2015	Franklin Hardware Store—power tools	\$1,200.00
	Total	\$1,200.00

Payment Due Date      Minimum Due  
July 31, 2015      \$36.00

**DIRECT ALL INQUIRIES TO**  
(800) 555-5555

**MAKE ALL CHECKS PAYABLE TO**  
Acme State Bank  
P.O. Box 309  
Evergreen, FR 33800

***THANK YOU FOR YOUR BUSINESS!***

**LIBRARY**

**Excerpts from Federal Truth in Lending Act**  
**15 U.S.C. §§ 1602 and 1643**

**§ 1602 Definitions and rules of construction**

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

...

(k) The term “credit card” means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

...

(o) The term “unauthorized use,” as used in section 1643 of this title, means a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit.

\* \* \*

**§ 1643 Liability of holder of credit card**

**(a) Limits on liability**

(I) A cardholder shall be liable for the unauthorized use of a credit card only if—

(A) the card is an accepted credit card;

(B) the liability is not in excess of \$50;

...

(E) the unauthorized use occurs before the card issuer has been notified that an unauthorized use of the credit card has occurred or may occur as a result of loss, theft, or otherwise; and

(F) the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it.

...

(d) **Exclusiveness of liability.** Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card.

## Excerpts from Restatement (Third) of Agency (2006)

### § 1.01 Agency Defined

Agency is the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.

### § 2.01 Actual Authority

An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent so to act.

### § 2.03 Apparent Authority

Apparent authority is the power held by an agent or other actor to affect a principal’s legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.

### § 3.01 Creation of Actual Authority

Actual authority, as defined in § 2.01, is created by a principal’s manifestation to an agent that, as reasonably understood by the agent, expresses the principal’s assent that the agent take action on the principal’s behalf.

### § 3.03 Creation of Apparent Authority

Apparent authority, as defined in § 2.03, is created by a person’s manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation.

### § 3.11 Termination of Apparent Authority

(1) The termination of actual authority does not by itself end any apparent authority held by an agent.

(2) Apparent authority ends when it is no longer reasonable for the third party with whom an agent deals to believe that the agent continues to act with actual authority.



**BAK Aviation Systems, Inc. v. World Airways, Inc.**

Franklin Court of Appeal (2007)

In 2005, BAK Aviation Systems, Inc. (BAK), issued a credit card to World Airlines, Inc. (World), to purchase fuel for a corporate jet leased by World from BAK. World designated Ken Swenson, an independent contractor hired by World, as chief pilot of the leased jet and gave him permission to make fuel purchases with the BAK credit card but only in connection with *non-charter* flights involving World executives. However, Swenson used the credit card to charge \$89,025 to World in connection with *charter* flights involving non-World customers prior to the cancellation of the credit card in 2006. When World refused to pay, BAK sought recovery in court.

The trial court entered judgment for BAK for the full amount in dispute. The court held that the federal Truth in Lending Act, which limits a cardholder's liability for "unauthorized" uses, did not apply to charges incurred by one to whom the cardholder had voluntarily allowed access for another purpose. World appeals.

The Truth in Lending Act, 15 U.S.C.

§ 1643(a), places a limit of \$50 on the liability of a credit cardholder for charges incurred by an "unauthorized" user. This appeal concerns the applicability of this provision to a card bearer who was given permission by the cardholder to make a limited range of purchases but who subsequently made additional charges on the card. We conclude that Swenson, who incurred the charges, was not an "unauthorized" user within the meaning of § 1643(a) and therefore affirm.

Congress enacted the 1970 Amendments to the Truth in Lending Act in large measure to protect credit cardholders from unauthorized use perpetrated by those able to obtain possession of a card from its original owner. The amendments limit the liability of cardholders for all charges by third parties made without "actual, implied, or apparent authority" and "from which the cardholder receives no benefit." 15 U.S.C. §§ 1602(o), 1643. Where an unauthorized use has occurred, the cardholder can be held liable only up to a limit of \$50 for the amount charged on the card, if certain conditions are satisfied. 15 U.S.C. § 1643(a)(1)(B).

By defining “unauthorized use” as that lacking “actual, implied, or apparent authority,” Congress intended, and courts have accepted, primary reliance on principles of agency law in determining the liability of cardholders for charges incurred by third-party card bearers. Under the parameters established by Congress, the inquiry into “unauthorized use” properly focuses on whether the user acted as the cardholder’s agent in incurring the debt in dispute. A cardholder, as principal, can create actual authority only through manifestations to the user of consent to the particular transactions into which the user has entered. *See* RESTATEMENT (THIRD) OF AGENCY § 3.01.

“Implied authority” has been held to mean actual authority either (1) to do what is necessary, usual, and proper to accomplish or perform an agent’s express responsibilities or (2) to act in a manner in which an agent believes the principal wishes the agent to act based on the agent’s reasonable interpretation of the principal’s manifestations in light of the principal’s objectives and other facts known to the agent. These meanings are not mutually exclusive. Both fall within the definition of

actual authority. *See* RESTATEMENT (THIRD) OF AGENCY § 2.02, comment (b).

With respect to the transactions Swenson made in connection with the charter flights, we conclude that no actual or implied authority existed.

Unlike actual or implied authority, however, apparent authority exists entirely apart from the principal’s manifestations of consent to the agent. Rather, the cardholder, as principal, creates apparent authority through words or actions that, reasonably interpreted by a third party from whom the card bearer makes purchases, indicate that the card bearer acts with the cardholder’s consent. *See* RESTATEMENT (THIRD) OF AGENCY § 3.03.

Though a cardholder’s relinquishment of possession of a credit card may create in another the appearance of authority to use the card, the statute clearly precludes a finding of apparent authority where the transfer of the card was without the cardholder’s consent, as in cases involving theft, loss, or fraud. However elastic the principle of apparent authority may be in theory, the language of the 1970

Amendments demonstrates Congress's intent that charges incurred as a result of *involuntary* card transfers are to be regarded as unauthorized under §§ 1602(o) and 1643.

Because the Truth in Lending Act provides no guidance as to uses arising from the *voluntary* transfer of credit cards, the general principles of agency law, incorporated by reference in § 1602(o), govern disputes over whether a resulting use was unauthorized. These disputes frequently involve, as in this case, a cardholder's claim that the card bearer was given permission to use a card for only a limited purpose and that subsequent charges exceeded the consent originally given by the cardholder. Acknowledging the absence of actual authority for the additional charges, a majority of courts have declined to apply the Truth in Lending Act to limit the cardholder's liability, reasoning that the cardholder's voluntary relinquishment of the card for one purpose gives the bearer apparent authority to make additional charges. (Citations omitted.)

Nothing about the BAK credit card itself, or the circumstances surrounding the purchases, gave fuel sellers reason to distinguish the authorized fuel purchases

Swenson made for the *non-charter* flights from the disputed purchases for the *charter* flights. It was industry custom to entrust credit cards used to make airplane-related purchases to the pilot of the plane. By designating Swenson as the pilot and subsequently giving him the BAK card, World thereby imbued him with more apparent authority than might arise from voluntary relinquishment of a credit card in other contexts. In addition, with World's blessing, Swenson had used the card, which was inscribed with the registration number of the Gulfstream jet, to purchase fuel on non-charter flights for the same plane. The only difference between those uses expressly authorized and those now claimed to be unauthorized—the identity of the passengers—was insufficient to provide notice to those who sold the fuel that Swenson lacked authority for the charter flight purchases.

Here, the disputed charges were not "unauthorized" within the meaning of 15 U.S.C. §§ 1602(o) and 1643(a)(1). Accordingly, BAK was entitled to recover the full value of the charges from World under their credit agreement. The judgment of the trial court is affirmed.

**Transmutual Insurance Co. v. Green Oil Co.**

Franklin Court of Appeal (2009)

This is an appeal from a holding of the trial court finding against defendant Green Oil Co. and in favor of plaintiff Transmutual Insurance Co. In March 2000, Transmutual obtained a Green Oil credit card for use in its business. Transmutual's office manager, Donna Smith, was responsible for requesting credit cards for Transmutual employees and paying bills. Smith did not have the authority to open new credit accounts for Transmutual; only its general manager had this authority.

On May 16, 2005, Smith made a written request to Green Oil for a GreenPlus credit card. A GreenPlus credit card may be used for purchases of goods and services other than those furnished at gasoline service stations. The GreenPlus application was signed by Smith as office manager. It also contained a signature purporting to be that of Alexander Foster as general manager and secretary-treasurer of Transmutual; however, the trial court determined that Foster's signature was forged by Smith.

During the period from May 2005 until July 2008, Smith wrongfully and fraudulently

used the GreenPlus card to obtain goods and services in the amount of \$26,376.53. Transmutual paid for these purchases with checks signed by Smith and an authorized officer. During this time, Transmutual employed accounting firms to perform audits, but they did not discover the fraud.

Under the federal Truth in Lending Act, 15 U.S.C. § 1643(a), a cardholder is liable only for a limited amount if certain conditions are met and if the use of the credit card was unauthorized. Accordingly, the initial determination is whether or not the use of the credit card in the case at hand was unauthorized. The federal definition of "unauthorized use" is "a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit." 15 U.S.C. § 1602(o). The test for determining unauthorized use is governed by agency law, and agency law must be used to resolve this issue.

Smith did not have actual or implied authority to request a GreenPlus credit card.

The trial court correctly determined that the principle of apparent authority controls in this case.

Apparent authority is created when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation of the principal. RESTATEMENT (THIRD) OF AGENCY § 3.03. Transmutual is bound by Smith's acts under apparent authority only to third persons who have incurred a liability in good faith and without ordinary negligence. The trial court correctly determined that Green Oil acted negligently by issuing Smith a GreenPlus credit card without independently verifying her authority. Because of Green Oil's negligence, the trial court determined that Green Oil, as the card issuer, could not rely upon Smith's ostensible authority to establish the existence of agency between Smith and Transmutual.

However, the trial court erred in not looking beyond Green Oil's negligence in issuing Smith the card. After receiving the first statement from Green Oil containing the fraudulent charges, Transmutual was negligent in not finding and reporting Smith's fraud. If the person or entity to whom a credit card is issued is careless, that

person or entity may be held liable.

The federal Truth in Lending Act does not address whether cardholder negligence removes the statutory liability limit. However, we believe that Transmutual's negligence in not examining its monthly statements from Green Oil removes this case from the statutory limit on cardholder liability.

A cardholder has a duty to examine his credit card statement promptly, using reasonable care to discover unauthorized signatures or alterations. If the card issuer uses reasonable care in generating the statement and if the cardholder fails to examine his statement, the cardholder is precluded from asserting his unauthorized signature against the card issuer after a certain time.

The facts at hand are similar. Green Oil was not negligent in billing Transmutual. If someone at Transmutual other than Smith had examined its statements from Green Oil, he or she would have discovered Smith's fraud. Transmutual had the responsibility to institute internal procedures for the examination of the statements from Green Oil which would have disclosed Smith's

deception. Transmutual had sole power to do so. Transmutual's failure to institute such procedures is the cause of that portion of the embezzlement that occurred following the billing from Green Oil that contained the first evidence of Smith's fraud.

Transmutual's negligence leads us to reexamine whether Smith acquired apparent authority in her use of the GreenPlus card after Transmutual became negligent. In *Farmers Bank v. Wood* (Franklin Ct. App. 1998), we set forth the test to determine whether or not apparent authority exists. The authority must be based upon a principal's conduct which, reasonably interpreted, causes a third person to believe that the agent has authority to act for the principal.

Thus, if a principal acts or conducts his business, either intentionally or through negligence, or fails to disapprove of the agent's acts or course of action so as to lead the public to believe that his agent possesses authority to act or contract in the name of the principal, the principal is bound by the acts of the agent within the scope of his apparent authority as to persons who have reasonable grounds to believe that the agent has such authority and in good faith deal with him.

*Farmers Bank, supra.*

Green Oil was negligent in issuing Smith the GreenPlus card. However, during Smith's fraudulent use of the card, Green Oil was not negligent. Rather, Transmutual (the cardholder) was negligent in not requiring that someone other than Smith examine its monthly statements. Smith embezzled money from Transmutual for three years through her fraudulent use of the GreenPlus credit card. During this lengthy period of embezzlement, Transmutual always paid its monthly bill to Green Oil.

Transmutual contends that it is not proper for the court to consider the fact that Transmutual paid all the Green Oil credit card charges. That contention is without merit. As a result of Transmutual's acts of paying the charges and its failure to examine its credit card statements so that it could notify Green Oil of the fraud, Transmutual allowed Green Oil to reasonably believe that Smith was authorized to use the credit card.

We conclude under the principles of apparent authority that Transmutual is liable for all of Smith's purchases from the time the credit card was issued.

Reversed.

## MULTISTATE PERFORMANCE TEST DIRECTIONS

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.

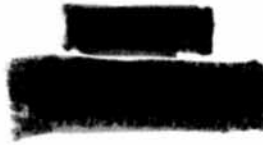
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Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the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

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Applicant Number



MPT-2

715



## *In re Franklin Aces*

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**In re Franklin Aces**

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**FILE**

**Franklin Arts Law Services**  
*Pro Bono Legal Services for the Franklin Arts Community*  
224 Beckett Avenue  
Franklin City, Franklin 33221

**MEMORANDUM**

**TO:** Examinee  
**FROM:** Eileen Lee, Esq., Executive Director  
**RE:** Al Gurvin  
**DATE:** July 28, 2015

We have agreed to offer legal advice to Al Gurvin concerning a claim he may have against the Franklin Aces professional football team. The relevant materials are attached.

Our engagement by Mr. Gurvin recognizes that, as a pro bono service, we do not have the resources to represent him in litigation. Rather, we have been retained solely to provide legal advice about his potential claim. If he decides to pursue litigation, we will help him find counsel.

Mr. Gurvin has asked for 1) our evaluation of the likelihood of success should he litigate his claim against the team, 2) our assistance in seeking a settlement (we have done so and received an offer), and 3) our recommendation as to whether he should litigate or accept the settlement offer that the team has made.

Please draft a letter to Mr. Gurvin providing your recommendation as to whether he should accept the settlement offer. Your recommendation should factor in your assessment of the likely outcome of litigation, the recovery he might realize should he prevail, his goals in pressing his claim, and any other factors you think relevant. You should fully explain your reasoning as to why he should accept or reject the settlement offer.

Do not separately state the facts, but include the relevant facts in support of your legal analysis and recommendation as to the settlement offer. Remember that Mr. Gurvin is not an attorney. Your letter should explain the law and recommendation in language that, while encompassing a full legal analysis including citations to relevant legal authority, does so in terms a nonlawyer may easily understand.

## *FRANKLIN SPORTS GAZETTE*

### **REJOICE, FRANKLIN FOOTBALL FANS, THE ACES ARE COMING!**

By Ben Jordan      January 27, 2014

FRANKLIN CITY, Franklin—Franklin’s long and unrequited longing for professional football is about to be satisfied. The Olympia Torches, after years of unsuccessful attempts to get support for a new stadium in Olympia, have announced that, starting in July of 2016, they will relocate to Franklin City.

ProBall Inc., the team owner, says that years of declining attendance in our neighboring state of Olympia—a result (in its view) of an aging, one could even say decrepit, stadium—have made a move imperative. Although many cities around the country sought to win the team, the owner chose Franklin City for several reasons, including the proximity of a good portion of the team’s fan base (without a team of their own, many Franklin residents followed the Torches) and—probably more importantly—the financial support of the Franklin State and Franklin City governments to underwrite the construction of a new, state-of-the-art stadium.

That new stadium will be built in the existing Franklin City Sports Complex, run by the Franklin Sports Authority. The Sports Complex currently includes the Omnidome, where Franklin’s pro basketball and hockey teams play, and Franklin Memorial Stadium, where the baseball Blue Sox play. The new stadium will be configured for soccer as well as football.

The team has also announced that it will change its name to the Franklin Aces. The new team logo and uniforms, yet to be created, will be announced in due course according to the team owner.

## Transcript of Interview between Eileen Lee and Al Gurvin (June 29, 2015)

- Lee:** Mr. Gurvin, nice to meet you. How may we help you?
- Gurvin:** They've stolen my design for the new football team's logo, and I need a lawyer.
- Lee:** Perhaps we'd better start at the beginning. I've read your intake application, and I know you qualify for our pro bono services given your income level, but tell me about yourself and how all this got started, from the beginning.
- Gurvin:** Okay, sorry, let's see. I work as a janitor at the Franklin Omnidome, the hockey rink and basketball facility used by our pro teams. I got real excited last year when they announced that the Olympia pro football team was moving to Franklin City.
- Lee:** Why were you so excited? Are you a big football fan?
- Gurvin:** I'll say—more than a big fan. I'm nuts about football, and I've been rooting for the Torches for years and years. I watch every game on TV, and I'd give my eyeteeth to be able to afford tickets to see games in person.
- Lee:** What happened after you saw the news reports of the move?
- Gurvin:** Well, I'm an amateur artist—no real training, but I like to doodle. When they announced that the team was moving, they also announced that it was changing its name to the Franklin Aces. They also said that they didn't yet have a logo or uniform designs. I didn't give it a second thought. But several months later, I started to think about a design and then one day it hit me. I realized that a real good design for a logo would be a hand holding the four aces from a deck of cards, fanned out like you hold cards. So I sketched that design, and it looked pretty good. I showed the sketch to my boss, and he liked it too.
- Lee:** Who's your boss? What's his position?
- Gurvin:** Dick Kessler—he's the work crew supervisor at the Omnidome. Anyway, he suggested that I send it to Daniel Luce, the CEO of the Franklin Sports Authority. So I took a drawing of the logo and faxed it to Mr. Luce with a note.
- Lee:** When did that happen, and what did the note say? Do you have a copy?
- Gurvin:** It was 10 months ago. Here's a copy of the note, and my original sketch [see attached note and description].
- Lee:** What happened then?
- Gurvin:** Nothing—I never heard back from anyone. Then, about a month ago, the team made a big announcement with a press conference and everything at which they announced

the new uniforms and logo, and it was mine, exactly! Here's a copy of their logo and the press release they issued with it, which was in the local newspapers [see attached press release and logo description]. I think they stole it from me, and I should be entitled to something for it—they should pay me something like \$20,000.

**Lee:** Have you registered the copyright in your design with the United States Copyright Office?

**Gurvin:** No—should I?

**Lee:** Well, a copyright exists from the moment a work is created, and you don't need any government action to grant it. But registration with the Copyright Office is a good idea for many reasons—for example, for our purposes, should you decide to litigate, you must have registered your claim before you can take the case to court. Even though the infringement you allege has already occurred, you can still register, but let's see what route you wish to pursue. Registration isn't expensive, and it won't hurt to wait to register for a few weeks in any event. Let me look into it. I happen to know José Alvarez, the General Counsel of ProBall Inc., the team owner—he's an old classmate and friend of mine. I'll contact him to see if we can work something out short of litigation, and get back to you.

**Gurvin:** Okay, great.

**Lee:** You should understand, Mr. Gurvin, that, while we'll be happy to evaluate your claim and help you seek a quick settlement, we're in no position to represent you if you decide to litigate it. As a pro bono service, we simply don't have the resources to undertake litigation on behalf of any client. So if litigation is ultimately the route you wish to follow, we'll try to help you find counsel, but our representation of you must end at that point.

**Gurvin:** Sure.

**Lee:** We'll draft an engagement letter for you to sign. I hope we can help you resolve this.

**Copy of Fax from Al Gurvin to Daniel Luce (September 25, 2014)**

Dear Mr. Luce: I'm a janitor in the Omnidome, and a big, big football fan. When I read that the Torches were moving to Franklin City, and that the team would become the Aces, I had a great idea for a logo for the team. I made a sketch, and it's attached to this note. I'd be honored if the team would consider and use my logo, and I wouldn't want anything from them if they did, except maybe some tickets to games in the new stadium. Thanks, Al Gurvin

[Actual sketch omitted]

\* \* \*

[DESCRIPTION OF GURVIN SKETCH: Mr. Gurvin's sketch consists of an outline of a hand from the wrist up, without any other features, holding four cards fanned out, in order from left to right, the ace of diamonds, ace of clubs, ace of hearts, and ace of spades.]

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**Press Release Announcing New Franklin Aces Logo**

[Franklin City, May 28, 2015] The Franklin Aces football team is delighted to announce its new logo and uniforms. After consideration of many designs, we believe this one will be most appealing to the fans and players. Later this year we will begin discussions with various merchandise manufacturers, and we expect that our fans will be able to purchase their Franklin Aces gear next year.

[Picture of Franklin Aces logo omitted.]

\* \* \*

[DESCRIPTION OF NEW FRANKLIN ACES LOGO: Although the outline of the hand is somewhat different, the Franklin Aces logo presented in the press release is otherwise identical to Mr. Gurvin's sketch.]

**ProBall Inc.**

**José Alvarez, General Counsel**  
Franklin City Sports Complex, Suite 520  
Franklin City, FR 33221

July 24, 2015

Eileen Lee, Esq.  
Franklin Arts Law Services  
224 Beckett Avenue  
Franklin City, FR 33221

Dear Eileen:

Thanks for your phone call of July 7, 2015, explaining Mr. Gurvin's claim. I've looked into the matter, and our conclusion is that your client has no basis for any claim against the team.

First, the design he created, whatever its merits, is not copyrightable subject matter. The images of playing cards are familiar designs and common property containing no original authorship. That being the case, any claim he might have must fail.

Second, even if the design were copyrightable, there is no proof that those who designed the new team logo had any access to it. Thus, even if the designs were identical, there could be no copyright infringement, for without proof of access, any claim must fail. To that end, I have attached affidavits from those involved that summarize testimony that would be given in court.

Even though your client has no basis for any claim, the team's owner, in an effort to avoid unhappy publicity, makes this offer: In return for a release of any claims based on your client's design, ProBall Inc. would give Mr. Gurvin a season ticket for a single seat, in a prime location, to all home games for the team's first season. (The retail price of such a season ticket will be \$5,000.) Eileen, we go back a long way, you know I'm good for my word, and I want to be forthright with you—this is the team's final, and only, settlement offer.

With kindest personal regards,

  
José Alvarez



**AFFIDAVIT OF DANIEL LUCE**

STATE OF FRANKLIN     )  
COUNTY OF LINCOLN    )

I, Daniel Luce, being duly sworn, depose and say:

1. I am Chief Executive Officer of the Franklin Sports Authority. The Authority is entirely separate from ProBall Inc., the owner of the Franklin Aces football team. The Authority and ProBall Inc. are not under common ownership or affiliated in any way.

2. On September 25, 2014, I received a two-page fax from Al Gurvin, a janitor at the Omnidome facility of the Franklin City Sports Complex. I do not have a copy of the fax, but I know when I received it because I checked the fax log in our office. Although I do not recall the specifics, I remember that the fax had a sketch attached to it, and that Mr. Gurvin wanted the sketch submitted as a possible logo for the Franklin Aces pro football team.

3. I knew that the team had retained ForwardDesigns, a commercial design firm, to design a logo and uniforms for the team. Hence, I did not think any input from the Authority or otherwise was needed. Although I do not remember specifically what I did with the fax, I believe I discarded it in the trash.

4. ProBall was given a suite of offices in the five-story Administrative Building of the Franklin City Sports Complex. Those offices are on the fifth floor. All the Authority's offices, including mine, are on the second floor, as is the fax machine which serves all of the Authority's departments. (The ground floor contains a museum and ticket offices; the third and fourth floors are occupied by the firms holding the parking and food concessions at our facilities.)

5. Other than occasional greetings while passing in the lobby of our building or sharing rides in the elevator, I have had no contact with anyone working for ForwardDesigns.


6. I and some of my staff meet occasionally with executives of ProBall Inc. to coordinate details concerning the construction and operation of the new football stadium. Other than that, no one from the Franklin Sports Authority has any dealings with representatives of ProBall Inc., the team owner.

Dated July 22, 2015



Daniel Luce

Signed before me on this 22<sup>nd</sup> day of July, 2015



---

Jane Mirren  
Notary Public

**AFFIDAVIT OF MONICA DEAN**

STATE OF FRANKLIN     )  
COUNTY OF LINCOLN    )

I, Monica Dean, being duly sworn, depose and say:

1. I am a commercial artist and designer for ForwardDesigns. Our firm was retained in August of 2014 by ProBall Inc. to design a logo and uniforms for the Franklin Aces pro football team. I was the sole designer working on the project. Our firm was paid \$10,000 for its services.

2. To facilitate my work on the project, the team gave me an office located in their suite of offices on the fifth floor of the Administrative Building of the Franklin City Sports Complex. I have had no contact with employees of the Franklin Sports Authority, other than with Julie Covington, a personal friend who works in the Authority's transportation office and with whom I occasionally have lunch. I have never met Daniel Luce, the Authority's Chief Executive Officer.

3. As I thought about a logo for the team, one obvious choice was a hand holding the four aces from a deck of cards. I had seen many versions of that image, including many on clip art collections on the Internet, none of which were protected by copyright, and which I used for inspiration. About five months ago, I drew that design, along with about a dozen others, and submitted it to ProBall Inc., who chose it as the new team logo. I alternated the suits of the cards in the design so that they appeared as first a red suit, then a black suit, and I made the last and most visible card the ace of spades, as it is the most striking and familiar card.

4. I do not recall ever seeing any sketch of any idea for the logo created by anyone else prior to creating my design.

Dated July 22, 2015

  
\_\_\_\_\_  
Monica Dean

Signed before me on this 22<sup>nd</sup> day of July, 2015

  
\_\_\_\_\_  
Jane Mirren  
Notary Public

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# LIBRARY

**Oakland Arrows Soccer Club, Inc. v. Cordova**  
United States District Court for the District of Columbia (1998)

The question of the boundary between copyrightable and noncopyrightable subject matter—that is, what types of works are protected by the Copyright Act, and what types of works fall outside its sphere of protection—arises in the context of this petition for a writ of mandamus against Ricardo Cordova, the Register of Copyrights. All such actions against the Register of Copyrights must be brought here in Washington, D.C., as it is the location of the Copyright Office.

The facts are simple and not in dispute: The Oakland Arrows professional soccer club developed a new logo and wished to register it with the United States Copyright Office. While registration is entirely permissive, 17 U.S.C. § 408(a), and the existence of a copyright does not depend on it, registration confers significant benefits to the copyright owner, not the least of which is that it is a prerequisite to bringing a suit for copyright infringement. 17 U.S.C. § 411.

The Arrows' new logo consisted of an oblique triangle, colored red, white, and blue. The Arrows' explanation for the design was threefold: 1) the triangle conjured up an image of an arrowhead; 2)

the triangle could be seen to be a stylized letter "A"; 3) the colors evoked the United States flag.

The Arrows submitted an application for copyright registration to the Copyright Office. The Office's procedure is to examine each work for which registration is sought and determine if the work qualifies, in its opinion, for copyright protection. In this case, the Office's examiner concluded that the work did not qualify for protection. There is an internal appeals mechanism within the Office, which the Arrows pursued, but without success. Hence, they bring this mandamus action, seeking to compel the Register of Copyrights to register the work.

We review the question *de novo*. While we do give deference to the decision of an expert administrative agency, that deference is not necessarily dispositive.

The standard for copyrightability is easily stated: copyright protects original works of authorship. 17 U.S.C. § 102. That standard, however, is not so easily applied. What constitutes authorship? What constitutes originality? The courts have wrestled with

these questions over the years. Justice Holmes, in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903), stated that “[It] is the personal reaction of an individual upon nature . . . . [A] very modest grade of art has in it something irreducible, which is one man’s alone. That something he may copyright . . . .” More recently, Justice O’Connor, in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 345 (1991), stated (internal references and quotations omitted):

Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity . . . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works will make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it may be.

How do we apply these tests to the work at hand? We are assisted, to some degree, by the regulations of the Copyright Office as to the types of works the Office will register. We quote the regulation—which the Office states is based on decades of court decisions—in full, from 37 C.F.R.:

#### **§ 202.1 Material not subject to copyright.**

The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:

(a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents;

(b) Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing;

(c) Blank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like, which are designed for recording information and do not in themselves convey information;

(d) Works consisting entirely of information that is common property containing no original authorship, such as, for example: Standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources;

(e) Typeface as typeface.

The Copyright Office, in defending its action, argues that the logo is simply a “familiar symbol or design,” with a “mere variation in coloring,” as in subsection (a) of

the regulation. While the Arrows make many arguments as to the artistic value of the work, the effort that went into creating it, and the connections to the team which it conjures up, none of those arguments can carry the day. The copyright law does not reward effort—it rewards original expression of authorship. What we have here is a simple multicolored triangle. That is a “familiar symbol,” with “mere variation of coloring.” There is not enough originality of authorship in that design to merit copyright protection. In Justice O’Connor’s words, even the “extremely low” “minimal degree of creativity”—the “creative spark”—is lacking here.

The Arrows’ petition for a writ of mandamus is denied.



## Savia v. Malcolm

United States District Court for the District of Franklin (2003)

In this action for copyright infringement, plaintiff Joseph Savia, the composer and copyright owner of the song “Perhaps,” claims that defendant Lauren Malcolm copied the melody of his song and used it in her song “Love Tears” without authorization. After extensive discovery, the parties have filed cross-motions for summary judgment. We deny the plaintiff’s motion and grant the defendant’s motion.

### Facts

In 1981, Savia wrote “Perhaps” and was successful in having it placed over the closing credits of the motion picture *The Duchess of Broken Hearts*. The motion picture had only a limited theatrical release, playing in a single “art house” movie theater in Franklin City for a three-week run. A dispute among the producers of the motion picture, for reasons not relevant here, has resulted in no further exploitation of the motion picture, either in theatrical release, in home video format, or on television, cable, the Internet, or otherwise. The motion picture was rated NC-17 by the Motion Picture Association of America because of its sexual content. That rating means that no one under the age of 17 will be admitted to a

theater showing the motion picture. “Perhaps” was never commercially recorded, other than for the soundtrack of the motion picture, and no recording of it has ever been released. Savia registered the work with the United States Copyright Office, and there is no dispute about the validity of the copyright in “Perhaps” or that he is the copyright owner.

In 2002, Malcolm, a lifelong resident of Franklin City and a highly successful 25-year-old songwriter, wrote “Love Tears,” which was commercially recorded and released by Remnants of Emily, a well-known rock band. The recording achieved great success, ultimately making number one on the *Billboard* “Hot 100” chart for four weeks. The recording has sold over two million copies, and the song has been widely performed and has been used in commercial advertisements. Malcolm, as songwriter, has, through the end of 2002, earned approximately \$1.5 million in royalties attributable to the song from these various uses.

The parties each presented expert testimony from musicologists. These expert witnesses

agreed, and the court as finder of fact also finds, that the lyrics of the songs are entirely different, but that the melodies are, if not identical, virtually so.

#### The Standard for Infringement

It is rare that direct evidence of copyright infringement exists. Therefore, the courts have turned to circumstantial evidence in determining whether one work infringes another. In doing so, the courts in this Circuit have uniformly applied a two-prong test for infringement: 1) Are the works “substantially similar”? 2) Did the alleged infringer have access to the copyrighted work? The reasons for these two standards should be obvious: If the works are not, at the very least, substantially similar, there can be no infringement. And if the alleged infringer had no access to the allegedly infringed work, there could be no possibility of copying. Certainly, the more similar the works, the less evidence of access need be adduced. But plausible evidence of access must always be found.

Two cases are instructive. In *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924), the legendary songwriter Jerome Kern was accused of plagiarizing the bass line from a wildly popular earlier work.

Although Kern testified that he did not consciously use the earlier work, the court concluded that Kern, a working songwriter who kept up with current popular music, must have heard it and so had access to it. Kern also argued that the bass line could be found in earlier works which were not protected by copyright; if he had copied from those works, he would not be infringing. But, as Kern could not prove that he was even aware of those works before the lawsuit, his argument failed, and he was found liable for infringement.

In *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd sub nom ABKCO Music Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983), George Harrison (of the Beatles) was accused of plagiarizing the melody of an earlier popular rock and roll song. He testified that he did not consciously copy the earlier song, and the court believed him. Nevertheless, the court concluded that he had access to the earlier song and so had “unconsciously” copied it; he was found liable for infringement.

#### Analysis

Here, there is no question that the works are virtually identical. Substantial similarity—

indeed, striking similarity—of the melodies is proven. The question is whether Malcolm had access to Savia’s song. Can access be plausibly inferred from the evidence? We conclude that it cannot.

As noted, Savia’s song was released to the public only in the form of the closing credits of a motion picture, one that had only a limited run in Franklin City. Further, the motion picture had been rated NC-17, meaning that no one under the age of 17 would be admitted to the theater. At the time the motion picture was released, Malcolm was four years old. While we can take judicial notice of the fact that the ratings code is sometimes more honored in the breach than in the observance, we think it implausible that a four-year-old child would be admitted to a theater showing an NC-17-rated movie.

Savia argues that, even so, Malcolm might have had access to “Perhaps” by hearing someone who had seen the motion picture play or sing the song. Without a scintilla of evidence to justify that conclusion, we cannot credit such mere speculation.

### Conclusion

We conclude that there is no plausible evidence that Malcolm had access to Savia’s work. For that reason, notwithstanding the virtual identity of the melodies of the two songs, we conclude that Malcolm’s song was original with her and was not copied from Savia’s. We deny Savia’s motion for summary judgment and grant Malcolm’s motion for summary judgment.

**Herman v. Nova, Inc.**

United States District Court for the District of Franklin (2009)

In our previous opinion, [citation omitted], Nova, Inc., a motion picture producer, was found liable to Herman for copyright infringement of Herman's unpublished screenplay. We now address the question of damages.

Herman, an amateur author, had, unsolicited, submitted the screenplay to Nova. Nova then used the screenplay as the basis for its own screenplay, from which, it announced, it was going to make a motion picture. It issued a press release announcing its intention to make a motion picture based on its own screenplay; the press release included a synopsis of the screenplay. Herman saw the press release and, before Nova took any further action, successfully sued Nova for copyright infringement.

Because Herman had not registered his copyright in his unpublished screenplay with the United States Copyright Office before the act of infringement occurred, his damages are limited to his actual damages and the infringer's profits. 17 U.S.C. §§ 412, 504(b). Had Herman registered before the infringement, he would have been entitled to statutory damages in lieu of

actual damages and profits, and, in the court's discretion, costs, including attorney's fees. Here, as Nova, the infringer, took no action after appropriating Herman's work and realized no gain, direct or indirect, thereafter, there are no profits resulting from the infringement which can be awarded. (The result would be different if, for example, the motion picture had been made and released, but such is not the case here.) The question, then, is what are Herman's actual damages?

As Herman was an amateur author, he had no track record of payments for his work and hence can submit no evidence of his own as to his screenplay's worth. The evidence adduced in discovery, from Nova's records and from third-party witnesses, shows that the range of payment which a motion picture producer like Nova would make for a screenplay of this sort would be between \$15,000 and \$50,000.

Given the unquestioned infringement that took place, we are disposed to award damages at the upper end of that range. Hence, judgment will be entered in Herman's favor for \$50,000.

## MULTISTATE PERFORMANCE TEST DIRECTIONS

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.