

Representative Passing Answers

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Applicant Number

MPT[®]

Multistate Performance Test

In re Mills

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In re Mills

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FILE

WARREN, SANCHEZ & BANKS LLP
Attorneys at Law
2500 Washington Blvd., Suite 160
Franklin City, Franklin 33075

MEMORANDUM

To: Examinee
From: Isabel Banks
Date: February 23, 2021
Re: Charlotte Mills matter

Our client, Charlotte Mills, owns an event planning business that organizes various social and athletic events in the city of Garden Grove. Mills was recently retained by the Ramble Group (Ramble) to plan its annual Springfest, a two-day event featuring a festival and a five-kilometer run. After Mills had already begun preparations for the event, she was informed that Ramble would be using another event coordinator.

Mills wants to know whether she has any legal recourse against Ramble. We have discussed the possibility of pursuing a claim against Ramble for breach of contract based on the communications and/or documents that were exchanged between Mills and Ramble's owner, Kathryn Burton.

I need you to draft a memorandum to me analyzing whether there is an enforceable contract between Mills and Ramble and what damages Mills might be entitled to if she were to sue Ramble for breach of contract. Another associate will assess other potential issues such as promissory estoppel and specific performance.

Do not include a separate statement of facts in your memorandum, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law support your conclusions.

WARREN, SANCHEZ & BANKS LLP
Attorneys at Law

FILE MEMORANDUM

From: Isabel Banks
Date: February 12, 2021
Re: Charlotte Mills matter

This memorandum summarizes my meeting today with Charlotte Mills regarding a potential business dispute:

- Mills is the owner of Mills Event Management (MEM), an event planning and coordination business that handles approximately 20 events per year, including festivals, races, galas, and fundraisers. MEM is basically a “one-woman show”; Mills handles all aspects of the business, bringing in paid helpers as needed.
- Mills has been in the event planning business for three years. Her services are increasingly in demand because she brings a creative perspective to the events she organizes, which boosts event attendance and enhances public and media awareness of the events and their hosts.
- In June of 2020, Mills was contacted by Ramble Group, a company in Garden Grove that hosts the popular Springfest event.
- Springfest is a weekend event that kicks off with a five-kilometer “Fun Run” at 8 a.m. on Saturday, followed by a festival the rest of Saturday and all day Sunday. The festival includes live music, food and beverages, vendor booths featuring local artists, and kids’ activities such as face painting.
- Springfest is held in April, typically the first or second weekend of the month. Springfest 2021 will be the fourth annual Springfest.
- Mills’s first contact with Ramble Group was a phone call from Ramble’s owner, Kathryn Burton, on June 3, 2020. In that phone call, Burton asked about Mills’s availability to organize and coordinate Springfest 2021, explaining that the event planning company that Ramble had used in other years was not available.

- During the call, Mills and Burton also brainstormed ideas for Springfest 2021, including possible venues, musical groups, and ways to boost attendance and enhance Ramble’s marketing opportunities related to the event. The call ended with Burton saying that she was excited about the prospect of working with Mills.
- Mills and Burton exchanged several emails after the initial phone call, including an email from Mills to Burton that attached a written event planning proposal for Springfest 2021.
- The written proposal was never signed by either party, but Ramble paid the initial \$2,000 deposit outlined in the proposal.
- After Mills received the deposit, she began preparations for Springfest 2021, including the following:
 - contacting the city and county and securing the necessary permits for the event, which entailed filling out application forms and paying permitting fees
 - preparing a preliminary budget and master plan for the event
 - creating a new Springfest 2021 website to incorporate the themes and ideas discussed with Burton and paying related webhosting and domain fees
 - reserving Discovery Park and the Garden Grove Promenade as alternate venues for the festival portion of the event
 - designing a preliminary racecourse map for the five-kilometer run
 - contacting local musicians about performing at the event (no bands booked yet, but four bands confirmed to be available)
- In all, Mills’s out-of-pocket expenses totaled \$3,000.
- While working on these tasks, Mills gave regular updates to Burton, mostly by telephone. At no time did Burton express concerns about Mills’s event preparations.
- On August 10, 2020, Mills received a phone call from Burton stating that Burton had decided to use another event planning company for Springfest 2021.
- Mills tried to line up a replacement event planning engagement for around the same time as Springfest 2021 but was unable to do so.

Initial Email Correspondence between Charlotte Mills and Kathryn Burton

From: Kathryn Burton <kburton@ramblefranklin.com>
To: Charlotte Mills <cmills@memfranklin.com>
Subject: Springfest 2021
Date: June 4, 2020

Charlotte, it was a pleasure talking with you yesterday! I like the concepts you have for Springfest 2021, including your idea of inviting gourmet food trucks to serve food in addition to traditional food/beverage booths. I think your ideas for marketing and branding strategies would significantly increase event attendance and enhance Ramble's visibility as the event's host. For the last two years, we have nearly doubled attendance, and I'd like to see that trend continue this year.

Can you send me a proposal outlining the event planning, coordination, and oversight services you provide? We can decide on the event date and location later—it needs to be either the first or second weekend in April 2021, preferably in or near downtown Garden Grove.

From: Charlotte Mills <cmills@memfranklin.com>
To: Kathryn Burton <kburton@ramblefranklin.com>
Subject: Springfest 2021
Date: June 4, 2020

Hi, Kathryn. I'm very excited about the possibility of working with Ramble Group to make Springfest 2021 the best Springfest ever! As to potential event dates, I don't currently have any events booked for the first and second weekends in April 2021, so either weekend would be fine.

Some options for the venue would be the Garden Grove Promenade (which has green space and more room for food trucks), the Old Town Waterfront (across the bridge from downtown Garden Grove), and Discovery Park (probably the best option if you want the event to be in the heart of the downtown). All three venues could accommodate an event of this size. They all have adjacent roadways for the five-kilometer run, so it shouldn't be a problem to get the city permits for the run and police department approvals for road closures along the racecourse.

I'm attaching my proposal. Please review it and let me know if you have any questions.

MILLS EVENT MANAGEMENT PROPOSAL

[attached to Mills's email of June 4, 2020]

Mills Event Management (MEM) is pleased to offer its professional management services for the Springfest 2021 event hosted by Ramble Group (Client). Services include event logistics, venue and course design, event consultation and guidance, and event marketing and branding. MEM will also oversee the hiring of necessary services, equipment rentals and deliveries, apparel ordering, and merchandise and awards if needed.

SCOPE OF WORK

MEM proposes to work alongside Client by providing professional event management services. This proposal outlines the pre-event and event-day services necessary to produce a smooth, safe, and professionally staged event.

RESPONSIBILITIES OF MILLS EVENT MANAGEMENT

Pre-Event Logistics and Planning

- Research and provide guidance on event date and location
- Prepare preliminary budget and master plan including venue and racecourse maps
- Reserve venue(s) and pay initial venue deposit(s) subject to reimbursement by Client
- Obtain necessary approvals and permits from the police department, city, and county
- Website assistance or design if needed
- Coordinate with city officials on necessary road closures, detours, parking areas, etc.
- Assist with selecting an emcee, DJ, and bands, if applicable

* * *

Event-Day Site Logistics

* * *

RESPONSIBILITIES OF CLIENT

- All financial obligations and expenses stemming from the event, including reimbursement of any expenses incurred by MEM. Such expenses may include but are not limited to (1) special event fees and permits, (2) facility rental fees, (3) website hosting, and (4) advertising and marketing.
- Solicitation and recruitment of all volunteers

- Acquisition and purchase of event insurance
- Neighborhood notification of residences and businesses as required by city
- Setup, breakdown, and removal of equipment rented or donated for event

EVENTS INCLUDED IN AGREEMENT

NAME	VENUE	DATE
Springfest 2021	To Be Determined	To Be Determined

It is understood that any event not yet determined or outlined with name, venue, and date will be scheduled according to the availability of MEM.

PAYMENT

Client shall pay MEM \$15,000 for up to the first 1,000 registrations or tickets sold and \$2 per additional registration or ticket sold. Client shall pay \$2,000 of this fee as a nonrefundable deposit before commencement of services.

Client shall reimburse MEM for any event-related expenses incurred by MEM.

All payments and reimbursements are due to MEM no later than seven days following completion of the event.

Should the event be canceled, a minimum payment of \$2,500 will be due at cancellation, plus reimbursement of any event-related expenses incurred by MEM. Work will begin after initial deposit is received. Please make checks payable to Mills Event Management.

ACCEPTANCE OF TERMS

We the undersigned accept the terms of payment and scope of work outlined in this agreement.

 Ramble Group
 Name/Title:
 Date: _____

 Mills Event Management
 Name/Title:
 Date: _____

Additional Email Correspondence between Charlotte Mills and Kathryn Burton

From: Kathryn Burton <kburton@ramblefranklin.com>
To: Charlotte Mills <cmills@memfranklin.com>
Subject: Springfest 2021
Date: June 7, 2020

I've reviewed your proposal—everything looks good. One question about your fees. Your fees include a lump sum of \$15,000 for the first 1,000 registrations or tickets sold plus \$2 for every ticket or registration sale above 1,000. Last year we had general admission ticket sales of about 2,500. However, we also generated about 500 registration fees from people who participated only in the 5K fun run and did not buy tickets for the festival. Does the \$2 per ticket fee in your proposal apply only to general admission tickets or would it also include fun-run-only registrations?

From: Charlotte Mills <cmills@memfranklin.com>
To: Kathryn Burton <kburton@ramblefranklin.com>
Subject: Springfest 2021
Date: June 7, 2020

Good question! Most festivals I handle have general admission ticketing—attendees pay a set price and receive a wristband allowing access to all areas of the event. Since Springfest is a combination festival and run, with some attendees participating only in the run, I'm willing to reduce the fee for fun-run registrations to \$1 per registration. So, if you had 2,500 general admission ticket purchasers and 500 fun-run participants, the first 1,000 general admission tickets would be included in my \$15,000 base fee, the remaining 1,500 general admission tickets would be charged at a rate of \$2 per ticket, and the 500 fun-run-only registrations would be billed at \$1 per ticket.

From: Kathryn Burton <kburton@ramblefranklin.com>
To: Charlotte Mills <cmills@memfranklin.com>
Subject: Springfest 2021
Date: June 8, 2020

That sounds fair. Are you still available the first weekend in April? That's the date we've chosen.

From: Charlotte Mills <cmills@memfranklin.com>
To: Kathryn Burton <kburton@ramblefranklin.com>
Subject: Springfest 2021
Date: June 8, 2020

Yes, I don't have anything booked for that weekend, but I am already getting inquiries about other events that month, so please let me know as soon as possible if you want me to move forward with

planning the event. If so, we should probably lock in a venue soon because they tend to book up quickly, especially for spring and summer events. I think our best bets are Discovery Park and the Garden Grove Promenade, which have the most flexibility in terms of the number of attendees they can accommodate as well as more space for vendor booths and a stage for the bands. I'd suggest submitting a reservation fee to hold both venues until you're ready to make a final decision.

From: Kathryn Burton <kburton@ramblefranklin.com>
To: Charlotte Mills <cmills@memfranklin.com>
Subject: Springfest 2021
Date: June 9, 2020

I agree that we really need to get going on this. Can you please check on the availability of both sites? Also, I think it's important to freshen up the Springfest website and give it a real facelift this year. Is that something you can help with?

From: Charlotte Mills <cmills@memfranklin.com>
To: Kathryn Burton <kburton@ramblefranklin.com>
Subject: Springfest 2021
Date: June 9, 2020

Absolutely! I've got some great ideas for the website.

From: Kathryn Burton <kburton@ramblefranklin.com>
To: Charlotte Mills <cmills@memfranklin.com>
Subject: Springfest 2021
Date: June 9, 2020

Fantastic! Please get started on the website design. I'll get you Ramble's initial deposit by the end of this week. I'm looking forward to working with you to make Springfest 2021 a huge success!

From: Charlotte Mills <cmills@memfranklin.com>
To: Kathryn Burton <kburton@ramblefranklin.com>
Subject: Springfest 2021
Date: June 9, 2020

Sounds great! Once I receive your deposit, I'll take care of securing the two potential venues and you can reimburse me later, per our agreement.

LIBRARY

Daniels v. Smith
Franklin Court of Appeal (2011)

Plaintiff Sam Daniels sued defendant Angela Smith for breach of an oral agreement to construct a warehouse for Smith. The trial court entered judgment for Daniels in the amount of \$57,500. Smith appealed on two grounds—first, the parties’ agreement was never reduced to writing and hence no binding agreement resulted, and second, the trial court erred in calculating the amount of damages. We affirm.

In August 2009, Smith sought Daniels’s advice regarding the demolition of certain structures on Smith’s land where she wanted to build a warehouse. Thereafter, Smith delivered to Daniels a set of plans and specifications, together with an “Invitation to Bid” that contained a “Bid Form.” The “Invitation to Bid” included the following sentence: “Selected bidder shall execute a contract for construction of the work within five days of notice of selection.”

On September 1, 2009, Daniels delivered his Bid Form to Smith. At meetings on various dates in September and early October, Daniels and Smith discussed proposed changes to the plans and specifications for the warehouse, and Daniels submitted a revised Bid Form on October 5. On October 9, Daniels and Smith met and agreed that there would be no further changes to the plans set forth in the revised Bid Form, which were complete and specific as to the type and grade of materials. The parties also agreed on the method of compensating Daniels and agreed that construction would begin no later than November 1 and be completed within 60 days thereafter.

The next morning, October 10, Smith telephoned Daniels. It is undisputed that during the call, Daniels stated that he could build the warehouse for \$227,000 and Smith replied, “If you can do the job for \$220,000, you have it.” Daniels responded: “I accept your offer, and I thank you very much for the job.” Smith then told Daniels to proceed, saying: “Let’s get this thing rolling.” Daniels replied: “Fine, I will get right on the phone now and start.” Immediately thereafter, Daniels began ordering supplies for the project and lining up plumbing and electrical subcontractors. Daniels also sent an email to Smith that day stating, in relevant part, “I am pleased to be awarded this work and hope to produce a warehouse we can both be proud of.”

The next day, October 11, Smith emailed Daniels an unsigned, standard form construction contract containing all the terms and conditions reached at previous meetings. Daniels signed the contract and emailed it back to Smith, requesting that Smith execute the agreement as well. Smith, however, did not reply. After trying unsuccessfully to reach Smith for more than a week, Daniels

drove by the site and saw a warehouse under construction by a different contractor. The warehouse was eventually completed at a cost of \$205,000 by the other contractor.

DISCUSSION

At the outset, we note that the statute of frauds does not apply here. Under Franklin Civil Code § 20, an agreement that by its terms is not to be performed within one year from the date of its making is invalid unless it is memorialized in writing and executed by the party to be charged. Smith and Daniels agreed that the warehouse contract would be completed in less than three months after the parties made their contract. Clearly, the parties intended the agreement to be completed in less than one year. Even if they had not agreed on a specific completion date, a reasonable amount of time would be inferred. Thus, there was no statutory requirement that the contract be in writing.

Contract Formation

We now turn to whether the evidence establishes the formation of a contract. The essential elements for formation of a contract are (1) offer, (2) acceptance, (3) the intention to create a legal relationship, and (4) consideration. Here, it is undisputed that an offer was made—specifically, Daniels’s revised Bid Form, which was submitted to Smith on October 5, 2009. Nor is it disputed that the alleged contract contained adequate consideration—namely, the construction of a warehouse in exchange for payment of \$220,000, which was Smith’s counteroffer. However, Smith claims that there was no acceptance (element #2) or intention to create a legal relationship (element #3).

In support of her contention that there was no binding contract, Smith erroneously relies upon *Green v. Colimon* (Fr. Ct. App. 2005), which stated the well-settled rule that “if the parties intend to reduce their proposed agreement to writing before it can be considered complete, there is no contract until the formal agreement is signed.” However, in *Green*, there was evidence that the parties intended to be bound only by a written contract, and the preliminary negotiations never reached the point where there was a meeting of the minds on all material matters. As the court noted in *Green*, “[t]here is no meeting of the minds while the parties are merely negotiating as to the terms of the agreement to be entered into. To be final, the agreement must extend to all terms that the parties intend to introduce, and material terms cannot be left for future settlement.” Smith’s brief fails to identify any further negotiations that might have been necessary to effect a mutual understanding of the parties. Instead, Smith merely argues that the parties intended that neither party would be bound until both signed the written contract.

In *Alexander v. Gilligan* (Fr. Sup. Ct. 2008), we rejected a similar argument in circumstances closely analogous to those here. The parties in *Alexander* finally (through email exchanges) agreed upon the terms of a six-month business consulting agreement after several meetings. But when the plaintiff presented a written contract for the defendant's signature, the latter refused to sign. The *Alexander* court held that the formal written contract was not *the agreement* of the parties but only *evidence of that agreement*. The court cited numerous cases to the effect that when parties agree, either orally or via email, upon all the terms and conditions of an agreement with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement has yet to be prepared and signed does not alter the binding validity of the agreement. Whether parties intend that an oral or email-based agreement should be binding is to be determined by the trier of fact from the surrounding circumstances, giving effect to the mutual intention of the parties as it existed at the time of contracting. *Alexander*.

Here, the agreement between Smith and Daniels for the construction of a warehouse is not the type of contract that by its very nature indicates that the parties intended to be legally bound only if a formal written contract was executed. *See* 1 CORBIN ON CONTRACTS § 2.9, at 152 (rev. ed. 1993) (“[t]he greater the complexity and importance of the transaction, the more likely it is that the informal communications are intended to be preliminary only”); *Haviland v. Magnolia Sec. Inc.* (Fr. Ct. App. 2009) (parties did not intend oral agreement for creation of multi-million-dollar venture capital fund to be legally enforceable given unusual complexity and size of transaction).

Justice and fair dealing also support the above principle. Otherwise, a party who has entered into a contract through a combination of telephone conversations, in-person discussions, and email correspondence would be able to avoid the contract by claiming that the contract had not been reduced to another written form. Contracts would never be enforceable if parties could avoid the obligations by refusing to sign a written document memorializing the terms of an oral or email-based agreement and thereby evade obligations incurred in the ordinary course of business.

When Daniels submitted his revised Bid Form, Smith counteroffered by stating that she would accept the revised Bid Form if Daniels could do the work for \$220,000 instead of \$227,000. When Daniels stated, “I accept your offer, and I thank you very much for the job,” acceptance occurred, despite Smith's argument to the contrary. In addition, Smith's statement “Let's get this thing rolling” made clear that both parties intended to be legally bound by their agreement, again despite Smith's argument to the contrary. Accordingly, we find that all four elements required for

formation of a contract exist in this case, including specifically Daniels's acceptance of Smith's counteroffer and statements by both parties that evidence an intention to be bound.

Damages

Smith claims that the \$57,500 damages award was erroneous due to uncertainty as to Daniels's cost of performance. Statutory damages for breach of contract include damages for all detriment "proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." FR. CIVIL CODE § 100. Unascertainable damages cannot be recovered for breach of contract. *Id.* However, § 100 has been liberally construed to prevent defendants from avoiding the consequences of their actions. Thus, it has been repeatedly held that where there is no uncertainty as to the *fact* of damage (i.e., as to its nature, existence, or cause), the same certainty as to its *amount* is not required. *See, e.g., Alexander* (although parties had not identified a specific fee, no uncertainty existed on whether fees would be paid). One whose wrongful conduct has made it difficult to ascertain damages cannot complain because the amount of damages must be estimated, provided that the estimate is reasonable. *Id.* If damages can be calculated with reasonable certainty, they will be upheld.

Here, Daniels sought to recover the expenses he incurred prior to Smith's breach, as well as the benefit of the bargain or the profit that he would have made had Smith not breached the contract and Daniels had been allowed to build the warehouse. Daniels submitted receipts for \$7,500 in expenses and a cost breakdown showing lost profits of \$50,000, both of which were received into evidence at trial. Because not all the items in the cost analysis breakdown were supported by subcontractor bids, Smith claims that the lost profit damages were uncertain. Daniels testified, as a contractor with 13 years of experience, that the difference between the contract price and his cost of construction was \$50,000. It was for the trier of fact to determine whether Daniels's valuation of the items unsupported by bids was fair and reasonable. Daniels's testimony and documentation were uncontradicted and appear to have been the best evidence available. Thus, the trial court did not err in awarding damages of \$57,500.

Affirmed.

Jasper Construction Co. v. Park-Central Inc.
Franklin Court of Appeal (2014)

Defendant Jasper Construction Co. (Jasper) appeals from a trial court judgment finding that Jasper breached a contract to construct and lease a parking garage to Park-Central Inc., which leases and operates public parking garages. We hold that the contract is sufficiently specific to be enforceable and that the trial court properly awarded damages for breach of contract.

In March 2008, Jasper and Park-Central signed a standard commercial lease (Lease) under which Jasper agreed to construct a parking garage on property it owned and to then lease the garage to Park-Central for 20 years. Under the terms of the Lease, Jasper would “proceed diligently” with the construction of the parking garage and give Park-Central the right to terminate the Lease if construction was not completed by July 1, 2010. The Lease set forth the monthly rent to be paid by Park-Central to Jasper and specified the square footage, numbers of floors and parking spaces, and locations of entrances and exits for the parking garage. The Lease further provided that the parking garage “shall be constructed in accordance with certain plans and specifications (Plans) to be prepared and approved by the parties” and gave Jasper the right to terminate the Lease if the Plans were not approved by January 1, 2009. Plans were prepared by Jasper’s architect and approved by both parties before the January deadline. When Jasper subsequently refused to construct the parking garage, Park-Central sued.

Jasper contends that the parties’ failure to incorporate the Plans into the Lease means that, as a matter of law, the Lease was not sufficiently definite and certain to give rise to a legal obligation. That contention is without merit. Case law does not support the notion that specifications are an essential condition of an enforceable contract. To the contrary, the specificity required for an enforceable contract depends upon the circumstances. Thus, in *Stark v. Huntington* (Fr. Ct. App. 2003), a contract was enforced notwithstanding the defendant’s assertion that “neither design specifications, nor price, nor time of performance have been agreed upon.” Jasper places great weight on the fact that the parking garage was not to be built until the parties had approved plans and specifications. There is, of course, nothing unusual in a contract containing a right of prior approval, which is construed as implying a covenant of reasonableness.

Jasper also challenges the damages award. We conclude that the trial court’s finding of damages is supported by the evidence.

Affirmed.

Thompson v. Alamo Paper Products Inc.
Franklin Court of Appeal (2017)

This appeal involves an employment contract. The trial court granted summary judgment to defendant Alamo Paper Products Inc. (Alamo). Plaintiff Marie Thompson appeals, contending that her alleged oral contract with Alamo is not barred by the parol evidence rule. We affirm.

The parties entered into a written employment agreement whereby Alamo hired Thompson to serve as its chief financial officer at an annual salary of \$150,000. The agreement was silent as to any salary increases or bonuses. When Thompson did not receive a bonus, she sued Alamo, alleging that the parties had orally agreed before executing the written contract that after a six-month probationary period, Alamo would increase Thompson's salary and pay her a bonus.

Thompson argues that the parol evidence rule does not bar her claim based on Alamo's alleged breach of the oral contract. We disagree. When contracting parties have entered into a valid written agreement dealing with the particular subject matter, and the evidence indicates that the parties intended that written agreement to be the final expression of their agreement (as by both parties having signed it), the written contract supersedes all negotiations concerning its matter that preceded or accompanied the execution of the contract.

The parol evidence rule prevents a court from considering prior or contemporaneous agreements that are inconsistent with the terms in the written agreement. *Bradley v. Ortiz* (Fr. Sup. Ct. 1998). Thus, when the parties intend to reduce the entire agreement to writing, the terms of the agreement are to be ascertained from the writing alone, if possible. In such a case, extrinsic evidence is admissible only to interpret contract terms that are ambiguous or uncertain. *Id.* In contrast, when the parties do not intend to reduce the entire agreement to writing, both written and oral communication may be relevant to prove the terms of the contract. *Id.*

The alleged oral agreement between Thompson and Alamo concerns exactly the same subject matter as the underlying written employment contract, and it directly contradicts a specific provision in the agreement (i.e., Thompson's salary) and would add a material term that the parties did not reduce to writing (i.e., Thompson's eligibility for a bonus). The written employment agreement contains no ambiguous or uncertain terms. Because the alleged oral agreement is inconsistent with the written employment agreement and the written agreement contains no ambiguous or uncertain terms, the alleged oral agreement is unenforceable.

Affirmed.

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.

Do not include your actual name anywhere in the work product required by the task memorandum.

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.

TO: ISABEL BANKS

FROM: EXAMINEE

RE: CHARLOTTE MILLS MATTER

FACTS

[per the instructions, the fact section of this memorandum is omitted]

ANALYSIS

I. IS THERE AN ENFORCEABLE CONTRACT BETWEEN MILLS AND RAMBLE?

Ms. Mills is able to support a viable breach of contract claim against Ramble based on the communications and/or documents that were exchanged with Ramble's owner, Ms. Burton. Specifically, the statute of frauds is inapplicable and the four elements for valid contract formation are satisfied.

A. The statute of frauds does not apply to our client's breach of contract claim.

As a preliminary matter, an attempt by Ramble to assert a statute of frauds defense would be invalid. Under Franklin Civil Code section 20, "an agreement by its terms is not to be performed within one year from the date of making is invalid unless it is memorialized in writing and executed by the party to be charged." Mills and Burton agreed that the Springfest contract would be completed in less than a year after the parties made their contract. Clearly, the parties intended that Mills would meet the terms of her contract by the April 2021 event date. The initial deposit was sent to Mills in June 2020, which is less than a year from the approximate event date in April. Even if they had not agreed on a specific completion date, case law supports that a reasonable time would be inferred. See *Daniels v. Smith* (Ct. App. 2011). Thus, there is no statutory requirement that the contract be in writing.

B. The four elements required for a valid contract to be formed are met.

The essential elements of contract formation are (1) offer; (2) acceptance; (3) the intention to create a legal relationship; and (4) consideration. See *Daniels*. Our client can satisfy each of these elements, as discussed below.

Ramble will potentially argue that Mills emailed proposal to Burton did not constitute a valid offer. Such argument, however, is not supported by case law binding on this Court. In *Jasper Construction Co v. Park-Central Inc.*, this Court held that "the specificity required for an enforceable contract depends on the circumstances." As in *Jasper*, the proposal sent by Mills to Burton is sufficiently specific to be enforceable. The trier of fact would be able to find that the specifications and terms that are outlined in great detail are sufficient and it is reasonable that Ramble considered that an offer to enter into a contract with Mills for the festival.

It is well-settled law that when parties agree, either orally or via email, upon all the terms and conditions of an agreement with the mutual intention that it will become binding, a valid agreement exists. See *Daniels* (citing *Alexander v. Gilligan* (Fr. Sup. Ct. 2008)). The "mere fact that a formal agreement has yet to be prepared and signed does not alter the binding validity of the agreement." Ramble will likely assert that the contract with Mills is invalid because the proposal was never signed by the parties. The Court makes clear, however, that the determination of whether parties intended "an oral or email-based agreement" to be binding is a matter decided by the trier of fact. *Id.* Specifically, the trier of fact considers "the surrounding circumstances, giving effect to the mutual intention of the parties as it existed at the time of contracting." *Id.* Here, the agreement between Mills and Burton for the festival is not the type of contract that requires a formal written contract to be executed.

In *Daniels*, the Court rejected an argument asserted by defendant that was in reliance upon *Green v. Colimon* (Ct. App. 2005). In *Green*, there was evidence that the parties intended to be bound only by a written contract, and the preliminary negotiations never reached the point where there was a meeting of the minds on all material matters. *Id.* This case is not analogous to the facts present here. Specifically, the Court noted that "to be final, the agreement must extend to all terms that the parties intend to introduce, and material terms cannot be left for future settlement." That is not the case with the negotiations between Mills and Burton. There is no evidence that presently exists that suggest that any details were left up in the air or were to be determined in the future. Additionally, there is no evidence that Burton expected Mills to delay her work on the project pending a determination or further discussion between the parties or a formally signed document. In *Green*, the Court still upheld the breach of contract claim despite that the agreement at issue was only signed by one party. As discussed below, it is clear in the email correspondence that after Mills and Burton agreed to modify the fee agreement, Mills was to begin working immediately.

The Court in *Daniels* further supports this contention in reliance on the principles of justice and fair dealing. *Id.* If the Court held otherwise, a party who entered into a contract through a combination of communication methods and emails would "be able to avoid the contract by claiming that the contract had not been reduced to written form." This is directly relevant to our

client's circumstances. When Mills submitted her proposal, Burton responded 3 days later with a follow-up question on the fee agreement. Mills replied the same day with a clarification statement and offer to revise the fee agreement for a reduction on the fun run registration tickets. On June 8, Burton responded, "[t]hat sounds fair," and the exchange went on to discuss the final logistics relating to the date chosen. Mills specifically requested that Burton let her know "as soon as possible" if she should move forward with planning the event. When Burton stated, "I agree that we really need to get going on this" and further instructed Mills to check venue availability and website redesign, acceptance occurred. In addition, Burton's statements made clear that time is of the essence -- this parallels the facts in Daniels, in which the Court held that this was a clear indication that both parties intended to be legally bound by the agreement. Thus, there was clear acceptance and an intent to create a legal relationship.

An attempt by Ramble to assert there was no valid consideration would also be futile. There was adequate consideration given, namely when Burton sent the initial deposit of 2,000 dollars as required and outlined in the proposal. The facts support that this deposit was received by Mills sometime during the week of June 9 and that she began working on the planning process upon receipt. Based on the foregoing analysis, our client has a strong argument to support a breach of contract action against Ramble.

II. WHAT DAMAGES MAY MILLS BE ENTITLED TO?

Ms. Mills can support a claim for damages that she incurred as a result of Ramble's breach.

In Daniels, this Court held that "[s]tatutory damages for breach of contract include damages for all detriment 'proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom'. Id. While "unascertainable damages" cannot be recovered, the case law supports that damages are liberally construed to prevent defendants from evading the consequences of their actions. Mills damages can be calculated with reasonable certainty. According to the call with client on February 12, her total out of pocket expenses totaled 3,000. The initial 2,000 deposit that Mills received is nonrefundable and constituted valid consideration, as well as giving Mills the green light to begin work on the project. The damage analysis would not include a deduction of the 2,000 already paid. Nearly 3 months after receiving the deposit and working on the project, Burton informed Mills of the decision to hire an alternative planner. It is important to note in the calculation of damages that Mills did attempt to line up a replacement engagement for around the same time as Springfest to mitigate her damages and economic loss, but was unable to make those arrangements. While remedial measures are not specifically stated as a requirement, it is a favorable fact for our client worthy of consideration by a judge or jury.

Mills received no indication that Ramble was unsatisfied with her work leading up to the August

phone call from Burton. Thus, she was in no way on notice that she should follow-up with Burton outside of the regular status updates that are highlighted in the facts. Mills should be entitled to the 3,000 in costs incurred during that three month time period. As recognized by this Court in Davis, Mills should be entitled to the expenses incurred prior to breach, and the benefit of the bargain or profit she would have made had the breach not occurred. See *Id.* As such, Mills is entitled to her out of pocket expenses, special event fees and permits, facility rental fees, website hosting and redesign, advertisement and marketing, as well as the lost profits as a result of the breach relating to the event itself. Per the agreement, Mills is entitled to the 15,000 value of the first 1,000 registrations. The Court may not be as likely to guarantee the added damage award of the \$2 per additional ticket sold because there is no way to determine what exactly that number would be. In contrast to the other damages, this number would rely on an estimation rather than guarantee. The Court still may, however, use its discretion to award a damage number that it deems fair for this amount. See *David* ("it was for the trier of fact to determine . . . valuation of the items unsupported by bids was fair and reasonable."). In any event, Mills is entitled to damages as a result of Ramble's breach.

Applicant Number

*State v. Kilross*

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State v. Kilross

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FILE

Smith & Smith LLP
Attorneys at Law
85 West 12th Street
Centralia, Franklin 33708

MEMORANDUM

To: Examinee
From: Marie Smith
Date: February 23, 2021
Re: State v. Kilross

We represent Bryan Kilross in a criminal case. The State of Franklin has charged Kilross with armed robbery, a felony. The State alleges that Kilross robbed a liquor store using a handgun.

Kilross agrees that he was at the liquor store early in the evening of the robbery. However, he denies committing the robbery that occurred soon after he left and tells us that he was elsewhere at the time. He has only his own statement to confirm where he was when the robbery occurred. The prosecution's case rests on the testimony of a single witness, the liquor store clerk. We must, therefore, seriously consider having Kilross take the stand to testify in his own defense.

In making this decision, we will have to anticipate any impeachment evidence that the State might use against Kilross as a witness. Kilross has an eight-year-old felony conviction for robbery, for which he long ago completed his sentence. Before making a final decision on whether Kilross will testify, we will file a pretrial motion seeking to prevent the prosecution from using the prior robbery conviction for impeachment.

I want you to draft our brief in support of this pretrial motion. You should argue that the prosecution cannot satisfy the requirements of Franklin Rule of Evidence 609 concerning the use of prior convictions for impeachment. As you know, the Franklin Rules of Evidence are identical to the Federal Rules of Evidence. Do not address the admissibility of this evidence under any other evidentiary rule.

Follow the attached guidelines for writing persuasive briefs in trial courts. Draft only the "legal argument" section; others will draft the statement of facts.

Smith & Smith LLP

OFFICE MEMORANDUM

To: Associates
From: Marie Smith
Date: July 8, 2018
Re: Guidelines for Persuasive Briefs in Trial Courts

The following guidelines apply to briefs filed in support of motions in trial courts.

I. Captions

[omitted]

II. Statement of Facts

[omitted]

III. Legal Argument

Your legal argument should make your points clearly and succinctly, citing relevant authority for each legal proposition. Do not restate the facts as a whole at the beginning of your legal argument. Instead, integrate the facts into your legal argument in a way that makes the strongest case for our client.

Use headings to separate the sections of your argument. Your headings should not state abstract conclusions but should integrate the facts into legal propositions to make them more persuasive. An ineffective heading states only: “The court should not admit evidence of the victim’s character.” An effective heading states: “The court should refuse to admit evidence of the victim’s character for violence because the defendant has not raised a claim of self-defense.”

In the body of your argument, analyze applicable legal authority and persuasively argue how both the facts and the law support our client’s position. Supporting authority should be emphasized, but contrary authority should also be cited, addressed in the argument, and explained or distinguished.

Do not assume that we will have an opportunity to submit a reply brief. Anticipate the other party’s arguments and respond to them in the body of your argument. Structure your argument in such a way as to highlight your argument’s strengths and minimize its weaknesses.

Transcript of Interview with Bryan Kilross
November 20, 2020

Att’y Smith: Bryan, tell me what happened.

Kilross: I was going downtown to pick up a woman I had started dating, Janice Malone, to go out for dinner. We were going to have some drinks before going out. I decided to buy a bottle of wine. The Pack ’N Go was on the way, so I stopped there.

Smith: Had you been there before?

Kilross: Yes, the day before, for some beer. The guy behind the counter kept watching me and wasn’t very friendly. But that didn’t bother me at the time.

Smith: What time did you go to the Pack ’N Go on the next day?

Kilross: I was supposed to get to Janice’s place at 6:30, so probably a little after 6 p.m.

Smith: What happened when you went in?

Kilross: I went over to the wine section and spent some time deciding what to get. I got some red wine that I’d heard about and wanted to check out. The same guy was working behind the counter, giving me the same nasty look. He carded me, which was fine, and I paid and left.

Smith: Where did you go?

Kilross: I was heading to Janice’s apartment building when she called and said that she had to cancel. She said that she had heard some bad news from her parents, who needed her to come home right away. I guess they live about three hours away, in Columbia City, so she had to leave then. I told her to call me when she got back.

Smith: And then?

Kilross: I wasn’t sure what to do. I didn’t want to go out on my own, but I didn’t feel like going home. So I just drove around for a while.

Smith: Why didn’t you go straight home?

Kilross: I wanted to cool down. I had been looking forward to being with Janice and felt like she had just blown me off. It turns out she was telling the truth, but I didn’t know that then.

Smith: Where did you go?

Kilross: I don’t really remember. I know I drove through downtown, then out into the countryside for maybe an hour. Then I came home, around 8 p.m.

Smith: What happened when you got home?

Kilross: I was at my front door when two police officers came up behind me. They asked if they could come in and said they had some questions. I told them yes. They asked whether I had gone to the Pack 'N Go earlier and I said yes. One of them got a call and stepped outside. When she came back in, she arrested me for robbing the liquor store. They cuffed me, took me downstairs, and then drove me to the police station.

Smith: And then?

Kilross: They put me in a room. After a while, a detective came in, gave me the Miranda warnings, and started questioning me. He asked me why I had gone back to the store, where I had put the money, and where I had stashed the gun; he thought I had robbed the place. I kept telling him what had happened, but he didn't believe me. He kept talking about my old conviction. Eventually, I shut up and called your number. I was glad you answered.

Smith: After you called, what happened?

Kilross: Not much, until the lineup, which you saw.

Smith: Yes, the clerk from the Pack 'N Go identified you. We'll be getting copies of his statement soon. Let me ask you, were there any other people in the Pack 'N Go when you bought that wine?

Kilross: No.

Smith: Did you see anyone else when you left?

Kilross: No.

Smith: What were you wearing that night?

Kilross: Jeans, a jean jacket, a T-shirt. I think a wool knit hat: it was cold.

Smith: All right. Now, tell me about your old conviction.

Kilross: Eight years ago, I pled guilty to robbing a convenience store with a friend of mine. It was a stupid thing to do, but I didn't know any better. I confessed as soon as I was caught, and my lawyer got me six months in jail and a year on probation. My friend was arrested a few days later and he also pled guilty.

Smith: Can you tell me what you did?

Kilross: Not much to tell. I drove, and we parked in front of the convenience store, put on ski masks, and went inside. My friend pretended to have a gun in his jacket while I held

out a bag for the store clerk to put the money in. He gave us the money and we left. Apparently the parking lot video camera recorded my license plate, and the police found me later that night. Like I said, it was stupid to do it at all.

Smith: Since you got off probation, what has happened?

Kilross: I've stayed out of trouble. It was hard finding a job at first, but then I got work at a warehouse, loading and unloading trucks. I worked my way up to shift supervisor. I'll lose that job if I get convicted again.

Smith: Any other trouble with the law?

Kilross: Two speeding tickets. I pled guilty to both and paid the fines.

Smith: Okay. I see that you posted bail. . . .

* * *

Smith & Smith LLP

FILE MEMORANDUM

From: Adrienne Burns, Investigator
Date: January 29, 2021
Re: State v. Kilross, Case No. 2020 CF 702: Summary of Evidence

This memorandum summarizes the evidence that the district attorney's office has disclosed to us and the information that I have acquired through my investigation.

Statement of Benjamin Grier: Grier is the store clerk who was on duty the night of the robbery at the Pack 'N Go. He stated that at about 6 p.m. that night, he saw a man who he recognized as Bryan Kilross enter the store. He recognized Kilross because Kilross had bought beer at the same store the previous day. He stated that Kilross went to the wine section and lingered for a few minutes before selecting a bottle. Grier asked Kilross for ID, which he gave. Kilross paid and then left.

According to Grier, about 15 minutes later, a man came into the store wearing the same clothes as Kilross: jeans and a buttoned jean jacket. The man had a stocking pulled over his head and held a gun. He asked Grier for the money in the cash register, which Grier gave him. Grier said he was pretty sure it was the same guy who had just bought the wine because he looked and sounded the same. Then the man left. Grier didn't see him drive away. Grier called the police and gave them Kilross's name, which he remembered from the ID.

Lineup: The police brought Grier in to view a lineup later that night. Grier identified Kilross as the robber with no hesitation.

Store Video: The police have two video feeds from the store, one from the interior and one from the parking lot. The interior video shows the back of a man matching Kilross's description bringing something to the counter at 6:12 p.m. This man has a hat on. The clerk appears to ask for ID, which the buyer offers. At no time is Kilross's face visible.

The interior video also shows another man approaching the counter at 6:24 p.m., with similar pants and jacket to the first, but with a stocking over his head and what appears to be a weapon. The events that follow match Grier's statement. At no time is this man's face visible.

The parking lot video does not show either Kilross or the other man driving into the lot, entering the store, or driving away.

Statement of Janice Malone: In my interview with her, Ms. Malone confirmed that she and Kilross were set to meet at her apartment at 6:30 p.m. At 5:45 that night, Ms. Malone received news from her parents and decided she had to leave to go visit them immediately. She stated that she called Kilross well before 6:30 to let him know. She did not remember the time of the call. She did not have further contact with him that night.

Prior Conviction: The police file contains a copy of the indictment and a transcript of the hearing on Kilross's guilty plea to the felony of robbery in 2013.

**STATE OF FRANKLIN
DISTRICT COURT OF MERCIA COUNTY**

State of Franklin,

Plaintiff,

v.

Case No. 2013 CF 427

Bryan Kilross,

Defendant.

INDICTMENT

The Grand Jury of Mercia County, State of Franklin, charges that on or about May 30, 2013, Bryan Kilross committed the felony of robbery under Franklin Criminal Code § 29. The Grand Jury more specifically states as follows:

1. That on or about that date, Bryan Kilross did take the property of the Quik Pantry convenience store located at 1507 Perimeter Drive, Franklin City, Franklin.

2. With the intent to commit theft, Bryan Kilross used force, or used intimidation, threat, or coercion, or placed employees of the Quik Pantry in fear of immediate serious bodily injury to themselves.

Wherefore, Bryan Kilross did act against the peace and dignity of the State of Franklin.

Dated: June 26, 2013



Glen Hodas
District Attorney
Mercia County
State of Franklin

A TRUE BILL;



Jean Schmidt
Presiding Juror of Grand Jury
Mercia County

**Excerpt from Hearing on Plea Agreement of Bryan Kilross, Case No. 2013 CF 427
July 17, 2013**

...

Court: Mr. Kilross, please describe what happened.

Kilross: Yes, sir. Dave and I drove to the Quik Pantry convenience store in my car. We parked in front of the store. Dave had a toy gun, which he put in his jacket pocket. We put on ski masks, because we thought that if we had the masks on, no one would recognize us and we wouldn't get caught. When we went into the store, Dave pointed the toy gun through his jacket pocket at the clerk and asked for all the money in the register. Dave said, "I have a gun." I held open a paper bag while the clerk put all the bills into it. When we had the money, we ran out of the store, got in the car, and drove away.

Court: Anything else, Mr. Kilross?

Kilross: No, sir. That's what happened.

Court: Do you have any other statement you want to make?

Kilross: Yes, sir. I am really sorry that I did this. I know that it was wrong and that I should not have done it. Also, I want the court to know that all the money was returned to the store.

Court: Is the state satisfied?

The State: Yes, your honor. . . .

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Excerpts from Franklin Criminal Code and Franklin Rules of Evidence

Franklin Criminal Code § 25 Theft

A person commits the offense of theft when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated.

...

Franklin Criminal Code § 29 Robbery

(a) A person commits the offense of robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another

(1) by use of force;

(2) by intimidation, by the use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another; or

(3) by sudden snatching.

(b) A person convicted of the offense of robbery shall be punished by imprisonment for not less than 1 nor more than 20 years. Robbery under this section is a felony.

Franklin Rules of Evidence

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that was punishable by death or by imprisonment for more than one year, the evidence

...

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

State v. Thorpe
Franklin Supreme Court (2012)

This case requires us to determine whether a prior conviction for robbery can be used to impeach a witness under Franklin Rule of Evidence 609(a)(2). This is a case of first impression in Franklin. Courts in other jurisdictions have reached contradictory conclusions on this question.

Jerome Thorpe robbed three different stores, on three separate days in July 2008. Thorpe pled guilty to two of these robberies, both of which were unarmed. In the third robbery, Thorpe and an accomplice presented a threatening note to a cashier; the accomplice had a pistol, which he pointed at the cashier. Thorpe contested the charge of aiding and abetting a robbery, claiming that he did not know that his accomplice had a gun.

Before trial, Thorpe indicated that he would testify and filed a pretrial motion to exclude the use of his guilty pleas to the two unarmed robberies for impeachment under Rule 609(a)(2). The trial court denied the motion. Thorpe testified and was impeached with the two guilty pleas. Thorpe was convicted, and the court of appeal affirmed. We review for abuse of discretion.

In relevant part, Rule 609(a)(2) provides generally that evidence of a prior conviction of a crime for which at least one element required proof of dishonesty or false statement, whether a felony or misdemeanor, may be used for impeachment, regardless of the severity of the offense. If a prior conviction falls within this category, the proponent of this impeachment evidence has an absolute right to use it for that purpose.

“Dishonesty” has at least two meanings. Broadly, the word connotes a breach of trust, including a “lack of . . . probity or integrity in principle,” “lack of fairness,” or a “disposition to betray.” Robbery may fit within this broad definition. More narrowly, “dishonesty” is defined as “deceitful behavior, or a disposition to lie, cheat, or defraud.” Robbery does not fit this definition because it is a crime of violent and not deceitful taking.

The Franklin Rules of Evidence are identical to the Federal Rules of Evidence. Given this, we have held that our courts may use federal legislative history as persuasive authority in interpreting the Franklin Rules. We find that the federal drafters intended the narrower definition of the term “dishonesty or false statement” [citations omitted]. Congress intended Rule 609(a)(2) to apply only to crimes that require proof of an element of misrepresentation or deceit, such as perjury, false statement, or criminal fraud, any of which bear directly on a witness’s propensity to testify truthfully.

Franklin’s definition of robbery includes no requirement that the prosecution prove an act of dishonesty or false statement to obtain a conviction. *See* FR. CRIM. CODE § 29. Moreover, the definition of robbery references “theft” as a predicate offense. The crime of theft may involve dishonesty or false statement. But deception is not an essential element of theft; the definition in Franklin Criminal Code § 25 also does not require such proof. Therefore, we hold that the crime of robbery is not a crime with an element requiring proof of dishonesty or false statement that could automatically be used to impeach a witness under Rule 609(a)(2).

However, our inquiry does not end there. The State contends that recent revisions to the Federal and Franklin Rules of Evidence permit the court to look beyond statutory definitions to the factual circumstances underlying the prior offenses. We agree, but only up to a point. A 2007 amendment to Franklin Rule 609(a)(2) mirrors an identical 2006 amendment to the Federal Rules. This amendment permits use of a prior conviction for impeachment if facts in the record establish an act of dishonesty or false statement.

The Federal Advisory Committee Note to the 2006 amendment offers clear guidance on this new language:

Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute, . . . a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the fact-finder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. But the amendment does not contemplate a “mini-trial” in which the court plumbs the record of the previous proceeding. . . .

In the case at hand, the prosecution can point to nothing in the record that establishes that Thorpe engaged in any act of deception or false statement when committing the two unarmed robberies. The prosecution could have done so by relying either on the language of its indictment or on facts admitted by the witness during the hearing on his guilty pleas, but it did not.

By way of example, in *State v. Frederick* (Fr. Ct. App. 2008), the defendant was charged with theft. The prosecution sought to introduce the defendant’s plea to an earlier shoplifting case. At her plea hearing in the shoplifting case, the defendant admitted that she had placed unpurchased items in a backpack and then lied about its contents to a security officer. We held that the prosecution had sufficiently proved acts of deception to use the prior crime to impeach the defendant under Rule 609. By contrast, in this case, the prosecution offered no such proof. In admitting the evidence, the trial court abused its discretion.

Reversed.

State v. Hartwell
Franklin Court of Appeal (2014)

Michael Hartwell was convicted of being a felon in possession of a firearm under the Franklin Criminal Code. In this appeal, Hartwell contends that the trial court erred in admitting evidence of a prior conviction for firearms possession to impeach his testimony at trial.

Hartwell was arrested after a police officer allegedly saw him pull a weapon out of his pocket and hold it behind his back while he and Tim Wagner walked past the officer's cruiser. The officer jumped out of the car and advised Hartwell and Wagner to drop their weapons. The officer testified that he saw a gun drop to the ground between Wagner's legs. Hartwell was arrested. As he was taken into custody, Hartwell exclaimed, "That's not my gun. You didn't see me with a gun." Later, a records search revealed that Hartwell was a convicted felon who was not permitted to possess a firearm.

At trial, Hartwell sought to prove that Wagner had possessed the gun and sought to impeach the testimony of the arresting officer. Hartwell also took the stand to testify that he had pulled his cell phone from his pocket, not a gun. Relying on Franklin Rule of Evidence 609(a)(1)(B), the trial court permitted the State to impeach Hartwell with a certified copy of a six-year-old federal conviction for possession of a firearm by a convicted felon, a federal offense identical to the one for which Hartwell was on trial. Hartwell was convicted.

Rule 609 permits evidence of a prior felony conviction to be offered to impeach a testifying witness. However, when the testifying witness is also the defendant in a criminal trial, the prior conviction is admitted only "if the probative value of the evidence outweighs its prejudicial effect to that defendant." FR. RULE OF EVID. 609(a)(1)(B). This reflects a heightened balancing test and creates a preference for exclusion. We review evidentiary decisions for abuse of discretion.

We consider four factors when weighing the probative value against the prejudicial effect under this heightened test: (1) the nature of the prior crime involved, (2) when the conviction occurred, (3) the importance of the defendant's testimony to the case, and (4) the importance of the credibility of the defendant.

(1) The nature of the prior crime: In evaluating the "nature of the prior crime," courts should consider the impeachment value of the prior conviction and its similarity to the charged crime. "Impeachment value" refers to how probative the prior conviction is of the witness's character for truthfulness. Crimes of violence generally have lower probative value in weighing

credibility. By contrast, crimes that by their nature imply some dishonesty have much higher impeachment value. In this case, Hartwell's prior conviction for possession of a firearm does not imply dishonesty and thus has relatively low probative value as impeachment.

As to "similarity," the more similar the prior crime is to the present charge, the stronger the grounds for exclusion. Admission of evidence of a similar offense can lead the jury to draw the impermissible inference that, because the defendant was convicted before, it is more likely that he committed the present offense. As stated in the Advisory Committee Notes to Rule 609, "the danger that prior convictions will be misused as character evidence is particularly acute when the defendant is impeached." Given this potential prejudice, evidence of similar offenses for impeachment under Rule 609 should be admitted sparingly if at all. Hartwell's prior conviction is for a crime virtually identical to the one for which he was tried in this case, maximizing the risk of prejudice.

(2) The age of the prior conviction: The Franklin Rules presumptively exclude convictions more than 10 years old. But even for convictions less than 10 years old, the passage of time can reduce the conviction's probative value, especially where other circumstances suggest a changed character. A prior conviction may have less probative value when the defendant has maintained a spotless record since the earlier conviction. Here, the prior conviction is six years old, and Hartwell has incurred no further convictions during that time.

(3) The importance of the defendant's testimony: The third factor focuses on the importance of the defendant's testimony to his defense at trial. If the defendant's only rebuttal comes from his own testimony, the court should consider whether impeachment with a prior conviction would prevent the defendant from taking the stand on his own behalf, severely undercutting his ability to present a defense. By contrast, if the defendant can establish his defense with evidence other than his own testimony, impeaching with a prior conviction would have less of an impact on the defendant's case. Wagner, Hartwell's companion, chose not to testify, exercising his Fifth Amendment right against self-incrimination. Thus, Hartwell had only his own testimony to support his theory at trial.

(4) The importance of the defendant's credibility: Where the defendant's credibility is the focus of the trial, the significance of admitting a prior conviction is heightened. But if the defendant testifies to unimportant matters or to uncontested facts, his credibility matters less and the need to impeach with prior convictions is lessened.

Hartwell's credibility is a central issue in the case, as is that of the arresting officer. But all other factors weigh *against* use of the prior conviction. The probative value of the prior conviction for attacking the defendant's credibility is low and is lessened still further by its age (six years) and the defendant's spotless record since that time. Further, the fact that the past conviction is virtually identical to the present offense creates a heightened risk of prejudice, one that has a significant impact on the central theory of the defendant's case.

We hold that the State has failed to meet its burden of establishing that the probative value of the prior offense for impeachment purposes outweighs its prejudicial impact. Thus, the trial court abused its discretion in admitting this evidence.

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.

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.

Do not include your actual name anywhere in the work product required by the task memorandum.

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.

To: Marie Smith

From: Examinee

Date: February 23, 2021

Re: Brief in State v. Kilross

The Evidence of Kilross's Prior Robbery Conviction Should Not Be Admitted Because it Fails to Satisfy Either Exception Under Rule 609.

A. Evidence of the Prior Conviction Should Not Be Admitted Under 609(a)(1)(B) Because its Probative Value Does Not Outweigh its Prejudicial Effect

Rule 609 permits evidence of a prior felony conviction to be offered to impeach a testifying witness. When the witness is also the defendant in a criminal trial, the prior conviction is admitted only when the probative value outweighs its prejudicial effect to that defendant. "This reflects a heightened balancing test and creates a preference for exclusion." *Hartwell*. Courts consider four factors when weighing the probative value against the prejudicial effect under this heightened test: 1) the nature of the prior crime involved; 2) when the conviction occurred; 3) the importance of the defendant's testimony in the case; and 4) the importance of the credibility of the defendant. *Hartwell*.

1. The prior robbery and charged crime are extremely similar and likely to cause prejudice and the prior robbery does not tend to show Kilross's dishonesty.

Courts consider the impeachment value and similarity to the charged crime. *Hartwell*. Crimes of violence generally have lower probative value in weighing credibility. *Hartwell*. Here, the prior robbery is a crime of violence committed by concealing Mr. Kilross and his co-conspirator's faces and demanding money from the cashier. The codefendant claimed to have a gun. This is a classic robbery by threat of violence. See *Thorpe* for discussion of robbery as a not inherently dishonest crime; see discussion below for discussion of why this particular robbery was not one characterized by dishonesty or false statements. Thus, this crime has a relatively low probative value as impeachment because it does not imply dishonesty.

Further, this crime is extremely similar to the charged crime, which is strong grounds for exclusion. *Hartwell*. The danger that prior convictions will be misused as character evidence is particularly acute when the defendant is impeached. *Hartwell citing Advisory Committee Notes*.

These crimes are nearly identical. Each is a charge of robbery of a convenience store. Thus, this factor counsels strongly against admitting the prior conviction.

2. The prior conviction is over eight years old and Mr. Kilross has had a good record since that time.

Convictions over 10 years old are presumptively excluded. But the passage of time for convictions under 10 years may reduce the probative value, especially when circumstances suggest a changed character. *Id.* In *Hartwell*, the court excluded a prior conviction that was six years old when the defendant had incurred no further convictions during that time. Here, the offense in question is eight years old, longer than the six in *Hartwell*. Further, Kilross has not had any real legal trouble since his conviction. He has held a steady job and has worked his way up to supervisor. While he has had two speeding tickets, he promptly plead guilty and paid fines on both. Those offenses do not contradict the evidence that he has changed, moved on from his past ways, and is now law-abiding. Many people receive speeding tickets while driving who are not criminals. Further, speeding tickets are not crimes of dishonesty and have nothing to do with committing robbery. Thus, The age of conviction and Kilross's behavior since suggest the court should exclude the prior conviction.

3. The importance of the defendant's testimony

In *Hartwell*, the court considered that the defendant's only rebuttal came from his own testimony and held that the court should consider whether impeachment with a prior conviction would prevent the defendant from taking the stand on his own behalf and severely undercut his ability to present a defense. If the defendant had other means to establish his defense, the prior conviction would have less of an impact on the defendant's case. Here, like the defendant in *Hartwell*, Kilross has only his own statement to confirm where he was when the robbery occurred. The prosecution's case rests on the testimony of a single witness, the liquor store clerk. Thus, an impeachment by prior conviction might hamper Kilross's only available defense in this case. Like in *Hartwell*, this counsels against admitting the prior conviction.

4. The importance of the defendant's credibility

Where the defendant's credibility is the focus of the trial, the significance of admitting prior conviction is heightened. But where the defendant testifies to unimportant matters or uncontested facts, credibility matters less. *Hartwell*. Here, Kilross's testimony would be the focus of his defense and the only rebuttal against the clerk's testimony. Thus, his credibility is admittedly of great concern. But like in *Hartwell*, other factors weight *against* use of the prior conviction. Further, the prosecution would not be prohibited from introducing other valid character evidence to impeach Mr. Kilross should it exist. The probative value of the conviction

is low, because it is not dishonest and it is identical to the current charge. Further, it is an eight year old charge from which the defendant has moved on and into a productive life. These factors show that the probative value of the prior offense does not outweigh its prejudicial impact.

B. The Evidence Should Not Be Admitted under 609(a)(2) because its Elements Did Not Require Proving or Admitting a Dishonest Act or False Statement, and Kilross's Prior Conviction Did Not Involve a Dishonest Act or False Statement

Rule 609(a)(2) provides that evidence of a prior conviction for which at least one element required proof of dishonesty or false statement, whether a felony or misdemeanor, may be used for impeachment, regardless of the severity of the offense. *State v. Thorpe*. "Dishonesty" means a breach of trust, lack of probity or integrity in principle, lack of fairness, or disposition to betray. *Thorpe*. "Robbery does not fit this definition because it is a crime of violent and not deceitful taking". *Thorpe*. Robbery, however, references "theft" as a predicate offense, and the crime of theft may involve dishonesty or false statement. *Thorpe*. But deception is not an "essential" element of theft, and thereby robbery. *Thorpe*. The *Thorpe* court held that robbery does not, by its definition, require as an element proof of dishonesty or false statement that can automatically be used to impeach under Rule 609(a)(2). Here, Mr. Kilross's prior felony conviction is for robbery. Under *Thorpe*, it may not automatically be used to impeach because it does not necessarily, by its terms, require an dishonesty or false statement.

A court may look--to a point--beyond statutory definitions to the factual circumstances underlying a prior offense. *Thorpe*. The *Thorpe* court, referring to the Advisory Committee Note to the 2006 amendment to rule 609, states that "[w]here the deceitful nature of the crime is not apparent from the statute, . . . a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions" to show that dishonesty or false statement was required for the conviction.

Here, the court can thus look to the indictment and Kilross's admissions at his change of plea hearing to determine whether facts in the record establish an act of dishonesty or false statement. *Thorpe*. The indictment makes no mention of a specific act of dishonesty or false statement. While it references an "intent to commit theft," the *Thorpe* court made clear that dishonesty or false statements are not an essential element of theft, and that thus, without something more, "theft" is not enough to automatically qualify a conviction under Rule 609(a)(2). In his plea agreement, Mr. Kilross stated that he went to the convenience store that was later robbed with his friend. The friend had a toy gun, which he put in his jacket pocket. The two put on ski masks and after entering the store, Mr. Kilross's friend pointed the gun at the clerk and asked for all the money in the register. The friend stated that he had a gun. The two left. Mr.

Kilross also stated that all of the money taken was returned to the store.

These facts are not sufficient to show that the prior robbery conviction required an act of dishonesty or false statement. Mr. Kilross did not lie or misrepresent anything to the store owner. He concealed his face, and his friend pointed a fake gun at the clerk and stated that it was "a gun." These facts simply do not evidence "deceitful behavior, or a disposition to lie, cheat, or defraud" as required by *Thorpe*. These facts show a classic violent robbery: individuals concealing their identity to threaten with force or intimidation to unlawfully take the property of another. While it could be argued that Mr. Kilross's co-conspirator was deceptive when he stated he had a gun, that argument misunderstands the co-defendant's purpose in stating he had a gun. He was not trying to deceive or swindle money from the cashier--he was attempting to steal by force. Further, the statement did not need to be attributed to Mr. Kilross to sustain the conviction, and thus, even if it were deceitful or a false statement under the meaning of 609, it would not apply to Mr. Kilross. Finally, merely concealing one's identity to commit crimes ought not be considered deceitful or a false statement--otherwise so many violent crimes would be considered deceitful that the 609(a)(2) requirements would hardly be necessary.

This case is distinguishable from *State v. Frederick*, where the prosecution proved acts of deception by showing the defendant admitted to placing unpurchased items in a backpack and then lying about the contents to a security officer. Unlike Mr. Kilross, that defendant did not attempt to take by force: she specifically attempted to commit theft via lying to a security guard. Mr. Kilross attempted to take by threat of force and intimidation, not by false statements or deception. While his coconspirator did falsely claim to have a gun, that claim was made for the purpose of intimidating and threatening force against the security guard, not to deceive him or take property by deceit. Thus, even if that false statement can be attributed to Mr. Kilross, it does not bring this conviction into the realm of deceit and false statements.

The element requiring dishonesty under Franklin's theft statute is that the perpetrator "unlawfully appropriates any property" while in "lawful possession" of that property. That statute does not contemplate the crime Mr. Kilross was previously convicted of. Two men donning masks to conceal their identities and forcefully taking property from a cashier is not an unlawful appropriation under the theft statute. Even if Mr. Kilross's actions were deceitful because he concealed his identity--which as discussed above, they were not--it was not the deceit contemplated or intended by Franklin's robbery statute by way of its theft statute. Finally, the facts show that Mr. Kilross was an exceptionally *honest* robber, if anything: he apologized to the sentencing court and expressed his remorse, and expressed that the money had been returned.

Mr. Kilross's prior conviction did not involve dishonest or false statements. Thus, it should not be admitted under 609(a)(2).

MULTISTATE ESSAY EXAMINATION DIRECTIONS
February 2021

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.

You may answer the questions in any order you wish. Do not answer more than one question in each answer booklet. If you make a mistake or wish to revise your answer, simply draw a line through the material you wish to delete.

Read each fact situation very carefully and do not assume facts that are not given in the question. Do not assume that each question covers only a single area of the law; some of the questions may cover more than one of the areas you are responsible for knowing.

Demonstrate your ability to reason and analyze. Each of your answers should show an understanding of the facts, a recognition of the issues included, a knowledge of the applicable principles of law, and the reasoning by which you arrive at your conclusions. The value of your answer depends not as much upon your conclusions as upon the presence and quality of the elements mentioned above.

Clarity and conciseness are important, but make your answer complete. Do not volunteer irrelevant or immaterial information.

According to Regulation 3 of the South Dakota Regulations of the Board of Bar Examiners, "The MEE will test both general and South Dakota principles of law."

February 2021

MEE Question 1

A woman owns and operates a food-truck business. Business has been good. The woman asked a man she knew to work with her. "It would be great if you'd help with my food-truck business. There is just not enough time in the day. I need someone to do the early morning produce shopping for me at the farmers' market. Are you interested?"

The man has a job as a night watchman and had been looking for a way to make extra money. He answered, "Sure, I'm interested. Text me at night what type of produce you want me to buy in the morning when I get off work. The market opens just as I get off my night shift. I could stop by the market with my car and then drop off the purchases at your truck." He then asked, "And how much would I be paid?"

The woman responded, "Texting works for me. I'll go to the market with you the first few times to give you a general idea of what I'm looking for. But then you'd be on your own, making the choices of which vendors to use and which produce to buy. Please use your own credit card to make the purchases, and I'll reimburse you."

Then the woman paused and continued, "As for pay, I can afford to pay you only \$20 per daily delivery. I know that's a bit low, but the business doesn't have the cash flow yet. So, my offer to you is that, in addition to \$20 per day, I will give you 10% of the food truck's profits."

The man thought for a bit and said, "Okay. It's a deal." They shook hands.

For the first few months, the arrangement worked well. The woman sent texts to the man each night indicating the type of produce to buy, and the man selected and purchased the requested produce in the morning from vendors he selected. He then dropped the produce off at the woman's food truck. The man paid the vendors with his own credit card and later was reimbursed by the woman. Except for the man's purchase and delivery of the produce, the woman did all the work related to the food-truck business.

One morning, while parking at the market, the man negligently ran his car into a farmer's stall, causing extensive damage. The man truthfully told the farmer that, although the accident was the man's fault, he had no money to pay for the farmer's damage and his automobile insurance had lapsed.

The farmer wrote the woman a letter demanding that she pay him for the losses caused by the man's negligence. The woman has asked her attorney what legal relationship she has with the man and what the liability implications would be in each case.

1. (a) Are the woman and the man partners in the food-truck business? Explain.
- (b) Assuming that the woman and the man are partners in the food-truck business, would the woman be liable to the farmer for the damage proximately caused by the man's negligence? Explain.

2.
 - (a) Is the man an employee of the woman? Explain.
 - (b) Assuming that the man is an employee of the woman, would the woman be vicariously liable to the farmer for the damage proximately caused by the man's negligence? Explain.
3.
 - (a) Is the man an independent contractor for the woman? Explain.
 - (b) Assuming that the man is an independent contractor for the woman, would the woman be vicariously liable to the farmer for the damage proximately caused by the man's negligence? Explain.

1.a. Partners in a business, or a partnership is defined as two or more people holding out or intending to open a business for profit. Further, one of the hallmarks of partnership is the sharing of profits and losses of the business and generally partners are not entitled to a salary or remuneration for their general activities in furtherance of the business. The parties here have not expressed an intent to partner in the business. The woman has offered to pay driver 20 dollars per day and to offered 10% of profits as an inducement to accept the delivery job offer. While the driver is accepting a 10% share of the profits as a partner might, the intent of the agreement looks more like the 10% is designed to pay the driver for his work - which would make this an employment arrangement or agency relationship for the woman rather than a partnership. Partners need not contribute proportionally to the business for partnership purposes, barring a partnership agreement that says otherwise. Here, the man only provided the supplies but contributed in no way to the operation of the food truck in any other way. In summary, without an intent to partner, there can be no partnership. Their relationship appears to be one of an independent contractor/employer. The manner in which the goods are bought and the payment for, are left up to the driver. The driver is paid a set fee for his work, regardless of how much produce is purchased.

1b. A person is always liable for their own torts, so here, the driver would be liable. But the woman could be jointly liable as well. Assuming the driver and woman are partners, the partnership would also be liable to indemnify the partner against liabilities from partnership business. Here the tort was committed during the drivers scope of work related to the partnership. The loss could be added to the capital account of the driver, but in the end, the woman would be liable for partnership debts in a manner equal to the partnership profits. So if she was paid 90% of the profits, so too would she be responsible for 90% of the partnership debts.

2.a. The man appears not an employee of the woman. He was hired to complete a task daily, and the manner in which he it is done is left to his discretion. He selected the vendors he saw fit to do business with. There was minimal training provided by woman and the man used his own vehicle and credit card to procure the produce. No benefits were provided.

2b. Assuming he is an employee, the woman would be vicariously liable to the farmer for the accident. The tort occurred while the driver was conducting employer business and not on a frolic or detour. It was a tort one would expect while driving a car for an employer, rather than a fist fight battery or some other type of tort.

3a. The man appears to be an independent contractor of the woman. An employer controls the manner in which work is done, whereas an independent contractor (IC) is judged on the results with the manner being left to the IC's discretion. While it is true that more skilled or specialized workers tend to be employed in IC capacities, here the man's work is focused solely on delivering supplies to the woman and he plays no other part in the business itself.

3b. As an independent contractor (IC), employers are generally not liable for the torts of their IC's. This is the advantage to employers in using IC's rather than employees. The woman would not be vicariously liable.

February 2021

MEE Question 2

A man was driving his truck on a divided highway in State B when the truck collided with a car driven by a woman. As a result of the collision, the man lost control of his truck, which skidded off the road into a deep ravine. The woman's car was knocked into the highway median and rolled over several times before coming to a stop. The truck and its cargo were damaged beyond repair, but the man was not injured. The woman, on the other hand, suffered serious injuries. A passenger in the woman's car was also seriously injured.

Two lawsuits resulted from the collision.

In the first lawsuit, the man, a citizen of State B, sued the woman, a citizen of State A, in the United States District Court for the District of State A. The man alleged that the woman had caused the accident by negligently changing lanes while he was attempting to pass her and that he, the truck driver, had exercised due care and caution at all times. The man's complaint sought damages of \$98,000—the value of the truck, trailer, and cargo. The woman answered the complaint, denying that she had driven negligently and asserting that the man had caused the accident by driving well above the speed limit and failing to look out for other vehicles on the road. The woman raised no other claims or defenses in her answer.

Following a bench trial in which both sides offered evidence as to the cause of the accident and the actions of each party, the judge entered judgment for the woman. The judge issued a short opinion finding, as a matter of fact, that "both the woman and the man operated their vehicles negligently" and that "both were at fault in causing the accident." The judge further correctly concluded, as a matter of law, that the contributory negligence law of State B applied. In addition, the judge concluded that the man could not recover because his negligence had contributed to the accident. The judgment was promptly entered denying all relief to the man and awarding costs to the woman. The man did not appeal, and the judgment became final three months ago.

One month ago, the woman and the passenger joined together in a second lawsuit. In this lawsuit they sued the man to recover damages for the personal injuries they had suffered in the accident as a result of his negligence. Like the woman, the passenger is a citizen of State A. This lawsuit was filed in the United States District Court for the District of State B. The woman and the passenger are each seeking damages well in excess of the \$75,000 diversity-jurisdiction threshold, and their claimed injuries warrant such damages. The man has filed an answer denying liability and raising several defenses including that the claims by the woman and the passenger are precluded by the earlier suit.

1. Do the Federal Rules of Civil Procedure permit the woman and the passenger to join their individual claims in a single lawsuit against the man? Explain.
2. Is the woman precluded from bringing her claim as a result of the judgment in her favor in the lawsuit brought by the man in federal court in State A? Explain.
3. Is the man precluded from denying that he was negligent with respect to the passenger as a result of the judgment against him in the lawsuit he brought against the woman in federal court in State A? Explain.

1. The FRCP allow the woman and her passenger to join their individual claims as a single lawsuit against the man.

The FRCP allow two plaintiffs to join claims against a single defendant in one lawsuit where the claims arise out of the same transaction or occurrence or involve a common nucleus of operative fact. Further, each plaintiff must independently satisfy the diversity requirement, meaning the plaintiff must be diverse from the defendant(s) and must assert claims in excess of \$75,000. Here, the claims asserted arise out of the same car accident that the woman and passenger were in with the defendant. Each is diverse from the defendant, as both are citizens of state A and the man is a citizen of state B. Further, each seek damages well in excess of \$75,000. Thus, the two may join their claims as a single lawsuit against the man.

2. The woman is precluded from bringing her claim as a result of the judgment in her favor in state A.

A claim is precluded when it is substantially related to and based out of the same transaction or occurrence as a claim previously brought on which final judgment was rendered. Both parties must be the same parties as in the previous lawsuit and the party against whom claim preclusion is asserted must have had a fair opportunity to litigate the claim. Claim preclusion seeks to advance judicial economy and save judicial resources, and to prevent parties from having to re-litigate the same claims. A mandatory counterclaim is one where it arises from the same transaction or occurrence as the plaintiff's claim and should be litigated in the same proceeding. Here, the man filed suit against the woman alleging that she had driven negligently and caused the accident. She asserted the defense of contributory negligence but it does not appear she brought a counterclaim against him for his negligence or seeking damages. Her claim arises out of the same events and occurrences as his--the crash where she was injured. She had an opportunity to file a mandatory counterclaim against him and did not do so. Thus, she waived the claim and is precluded from now bringing it.

3. The man is likely precluded from denying his negligence with respect to the passenger.

Issue preclusion occurs when an issue was actually litigated, the party against whom it is being used was a party to the proceeding where it was litigated and had a fair chance to litigate it, the

issue was essential to the judgment, and a final judgment was rendered. Here, the man litigated the issue of his negligence in the proceeding against the woman. The court concluded that the man's negligence contributed to the accident. This was essential to the judgment because it determined the issue of contributory negligence that ended the lawsuit. Previously, issue preclusion applied only between two parties who were actually parties to the lawsuit. However, modern courts have expanded the rule to allow issue preclusion to be used against a party that had the opportunity to litigate it by a party who was not in the previous lawsuit, as here, with the passenger. Courts apply issue preclusion against parties who were parties to previous lawsuits and actually litigated the issue, but not against those who were not. Here, the issue preclusion is against the man, who was a party to the previous lawsuit and actually litigated the issue of his negligence and that issue was essential to the judgment. Non-mutual issue preclusion may preclude the man from arguing he was not negligent against the woman, because a previous court found differently and because the State B court would have to give credit to the judgment in state A. Courts are hesitant, however, to allow non-mutual issue preclusion, particularly as here, where the previous plaintiff is now a defendant. Further, the man's motives in the previous suit--seeking a judgment against the woman--may be slightly different than those in this suit--protecting himself from liability against the passenger. Thus, a court may decline to allow the passenger to assert issue preclusion against the man. The man certainly cannot assert issue preclusion against the passenger (precluding her from litigating the woman's negligence), because she was not a party to the previous lawsuit.

February 2021

MEE Question 3

KeyCo, a company that manufactures keys, has had significant cash flow problems as a result of market trends away from keys and toward electronic locks. Accordingly, last year KeyCo borrowed money on three occasions.

On February 1, KeyCo borrowed \$200,000 from Firstbank. Pursuant to an agreement signed by both parties, KeyCo promised to repay the loan within two years and granted Firstbank a security interest in "all of KeyCo's assets" to secure its repayment obligation. On the same day, Firstbank filed a properly completed financing statement in the appropriate filing office, listing KeyCo as the debtor and indicating the collateral as "all of KeyCo's assets."

On April 1, KeyCo borrowed \$400,000 from Secondbank. Pursuant to an agreement signed by both parties, KeyCo promised to repay the loan within four years and granted Secondbank a security interest in "all of KeyCo's equipment" to secure its repayment obligation.

On June 1, KeyCo borrowed \$600,000 from Thirdbank. Pursuant to an agreement signed by both parties, KeyCo promised to repay the loan within six years and granted Thirdbank a security interest in "all of KeyCo's equipment" to secure its repayment obligation. At the time of this transaction, Thirdbank knew about KeyCo's transactions with Firstbank and Secondbank as described above.

On August 1, Thirdbank filed a properly completed financing statement in the appropriate filing office, listing KeyCo as the debtor and indicating the collateral as "all of KeyCo's equipment."

On October 1, Supplier obtained a judgment against KeyCo for an unpaid debt and, in connection with that judgment, obtained a lien on KeyCo's key-manufacturing machine.

Except as described above, no financing statements have been filed that list KeyCo as the debtor.

KeyCo has defaulted on its obligations to Firstbank, Secondbank, and Thirdbank. Each of those banks, as well as Supplier, is asserting an interest in the key-manufacturing machine.

1. Which banks, if any, have enforceable security interests in the key-manufacturing machine? Explain.
2. Which banks, if any, have perfected security interests in the key-manufacturing machine? Explain.
3. What is the order of priority of the enforceable security interests and Supplier's lien on the key-manufacturing machine? Explain.

1. Banks with Enforceable Security Interest Against KeyCo

A. FirstBank

FirstBank would not have an enforceable security interest in KeyCo's key-manufacturing machine because their security interest never attached. If proper attachment does not occur, no enforceable security interest is created for the creditor against the debtor. A requirement for attachment is a properly executed security agreement, or contract to create a security interest. One of the sub-requirements for the security agreement is that it must contain a reasonable description of the property, or collateral, in which creditor holds a security interest. Plain language that helps clarify the specific collateral or the Article 9 categories of collateral are both sufficient to meet this standard. The phrase "all of KeyCo's assets" is not valid under Article 9 as it is too broad and does nothing to specify what the collateral actually is that FirstBank is trying to retain a security interest over. FirstBank therefore failed to execute a proper security agreement and subsequently failed to meet a requirement for proper attachment resulting in no enforceable security agreement against

B. SecondBank

Unlike FirstBank, SecondBank does hold an enforceable security interest in KeyCo's key-manufacturing machine. SecondBank met all the requirements of attachment by executing a proper, signed security agreement and exchanging value (the \$400,000 for the interest). Where FirstBank's security agreement failed in its identification of the collateral to hold a security interest in, SecondBank's succeeds. While "all of KeyCo's assets" is invalid, "all of KeyCo's equipment" has been held valid because a fact-finder could go to KeyCo's facilities and pick out all of their property falling under the Article 9 categorical definition of equipment which is the property used or able to be used for the operation of a business. It is clear that the key-manufacturing machine would clearly fall under the description of "all of KeyCo's equipment" because this machine would be used in the day-to-day operations of a key making company. SecondBank does have an enforceable security interest that has attached.

C. ThirdBank

Like SecondBank, ThirdBank also retains an enforceable security interest in KeyCo's key-manufacturing machine. Its security agreement was signed and contained the valid phrase "all of KeyCo's equipment" when identifying the collateral the security interest would be held in. The mere knowledge that ThirdBank had regarding FirstBank and SecondBank's previous

transactions does not bar ThirdBank from creating their own transaction and enforceable security interest in KeyCo's machine.

2. Banks with Perfected Security Interest Against KeyCo

A. FirstBank

FirstBank would not have a perfected security interest in KeyCo's key-manufacturing machine because although it filed a properly executed filing statement with the appropriate filing office (the Secretary of State for the applicable state), they had no security interest to perfect as it was invalid from inception as explained in Part 1. If FirstBank amends their security agreement with KeyCo they would be able to refile a filing statement and therefore perfect. While the phrase "all of KeyCo's assets" was invalid for the security agreement, it would be acceptable on the filing statement.

B. SecondBank

SecondBank does not have a perfected security interest against KeyCo's machine because the facts do not indicate that SecondBank ever executed or filed a filing statement with the appropriate Secretary of State.

C. ThirdBank

ThirdBank does have a perfected security interest against KeyCo's key-making machine because they properly created an enforceable security interest and then executed a proper filing statement with the applicable filing office (again Secretary of State of the applicable state). The fact that the filing statement was not filed until two months later has no bearing on ThirdBank's perfected security interest. Their filing statement will be good for 5 years or until a name change or move of collateral/debtor disrupts its enforceability.

3. Order of Priority of Enforceable Security Interest

The order of priority of the enforceable security interests in KeyCo's key-making machine would be (1) ThirdBank; (2) SecondBank; and (3) Supplier. As of now, under these facts, FirstBank has no security interest and is therefore not in the order of priority. ThirdBank would have first priority in the machine because not only did they create their security interest before SecondBank and the Supplier but they also held themselves out against and above other creditors by perfecting their security interest when executing the proper filing statement. SecondBank would likely come before the Supplier in the order of priority because they created their security interest first (April 1 compared to October 1) but Supplier may argue that their lien attached to the machine and must be resolved before another creditor can take its interest.

**February 2021
MEE Question 4**

Thirty years ago, a man purchased a 170-acre tract of farmland. The farmland was bordered on the east by a county road that connected to the main street of a small town where the man worked in the local feed store. On the west, the farmland was bordered by a state highway.

Immediately after acquiring the farmland, the man built and moved into a house on its easterly portion. He constructed a vehicle shed on the westerly portion of the farmland in which he stored farm tractors and some of his cars. He then built a 10-foot-wide east-west gravel road that stretched across the entire farmland connecting the county road to the state highway. This gravel road allowed the man to travel between his house and the vehicle shed and also to drive tractors and cars out of the shed and onto the county road. It additionally gave him two routes from his house to the small town. It took the man 15 minutes to drive to town using the county road; using the state highway, which resulted in a more circuitous trip, took 45 minutes.

After building the gravel road across the farmland, the man usually used the county road to drive to work, although occasionally he used the state highway. On weekends, however, when he wasn't working, he frequently used the state highway because it allowed him to easily reach other towns where he visited friends.

Two years ago, the man conveyed the westernmost 90 acres of the farmland, including the vehicle shed, to a woman who worked in the same feed store as the man. This 90-acre portion included the western portion of the gravel road that the man had constructed across the property. The deed conveying the westernmost 90 acres to the woman did not mention the gravel road, and the deed was not recorded. The woman built a house on the 90 acres and moved in. She used the gravel road across the man's land to access the county road when driving to work.

One year ago, the woman conveyed her 90 acres to a friend, who moved into the house the woman had built. The friend worked in the same small town as the man and the woman, and the friend also used the gravel road across the man's land to access the county road. The deed conveying the property to the friend stated that the woman was conveying to the friend the 90 acres, together with "the right to use the gravel road" crossing the adjacent 80 acres owned by the man to reach the county road. This woman-to-friend deed was promptly recorded.

Five months ago, the man conveyed his 80 acres to a builder by a deed that made no mention of the gravel road. The builder paid the man fair value for the land and promptly recorded this man-to-builder deed.

Four months ago, the builder erected a barrier across the gravel road. The barrier prevented the friend from using the gravel road across the builder's land to reach the county road.

Three months ago, the friend recorded the man-to-woman deed.

The land is in a state that has a notice-type recording act and uses a grantor-grantee index. In this jurisdiction, the time to acquire an easement by prescription is 20 years.

1. Before the man's conveyance to the builder, did the friend have an implied easement from prior use over the man's 80 acres? Explain.
2. Assuming that the friend had an implied easement from prior use, did the builder take ownership of the 80 acres free and clear of that easement? Explain.

The woman had an easement by prescription when the man sold her his land

An easement by prescription exists when a landowner uses a certain part of his land for a purpose, and then subdivides the parcel and the land on the portion retained by the landowner continues to be used for that purpose, for example, a road passing across the landowner's retained land. When the man sold the land to the woman, he was using the road across his land for access to the county road from the western parcel. He had been doing so for greater than the statutory period, which is 20 years, as he had been doing so for 30 years. He transferred to the woman the portion of land from which he used to drive his vehicles across the eastern portion to the county road. The woman built her house on the western portion of the land and continued to use the man's road across the eastern portion. The woman's use was open and notorious. She was in horizontal privity with the man because he sold her the land that he subdivided from his prior larger parcel. Thus, even though it was not described in the deed, an easement by prescription was created when the man sold the land to the woman.

The friend had an implied easement by prior use

The friend had an implied easement by prior use. The friend received the land described in the deed from the woman, along with the right to use the gravel road crossing the man's land. The woman had been using the road across the man's land under a valid prescription easement and the right was transferred to the friend when the friend bought the land. The friend had been using the easement for seven months when the man sold the land to the builder. Thus, the friend had a valid easement by prior use.

The builder did not take free and clear of the easement if he had notice of the easement

The builder recorded the deed from the man that made no mention of the gravel road. In a notice jurisdiction, he took the land free of the easement assuming he had no actual, inquiry, or constructive notice of the easement. The deed from the woman to friend was recorded when the builder purchased the land. However, because the man to woman deed was not recorded, the woman-friend deed was a wild deed. Since the jurisdiction uses a grantor-grantee index, the man can't have been expected to retrieve the deed from the woman-friend because it was not in the chain of title of the man-woman. While the man-woman deed did not mention the gravel

road, it would have led to discovery of the woman-friend deed, which would have been in the same chain of title, and the builder would have discovered the easement over the gravel road. While the friend recorded the man-woman deed, it was after the builder recorded his deed and thus he could not have had notice at the time he recorded. Since the jurisdiction is a notice jurisdiction, he recorded without notice and therefore took the land not subject to the easement.

However, notice may be imputed to the man because he would have discovered the easement upon reasonable inspection of the land. Had he conducted a reasonable inspection of his land prior to purchasing, he would have noticed the road and been able to inquire about whether it was an easement, county road, etc. He could be reasonably expected to make such an inspection prior to buying land for development, and the easement would have been immediately obvious upon inspecting the land. He could have seen the 10-foot wide gravel road and known to inquire whether it was used only by the man or whether the adjacent property owner used it too; he could have even seen the adjacent property owner using the road because the friend used to it go to work. Thus, the man was on inquiry notice and should have known of the easement. if a court found that he should have known of the easement, then he will not take the man's land free of the easement.

**February 2021
MEE Question 5**

A grocer planned to open a supermarket and needed shopping carts for her store. On March 1, she went to the showroom of a shopping-cart supplier to look at a variety of samples of modern shopping carts. After looking around the showroom, the grocer pointed to a shopping cart that bore a price tag of \$125 and said to the supplier, "These are the carts I want for my store. When can you get me 100 of them?" The supplier said that he could deliver 100 of those shopping carts to the grocer's supermarket within 30 days. The grocer responded, "That's great. Please ship me 100 of these shopping carts by March 31, and I will wire you payment of \$12,500 as soon as they arrive." The supplier said, "You've got a deal!"

On March 2, the grocer sent the supplier an unsigned note, handwritten on plain paper, stating in its entirety: "It's a pleasure doing business with you. This will confirm the deal we made yesterday for 100 shopping carts at \$125 each." The supplier received the note on March 4 and read it immediately but never responded to it in any way.

On March 31, the grocer received an envelope delivered by an express delivery service. Inside the envelope was a document printed on the supplier's letterhead. The document stated, in its entirety: "Thanks so much for your business. The 60 shopping carts you ordered from us are on the way. Be on the lookout for our delivery truck—it may even arrive today! Please send us payment of \$7,500 (60 carts x \$125/cart) as soon as you receive the carts."

Later that day, the supplier's truck arrived at the grocer's supermarket, and the truck driver said to the grocer, "I've got 60 shopping carts for you in the truck." The grocer replied, "I didn't order 60 shopping carts; I ordered 100. You go back to your boss and tell him to send me the right order." The grocer refused to allow the truck driver to unload the 60 shopping carts from the truck and did not pay for them.

The grocer would like to sue the supplier for breach of contract for failing to deliver 100 shopping carts.

Is there an enforceable contract requiring the supplier to sell 100 shopping carts to the grocer for \$125 each? Explain.

A valid contract requires an offer, acceptance, and consideration. Here, after initial negotiations, the grocer offered \$12,500 in exchange for 100 grocery carts. The supplier responded, "you've got a deal!" accepting the offer. Thus, absent any valid contract defenses, a valid contract exists.

Statute of frauds

A contract for goods is covered by the UCC and shopping carts are goods, thus, the UCC applies here. The statute of frauds applies to UCC goods contracts exceeding \$500. Here, the purported contract is for \$12,500, so the statute of frauds applies. Under the statute of frauds, no contract is enforceable unless in writing and signed by the party to be charged, here, the supplier. There is no evidence that the supplier signed a writing here. An exception to the statute of frauds exists where the parties are merchants. Here, the parties are merchants. In that case, if the party attempting to enforce the contract sent a signed writing to the party attempting to avoid the contract, and the other party did not respond within ten days, then the statute of frauds is satisfied. Here, the grocer sent the supplier an unsigned note, handwritten on plain paper, confirming the details of the alleged contract. The writing was not signed. Further it was not on letter head, which can be construed to be a signature. It was handwritten on plain paper. Thus, the statute of frauds is not satisfied by grocer's mailing the memorialization of the deal because the grocer sent a writing, but not a signed writing, to the supplier. As the supplier has a valid defense in the statute of frauds, no contract was formed based on the grocer's signed writing.

The supplier's letter may satisfy the writing requirement. It was on the supplier's letterhead and confirmed a contract for 60 carts. However, the grocer objected wi

The statute of frauds may also be satisfied when the side seeking to enforce the contract has fully performed. Here, the supplier appeared to have performed in part by sending 60 carts, but the grocer has not performed at all because he has not sent any money to the supplier. Thus, that exception to the statute of frauds does not apply either.

The supplier, however, appeared to believe the contract was for 60 carts. He fully performed on that obligation by delivering 60 carts to the grocer. The supplier may be able to assert that the statute of frauds was satisfied by full performance on a contract of 60 carts, but the grocer cannot assert that a contract for 100 carts exists. Thus an enforceable contract may exist as to the 60 carts. The supplier may be able to sue for breach because the grocer refused a shipment and refused to pay after the grocer performed.

There is also a statute of frauds exception for specially manufactured goods, but nothing indicates these carts were specially manufactured. They were sitting on the showroom and the grocer saw them there, so the facts don't indicate that the supplier manufactured them specifically for the grocer.

February 2021
Indian Law Bar Exam Question

Sam Thompson is non-Indian. James Red Earth is an Indian and a member of the Rosebud Sioux Tribe. They are both residents of the Rosebud Sioux Reservation in south central South Dakota. Sam was in a long-term relationship with a non-Indian woman by the name of Karla Robinson. On a recent evening, Sam came home heavily intoxicated to their residence in the Antelope Community which is located on the Rosebud Sioux Reservation. He and Karla argued for a long time. When Karla accused Sam of past infidelities, he got angry, pulled out his pistol, and shot Karla twice. She died from the resulting gunshot wounds.

Mr. Red Earth is involved in a long-term relationship with a Tribal member whose name is Helen Cloud. They cohabit and share a home. On a recent evening in their home also located in the Antelope Community, they argued. James became increasingly belligerent and without provocation, he struck Ms. Cloud in the face and knocked her unconscious.

Mr. Red Earth previously pled guilty twice in the Rosebud Sioux Tribal Court to the crime of domestic assault of Ms. Cloud.

Where does jurisdiction lie for each of these men?

When determining jurisdictional authority for crimes involving Indians, or non-Indians on the reservation, there are three elements that need to be examined: (1) Where the crime occurred (on or off Indian lands) (2) if there is a statute authorization the application of state jurisdiction **PL-280** (3) the composition of the Victim and the Perpetrator (Indian vs. non-Indian)

Indian Lands are determined as follows (1) on or within the exterior boundaries of a Indian reservation (2) other tribal lands (3) allotments

Under the Major Crimes Act, there are 10 major crimes that fall under Federal Jurisdiction on Indian lands, murder also falls under the Interracial Crimes Act when it is committed against and Indian v. non-Indian or vice versa on Indian lands. There are certain exceptions that now exists whereas tribes can prosecute non-Indians for crimes committed on the reservation, namely certain crimes committed against Indians Victims, namely under the VAWA - Violence Against Woman Act)

Indian Perpetrator vs. Indian Victim - Jurisdictional Authority

- Federal (Under the Major Crimes Act and under the Interracial Crimes Act)
- State if there is a statute authorization application of state jurisdiction (PL 280)
- Tribal (subject to tribal law)

Indian Perpetrator vs. Non-Indian Victim - Jurisdictional Authority

- Federal (Under the Interracial Crimes Act)
- State if there is a statute authorization application of state jurisdiction (PL 280)

Non Indian Perpetrator vs. Indian Victim - Jurisdictional Authority

- Federal (Under the Interracial Crimes Act)
- State if there is a statute authorization application of state jurisdiction (PL 280)
- Tribal (tribes now have jurisdiction and can prosecute non-Indians involving certain crimes committed against Indians Victims, namely under the VAWA -Violence Against Woman Act)

Non-Indian Perpetrator vs. Non Indian Victim - Jurisdictional Authority

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- State Jurisdiction

In the matter of Sam Thompson, a non-Indian, who shot and killed his non-Indian long term partner on the Rosebud Sioux Indian Reservation. **Only state jurisdiction applies in this matter because both parties are non-Indians.**

In the matter of James Red Earth, who is now facing three violations of domestic assault on his long term partner Helen Cloud. **Federal and tribal jurisdictional authority apply here. Under the three strikes rule, Federal jurisdiction would apply to this matter. The tribe can also prosecute for the domestic assault. State jurisdiction does not apply because South Dakota is not a PL-280 state.**
