

**This Opinion is Not a
Precedent of the TTAB**

Mailed: April 19, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Tiffany Ferrara and WodSnob, LLC
v.
Courtney Sebastianelli
—————

Consolidated:
Opposition No. 91218270 (parent)
Opposition No. 91219528
—————

Heather R. Norton of Law Office of Heather Norton
for Tiffany Ferrara and WodSnob, LLC.

James R. Menker of Holley & Menker, P. A.
for Courtney Sebastianelli.

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Before Seeherman, Wellington and Masiello,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Courtney Sebastianelli d/b/a WOD Snob (“Applicant”) has filed two applications
seeking to register the mark **WOD Snob** for:

Decorative magnets in International Class 9;¹ and

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¹ Application Serial No. 86124606 (subject of Opposition No. 91218270), filed on November 20, 2013, based upon an allegation of use in commerce under Section 1(a) of the Trademark Act, claiming August 29, 2013 as both the date of first use and the date

Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms in International Class 25.²

Tiffany Ferrara and WodSnob, LLC (“Opposers”) oppose registration of Applicant’s mark in each application on the ground of likelihood of confusion.³ Opposers plead ownership of an application (Serial No. 86123606) for the mark **WODSNOB** in connection with athletic apparel and online retail store services featuring fitness-related equipment, apparel, supplements and nutrition (Notice of Opposition ¶ 5);⁴ that they have been using the WODSNOB mark in connection with the goods listed in the pleaded application “since at least as early as July of 2013” (*Id.* ¶ 6); that the parties’ marks are “effectively identical” and the respective goods will be marketed “to the same target audience . . . namely, exercise enthusiasts” (*Id.* ¶ 7); and that Applicant’s mark is “likely to cause confusion or mistake or to deceive, within

of first use in commerce.

² Application Serial No. 86114758 (subject of Opposition No. 91219528), filed on November 10, 2013, based upon Applicant’s allegation of a bona fide intent to use the mark in commerce, under Section 1(b) of the Trademark Act.

³ The ESSTA electronic transmittal sheets for both notices of opposition also list a claim of false suggestion of a connection, under Section 2(a) of the Trademark Act, as a ground for opposition. Opposers also alleged that Applicant’s mark was “likely to create a false suggestion of a connection with Opposers’ Mark, within the meaning of Section 2(a)” in the body of the notice of opposition for Opposition No. 91218270. However, Opposers did not pursue this ground in their final brief and, in view thereof, we consider any false suggestion of a connection claim to be waived.

⁴ 4 TTABVUE (Opposers’ amended notice of opposition). Record citations are to TTABVUE, the Trademark Trial and Appeal Board’s publically available docket history system, by entry number and, if applicable, page number. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Unless otherwise indicated, all TTABVUE record citations are to Opposition No. 91218270, which has been designated as the “parent” proceeding.

the meaning of Section 2(d) of the Trademark Act, resulting in loss, damage and injury to Opposers and the purchasing public.” (*Id.* ¶ 10).

Applicant, in her answers, denied the salient allegations of the notices of opposition.

I. Joint Stipulation for Accelerated Case Resolution (ACR) and Consolidation

On December 11, 2015, Opposers filed a “joint stipulation of the parties: (a) to elect accelerated case resolutions (sic) procedure and (b) to establish facts and procedures for use in connection with accelerated case resolution” in Opposition No. 91218270.⁵

By way of the stipulation, the parties stipulated to the following facts:

1. Opposers have never given Applicant any consent or permission or otherwise authorized Applicant to use or register the mark set forth in application Serial No. 86124606.
2. Applicant contacted Opposers via electronic mail on or about August 23, 2013. In that correspondence Applicant asked Opposers whether Opposers would be "willing to let go of the domain wodsno.com."
3. There is no connection or affiliation between Opposers and Applicant.

The parties also agreed, *inter alia*, that no additional discovery shall be conducted; the “parties will have produced all of the documents they will rely upon by December 10, 2015;” neither party will rely on expert testimony; briefs will be submitted “in accordance with summary judgment format;” evidence may be submitted in the form of declarations or affidavits; and to forego oral hearing. In addition the parties stipulated to a schedule of dates for submission of “Opposer’s ACR brief and

⁵ 15 TTABVUE.

supporting evidence . . . Applicant’s opposition brief and supporting evidence . . . [and] Opposer’s reply brief.”

On December 21, 2015, Opposers filed a motion to consolidate the involved opposition proceedings and specifically requested that “the Board’s Accelerated Case Resolution Ruling applies to both proceedings.”⁶ Opposers further stated in the motion that “Counsel for Applicant does not oppose this request.”

By way of the Board’s March 2011 order, the ACR stipulation was approved by the Board and the proceedings were consolidated.⁷

The parties submitted their ACR briefs in accordance with the schedule set forth in the stipulation.

II. The Parties’ Evidentiary Submissions

The record in this case consists of the pleadings and, by rule, the files of the two opposed applications. Trademark Rule 2.122. In addition, we note and accept the parties’ stipulated facts as being entered into the record.

With their main ACR brief Opposers submitted a declaration, with accompanying exhibits, of their counsel, Heather R. Norton. For the most part, Ms. Norton simply lists each exhibit, and avers only that the exhibits are “true and correct copies of . . . documents produced in this action.”⁸ The exhibits include: photographs of apparel

⁶ 17 TTABVUE.

⁷ 22 TTABVUE.

⁸ 16 TTABVUE.

with the term WODSNOB on the apparel itself and on hang tags; printouts from a WODSNOB website; printout of an invoice from the GODADDY.COM website addressed to Thomas Ferrara; printout of emails from Facebook, Gmail Team and Twitter to “TJ Ferrara” or “T Ferrara”; photograph of individuals wearing t-shirts that appear to have the term WODNSNOB on them; a copy of Applicant’s responses to certain of Opposers’ interrogatories (Nos. 3, 11-12); printouts of email correspondence between Courtney Sebastianelli and Tiffany Ferrara; photographs of invoices; screenshots from a mobile phone; an unsigned Boxlife Magazine advertising agreement; copies of emails between Tiffany Ferrara and other individuals; printouts from Applicant’s involved application files; printouts that appear to come from the internet or mobile telephone screenshots; printouts from the Facebook website (“www.facebook.com/thewodsnob”); printouts from the Etsy website (“www.etsydogy.net/shop/wodsnob/...”); printouts from the website “who.godaddy.whois.asp...”; and printouts from the website www.wodsnob.net.

In addition, Opposers submitted with the declaration what they refer to as a “statement of undisputed facts” comprising a table with the headings “Paragraph,” “Fact” and “Evidentiary Support.” The column headed “Fact” lists various asserted facts, with a corresponding “Evidentiary Support” consisting of a citation to paragraph(s) of the Norton declaration where, presumably, each asserted fact may be

found, and exhibits from the Norton declaration.⁹ However, as noted, the declaration does not actually recite any facts regarding the exhibits, except to state that the particular exhibit referenced in each paragraph is a “true copy,” generally of a document produced in discovery.

For her part, Applicant submitted her own declaration¹⁰ with accompanying exhibits that include, in her words, copies of the following: the graphic file for the logo that was submitted with one of the involved applications; photographs “taken in 2013 of displays . . . created to sell [Applicant’s goods]”; photographs of Applicant’s “packaged decorative magnets and ornaments taken in 2013”; printout from Applicant’s Facebook page; printouts from Applicant’s Etsy “online store”; printouts from Applicant’s blog; printouts from the website www.myfitstation.com; “a shipping label from one of [Applicant’s] sales” from November 20, 2013; picture of headbands that Applicant “was selling at fitness events and competitions starting in November 2013”; and a printout “of the domain name registration for the wodsnob.net” domain name.

With their ACR reply brief Opposers submitted the declaration of Opposer Tiffany Ferrara, and accompanying exhibits that include, in her words, copies of the

⁹ It is unclear if the “Paragraph” column was intended to track the paragraphs of the Norton declaration; that is, there are 24 rows under “Paragraph,” numbered 1 through 24, and the Norton declaration also has 24 numbered paragraphs.

¹⁰ 19 TTABVUE.

following:¹¹ Opposers' responses to certain of Applicant's interrogatories (nos. 1-3, 12-24); an email from online payment processor BrainTree "confirming [Opposers'] site was compliant with the payment processor's requirements"; a "receipt from a July 23, 2013 sale with the shipping label" and invoices; "a receipt dated August 23, 2013 . . . show[ing] that [Opposers'] wodsnob.com website was active on that date and that in fact we sold WodSnob branded goods on that date"; "analytics from [Opposers'] website from July 2013 to November 2013"; a screenshot of Opposers' website showing "the virtual shopping cart"; and a screenshot of Opposers' Twitter account; analytics from Google that "show traffic" to Opposers' website.

In her declaration, Ms. Ferrara also makes averments regarding the exhibits previously submitted with the declaration of Opposers' counsel, Ms. Norton, and filed with their main ACR brief.

III. Applicant's Objection to Opposers' Rebuttal Evidentiary Submissions

Applicant has objected to Ms. Ferrara's declaration and the exhibits attached there on the basis that they "constitute improper rebuttal."¹² Applicant remonstrates that "[i]t was incumbent upon Opposers to proffer admissible evidence concerning priority during their case-in-chief." Applicant notes that Opposers did proffer some evidence with their main ACR brief and Applicant "objected and challenged such evidence," but Applicant's challenges regarding the sufficiency of that evidence "do

¹¹ 20 TTABVUE 15-53.

¹² 21 TTABVUE 2.

not open the door for Opposers to proffer evidence during their rebuttal.”¹³ Applicant argues that “allowing Opposers to introduce testimony and evidence of the nature submitted as and with the rebuttal declaration denies Applicant the opportunity to address the testimony and evidence in any way.”¹⁴

Opposers did not respond to Applicant’s objections.

“It is axiomatic that rebuttal testimony may be used only to rebut evidence offered by the defendant.” *Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1958 (TTAB 2008), citing *Wet Seal Inc. v. FD Mgmt. Inc.*, 82 USPQ2d 1629 (TTAB 2007). See, e.g., *Carefirst of Maryland Inc. v. FirstHealth of the Carolinas Inc.*, 77 USPQ2d 1492, 1498 (TTAB 2005); *Hard Rock Café Int’l (USA) Inc. v. Elsea*, 56 USPQ2d 1504, 1508-09 (TTAB 2000) [evidence of plaintiff’s sales and advertising is improper rebuttal]; *Osage Oil & Transportation, Inc. v. Standard Oil Co.*, 226 USPQ 905, 907 n.10 (TTAB 1985); *Rowell Laboratories, Inc. v. Canada Packers Inc.*, 215 USPQ 523, 525 n.2 (TTAB 1982) [“material intended to buttress petitioner’s case-in-chief ... constituted improper rebuttal”]; *American Meat Institute v. Horace W. Longacre, Inc.*, 211 USPQ 712, 719 (TTAB 1981) [“[i]t is the general rule that a party plaintiff may in his case on rebuttal introduce facts and witnesses appropriate to deny, explain, or otherwise discredit the facts and witnesses adduced by the opponent, but not any facts or witnesses which might appropriately have been introduced during its case-

¹³ *Id.*

¹⁴ *Id.*

in-chief to sustain its pleading” and thus “a plaintiff may not utilize its rebuttal period to prove its case-in-chief or to shore up its principal case in light of a defendant's evidence”]; and *VIP Foods, Inc. v. V.I.P. Food Products*, 200 USPQ 105, 108 n.1 (TTAB 1978) [“[t]o the extent that petitioner, by this testimony, attempted to establish a date of first use for its ‘VIP’ mark, which is matter for its testimony-in-chief ..., it is improper rebuttal and will not be considered in determining petitioner's record”].

With the aforementioned principle in mind, we find that the bulk of Ms. Ferrara’s declaration and the exhibits thereto constitute improper rebuttal. That is, many of Ms. Ferrara’s averments in her declaration and all exhibits filed therewith plainly relate to facts which appropriately should have been introduced as part of Opposers’ case-in-chief. This includes factual testimony and evidence involving Opposers’ standing, ownership of their pleaded mark and priority. Applicant was entitled to an opportunity to rebut, with her ACR brief and accompanying evidence, the evidence proffered in support of Opposers’ allegations in the notices of opposition. This opportunity was foreclosed because Opposers withheld the evidence until their rebuttal, which is intended to be limited to denials, refutations or explanations of Applicant's testimony and evidence. *General Electric Company v. Graham Magnetics Incorporated*, 197 USPQ 690, 692 n.5 (TTAB 1977).

The only proper rebuttal evidence in Ms. Ferrara’s declaration are the averments that directly rebut certain statements made by Applicant Sebastianelli in her declaration, namely, that “no active website was found using that domain name [www.wodsnob.com] when I checked on November 21, 2013” and her following

statement, “that domain name did not lead to an active website on December 7, 2013.”¹⁵ To be clear, only the averments made by Ms. Ferrara, contained in ¶¶ 14-17 of her declaration, that involve the status of the domain name “www.wodsnob.com” during the period of November 21, 2013 to December 7, 2013, are proper rebuttal.¹⁶

Accordingly, Applicant’s objection to the Ferrara declaration is, as discussed above, sustained. Aside from those averments made by Ms. Ferrara in her declaration, as described above, the remaining averments and all exhibits accompanying the declaration constitute improper rebuttal and have been given no consideration.

IV. Opposers’ Standing

Standing is a threshold issue that must be proven in every *inter partes* case, including these consolidated opposition proceedings. *See Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) (“The facts

¹⁵ 19 TTABVUE 5 (Sebastianelli Dec. ¶ 17).

¹⁶ We also note the first two paragraphs of the Ferrara declaration wherein she avers:

1. I make this declaration in support of Opposers’ Case Resolution Brief. I have personal knowledge of the facts stated herein. I make this declaration in order to address statements made by Applicant in her Case Resolution Brief and in her supporting declaration.
2. Certain statements made in Applicant’s declaration and brief are false and it is necessary for me to make this declaration in order to address those inaccuracies.

These paragraphs do not contain any substantive factual statements other than to characterize statements made by Applicant in her declaration as false. Moreover, Ms. Ferrara’s statements that her declaration is “necessary” and being made to “address statements made by Applicant” do not control the nature of her declaration. Rather, we must make the determination whether or not the declaration is proper rebuttal.

regarding standing . . . must be affirmatively proved. Accordingly, [plaintiff] is not entitled to standing solely because of the allegations in its [pleading].”). To establish standing in an opposition, the plaintiff must show both “a real interest in the proceedings as well as a ‘reasonable’ basis for his belief of damage.” *See Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). To prove a “real interest” in this case, Opposers must show that they have a “direct and personal stake” in the outcome herein and are more than “mere intermeddler(s).” *See Ritchie v. Simpson*, 50 USPQ2d at 1026; *see also Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 853 F.2d 888, 7 USPQ2d 1628 (Fed. Cir. 1988).

The fact that the parties elected to utilize ACR does not alter this standard of proof. *See* TBMP § 702.04(a) (2015) (“The standards of proof in an ACR proceeding are the same as the standards of proof in a traditional Board proceeding,” citing *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. ___, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049, 2056 (2015) (party opposing registration bears the burden of proof)); and *Dan Robbins & Associates, Inc. v. Questor Corp.*, 599 F.2d 1009, 202 USPQ 100, 105 (CCPA 1979)). Opposers, as plaintiffs in these proceedings, must nonetheless prove their standing (and their claim) by a preponderance of the evidence. *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); *Cerveceria Centroamericana, S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989); and *Life Zone*, 87 USPQ2d at 1959.

In her ACR brief, Applicant contends that Opposers have not established that they have standing.¹⁷ Applicant asserts that any allegations involving Opposers' standing are not supported by the evidence submitted with their main ACR brief. In their reply ACR brief, Opposers make conclusory statements regarding their ownership of a WODSNOB mark and an application to register this mark, without referencing any evidence, and that "the parties' respective briefs make clear that a controversy exists between the parties."¹⁸

Based on the record of before us, we find that Opposers have not met their burden of establishing standing to be heard on their substantive claim. Although Opposers pleaded ownership of a mark WODSNOB used on athletic apparel and in connection with retail services, and that they filed a corresponding application to register the mark, these allegations were not admitted by Applicant and have not been proven. Ms. Norton does not state in her declaration that Opposers are owners of a mark or that they filed an application. She also does not offer any testimony describing the exhibits whereby we could construe any of them as proof of Opposers' interest in a mark. Rather, Ms. Norton merely verified the exhibits are "true and correct copies" of the various documents that were produced. Only with respect to Exhibits Q and V, does she describe them.¹⁹

¹⁷ 18 TTABVUE 5-6.

¹⁸ 20 TTABVUE 4.

¹⁹ Exhibit Q is described as "portions of Applicant's trademark applications that are at issue in the present action" and that they were "downloaded from the [Office] website, and last

With respect to the Norton declaration exhibits, while they are deemed to be “true and authentic” copies, they can only be considered for what they show on their face and not for the truth of the statements or activities shown in the documents, as there is no declaration testimony corroborating the truth or explaining the significance of these documents. For example, Norton declaration exhibits A-C comprise copies of printouts or photographs of apparel containing the term WODSNOB imprinted on the articles of clothing. On the face of these pictures, there is no way to determine if these are Opposers’ goods. Likewise, exhibits L-M are copies of email communications merely showing that Courtney Sebastianelli and Tiffany Ferrara, on behalf of WODSnob LLC, exchanged emails regarding the domain name wodsno.com and the mark WODSNOB. Factual assertions set forth in the emails are hearsay without any testimonial support. On their face, the emails do not demonstrate that Opposers have rights in a mark or that they have a reasonable basis for their belief that they will be damaged by registration of Applicant’s mark. The remaining exhibits are equally ineffective for purposes of establishing Opposers’ standing; for many of them, it is unclear if they involve Opposers at all and some exhibits involve only Applicant, *e.g.*, exhibit K comprises Applicant’s responses to interrogatories regarding Applicant’s activities and exhibit V comprises screenshots taken from Applicant’s website.

accessed on December 21, 2015.” 16 TTABVUE 14 (Norton declaration ¶ 18). Exhibit V is described by Ms. Norton as “website screenshots taken by Opposers’ counsel on December 21, 2015. Counsel obtained the first screenshot by visiting the www.wodsno.net domain. Counsel obtained the second screenshot by visiting the www.etsy.com domain and searching for the ‘WOD Snob’ store.” 16 TTABVUE 15 (Norton declaration ¶ 23).

We have considered the parties' stipulated facts, including the stipulation that "Applicant contacted Opposers via electronic mail on or about August 23, 2013. In that correspondence Applicant asked Opposers whether Opposers would be 'willing to let go of the domain wodsno.com.'" This stipulated fact, however, is vague and Applicant's mere query to Opposers whether they would "let go" of a domain name does not amount to an admission by Applicant that Opposers are the owner of the domain name, let alone that Opposers have any trademark rights in wodsno.com. It is not sufficient to confer standing on Opposers.

After careful consideration of all of the evidence properly before us and for the aforementioned reasons, we find Opposers have failed to prove standing to oppose the registration of Applicant's mark.

V. Priority

Even though the Opposition must be dismissed on the basis that Opposers failed to prove their standing, we add that Opposers have not proved prior trademark rights either. To prevail on a likelihood of confusion claim brought under Trademark Act Section 2(d), a party must first prove that it owns "a mark registered in the Patent and Trademark Office or a mark or trade name previously used in the United States ... and not abandoned . . ." Trademark Act Section 2, 15 U.S.C. § 1052. Again, Opposers are the plaintiffs in these proceedings and thus have the burden of proving their claim, including priority, by a preponderance of the evidence. *Young*, 47 USPQ2d at 1754; *Cerveceria Centroamericana*, 13 USPQ2d at 1309; and *Life Zone*, 87 USPQ2d at 1959. For purposes of priority, Applicant may at the very least rely on

the filing dates of her applications. *M.C.I. Foods, Inc. v. Bunte*, 96 USPQ2d 1544, 1550 (TTAB 2010); *see also, J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 437 (CCPA 1965). The involved applications were filed on August 29 and November 10, 2013, respectively (see footnotes 1-2).

In their main ACR brief, Opposers rely exclusively on their self-styled “statement of undisputed facts” in support of their contention that they have priority. Applicant argues in her ACR brief that Opposers “failed to prove that they used any similar mark on or in connection with any goods prior to the filing dates of the [involved applications].”²⁰ Applicant points out that there is no contextual testimony from Ms. Norton regarding the exhibits accompanying her declaration and many of the exhibits are deficient on their face for purposes of establishing priority. In response, Opposers argue that the record “shows that Opposers are the senior users of the WODSNOB mark.”²¹ Opposers make several factual assertions, citing to arguments made in their initial ACR brief, the Ferrara declaration and its accompanying exhibits, and exhibit Q to the Norton declaration.

We have carefully reviewed all of the evidence that is properly before us and find that Opposers have not demonstrated ownership of a mark, let alone use of a mark prior to November 10, 2013. The factual assertions made by Opposers in their briefs regarding priority are not evidence and are without any evidentiary support. While

²⁰ 18 TTABVUE 7.

²¹ 20 TTABVUE 5.

it may seem obvious, we would be remiss if we did not point out that argument made in briefs cannot substitute for testimony. Thus, we are not persuaded when Opposers, in their reply ACR brief, cite to previously-made statements in their main brief as if this lends some evidentiary value to the assertions. Likewise, Opposers' reliance on their self-styled "statement of undisputed facts," filed with their main ACR brief, is misplaced. Simply put, this "statement of undisputed facts" is not a list of facts stipulated by the parties and cannot be considered testimony. Rather, it may at best be construed as factual conclusions drawn by Opposers based on exhibits to the Norton declaration. However, as previously discussed, the Norton declaration exhibits have little evidentiary value and can be considered only for what they show on their face. That is, for many of the reasons outlined above, the Norton declaration exhibits do not establish priority.

Finally, as discussed, much of the Ferrara declaration constitutes improper rebuttal. Indeed, all of the Ferrara declaration paragraphs that Opposers cite in their reply brief to establish priority are the subject of Applicant's sustained objection and have not been given consideration.²²

In sum, Opposers have not proven priority and thus cannot prevail on the likelihood of confusion ground.

²² Specifically, in the priority section of their reply ACR brief, Opposers cite to Ferrara declaration ¶¶ 3, 6-7, 9-13, 21-24, and 26, and exhibits DD and EE; all of this testimony and exhibits have been deemed to be improper rebuttal evidence.

VI. Conclusion

Opposers have failed to demonstrate their standing to oppose registration of Applicant's mark in each of the applications; and that, even if such standing were established, Opposers have failed to prove priority and thus cannot prevail on their alleged likelihood of confusion ground for opposition.²³

Decision: The consolidated oppositions are dismissed.

²³ In their main ACR brief, Opposers argued that Applicant committed fraud because she "knowingly made false statements to the [USPTO]" by way of a sworn statement that she was not aware of any prior user of the mark and "on that basis . . . her applications should be denied." 16 TTABVUE 9-10. Applicant objected to this argument on the basis that fraud was not pleaded by Opposers as a ground for opposition and Applicant "has not consented, either implicitly or explicitly, to a trial on this issue." 18 TTABVUE 18. Opposers did not respond or further argue this ground in their reply brief. Accordingly, because fraud was not pleaded and it has not been tried, the ground is not before us and we give it no further consideration.