

**THIS OPINION
IS NOT A PRECEDENT OF
THE TTAB**

Mailed: September 4, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Reece R Halpern
v.
Grand Media, LLC¹

Opposition No. 91165362
to Application No. 78389660
filed on March 24, 2004

Reece R. Halpern, Esq., *Pro Se*, with Harvey I. Wittenberg,
Esq. as co-counsel for Reece R. Halpern.

David L. Sigalow of Allen, Syer, Doppelt, Milbrath &
Gilchrist for Grand Media, LLC.

Before Quinn, Walters and Kuhlke, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

Reece R Halpern filed his opposition to the application
of Grand Media, LLC to register the standard character mark

¹ By change of name from Currier Palmer Publishing.

GRAND for a "magazine of interest to grandparents raising their grandchildren," in International Class 16.²

As grounds for opposition, opposer asserts that applicant's mark, when applied to applicant's goods, so resembles opposer's previously used mark GRAND TIMES for a magazine for older adults as to be likely to cause confusion, under Section 2(d) of the Trademark Act.

Applicant, in its answer, denied the salient allegations of the claim and asserted, affirmatively, that opposer's mark is abandoned.

We note that there are several motions outstanding in this case and we begin by considering these motions. First, applicant has strongly objected to the evidence submitted by opposer during his testimony period, contending that this evidence is inadmissible and moving to strike it from the record. The only evidence submitted by opposer during his testimony period was his affidavit, which was accompanied by 23 exhibits. Opposer argues, essentially, that he misread the requirements for submitting evidence and that not accepting his affidavit and exhibits exalts form over substance. We disagree. The procedures for the introduction of evidence in *inter partes* proceedings before the Board are clearly spelled out in the Trademark Rules of

² Application Serial No. 78389660, filed March 24, 2004, based upon an allegation of a bona fide intention to use the mark in commerce in connection with the identified goods.

Practice. Trademark Rule 2.123(a)(1), 37 CFR §2.123(a)(1), states that witness testimony must be by deposition upon oral examination; and Trademark Rule 2.123(b), 37 CFR §2.123(b), states that witness testimony may be in the form of an affidavit by written agreement of the parties. Oral testimony by deposition allows for the foundation and authentication of exhibits introduced in connection with the testimony and it permits cross examination of the witness by opposing counsel. These are important aspects of the trial process that are not merely form over substance, and we expect parties to familiarize themselves with these procedures for practicing before the Board. We agree with applicant that opposer's affidavit and accompanying exhibits are inadmissible. Applicant's motion to strike is granted, this evidence is not part of the record, and opposer's affidavit and accompanying exhibits have been given no consideration.³

In its brief, applicant objected to, and moved to strike, the exhibits attached to opposer's brief. It is well established that all evidence must be properly introduced into evidence during the trial period. See Trademark Rules 2.121(a) and 2.122(e), 37 CFR §§2.121(a) and 2.122(e). Therefore, applicant's motion is granted, the

³ Applicant argues that this evidence should be excluded also because, in his brief, opposer neither described the record nor referred to his

exhibits attached to opposer's brief are not part of the record, and these exhibits have been given no consideration.

Applicant filed a motion to "strike" opposer's co-counsel as well as his cross examination of applicant's witnesses. Opposer represents that he is an attorney and he has proceeded with this case *pro se*. He states that he obtained the services of an attorney, Harvey I Wittenberg, whom he characterized as "co-counsel," to represent him at the depositions of applicant's two witnesses and he introduced Mr. Wittenberg as his co-counsel at the depositions. Mr. Wittenberg subsequently filed his notice of appearance on behalf of opposer. The notice of appearance is dated prior to the depositions and was received by the USPTO eight days after the depositions. The notice indicates that correspondence should continue to be directed to opposer. Applicant argues that the notice of appearance should have been filed with the Board before Mr. Wittenberg could properly appear at the depositions on opposer's behalf. The relevant rule follows (emphasis added):

§ 2.17 Recognition for representation.

(a) When an attorney as defined in § 10.1(c) of this chapter acting in a representative capacity **appears in person** or signs a document in practice before the United States Patent and Trademark Office in a trademark case, his or her personal appearance or signature shall constitute a representation to

affidavit and exhibits. Applicant has provided no valid basis for this argument and it is not persuasive.

the United States Patent and Trademark Office that, under the provisions of § 10.14 and the law, he or she is authorized to represent the particular party in whose behalf he or she acts. Further proof of authority to act in a representative capacity **may** be required.

. . .

(c) To be recognized as a representative, an attorney as defined in § 10.1(c) of this chapter may file a power of attorney, **appear in person**, or sign a document on behalf of an applicant or registrant that is filed with the Office in a trademark case.

Opposer's co-counsel appeared in person at applicant's deposition with opposer, who, on the deposition record, introduced Mr. Wittenberg and stated that he had retained Mr. Wittenberg as his co-counsel. While it may be unusual for a *pro se* applicant to retain "co-counsel," it is not at all unusual for counsel representing a party before the Board to bring in co-counsel. Therefore, Mr. Wittenberg's appearance is proper and applicant's motion to strike Mr. Wittenberg's appearance and his cross examination of the witnesses is denied.

Opposer makes numerous references to the Board's decision denying applicant's motion for summary judgment and the evidence submitted in connection with that motion. To be perfectly clear, the standard for deciding a motion for summary judgment is quite different from the standard for a final decision in an opposition proceeding after trial. In this case, the burden is clearly upon opposer to establish by a preponderance of the evidence his standing, his

ownership of a valid (pleaded) mark in connection with the pleaded goods, his priority, and that a likelihood of confusion exists. *Massey Junior College, Inc. v. Fashion Institute of Technology*, 492 F.2d 1399, 181 USPQ 272 (CCPA 1974). This burden is not met by mere allegations in the pleading and brief.

The record in this case consists of the pleadings; the file of the involved application; various documents made of record by applicant's notices of reliance; and the testimony depositions by applicant of Christine Crosby and Jonathan Micocci, principal's of applicant, with accompanying exhibits. Both parties filed briefs on the case.

Because opposer submitted no evidence during its trial periods, we consider the evidence submitted by applicant to determine if applicant has established or admitted the elements of opposer's case. In this regard, representations made by opposer's co-counsel during cross examination of applicant's witnesses do not establish facts upon which opposer can rely; and exhibits shown by opposer's co-counsel to applicant's witnesses are without proper foundation and authentication for purposes of establishing any elements of opposer's case.

Having considered the evidence of record and the parties' briefs, we conclude that opposer has not met its

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burden of establishing any of the elements of its case and, therefore, the opposition must fail.

Decision: The opposition is dismissed.