Maryland State Board of Law Examiners

JULY 2023 UNIFORM BAR EXAMINATION (UBE) IN MARYLAND – REPRESENTATIVE GOOD ANSWERS

NOTICE: These Representative Good Answers are provided to illustrate how actual examinees responded to the Multistate Performance Tests (MPT 1 & 2) and the Multistate Essay Examination (MEE 1-6). The Representative Good Answers are not "average" passing answers nor are they necessarily "perfect" answers. Instead, they are responses which, in the Board's view, illustrate successful answers written by applicants who passed the UBE in Maryland for this session. These answers are reproduced without any changes or corrections by the Board, other than to spelling and formatting for ease of reading.

MPT 1

Representative Good Answer No. 1

1. This court should exclude testimony from Doris Gibbs related to Mr. Dobson's silence following a non-accusatory statement because the silence is impermissible hearsay.

Under FRE 801(d)(2), statements made by a party and offered by an opposing party are non-hearsay. Silence may be a statement if it was intended as an assertion. FRE 801(a). If the silence is offered as an admission, where a party's silence indicated the party's manifestation that it adopted the statement or believed it to be true, then the silence may be admissible as non-hearsay. *Reed v. Lakeview Advisers LLC.* For a statement to be acquiesced by silence, four conditions are required: "(1) the party must have heard the statement, (2) the party must have understood the statement, (3) the circumstances must be such that a person in the party's position would likely have responded if the statement were not true, and (4) the party must not have responded." *Id.*

In the instant case, plaintiff seeks to exclude testimony that Ms. Gibbs stated, "We have all been clumsy before. I bet that you were trying to get to the store quickly. And I would guess, like most of us, you were on your phone at the time," and that Mr. Dobson did not respond. Mr. Dobson's silence in response to Ms. Gibbs's statement was not intended as an assertion or a manifestation that Mr. Dobson believed the statement to be true, which therefore makes the statement and its following silence inadmissible hearsay.

The circumstances are not that a party in Mr. Dobson's position would likely have responded if untrue. Unlike in *Reed*, the case which promulgated the four-part test for acquiescence by silence, Ms. Gibbs' statement was made in a non-accusatory way. In *Reed*, the suit was for wrongful termination as age discrimination, and the statement which Margaret Reed acquiesced by silence was an accusatory statement explaining that "[Ms. Reed] know[s] that [she] [was]n't doing [her] job competently." *Reed.* The statement was made by the HR director, Beth Adler, an obvious opponent in litigation. Beth Adler made an accusation against Margaret Reed to which a reasonable person, if they disagreed, would have responded. Here, Ms. Gibbs was a longtime friend who cared for Mr. Dobson during his recovery. The statement by Ms. Gibbs was made during a dinner in which the Dobson couple shared their thanks with the Gibbs for their assistance during Mr. Dobson's recovery. This is unlike *Hill v. Hill*, where a husband's silence to a wife's accusation that "you are having an affair," was admissible, because there was no accusation by Ms. Gibson and the statement that Mr. Dobson did not respond to was meant to offer understanding of the situation between friends. Ms. Gibson did not accuse Mr. Dobson of any moral or legal wrongdoing, as did husband to wife in *Hill*, nor was she making the type of accusation apparent in *Reed*, and therefore it is reasonable for Mr. Dobson to not respond.

Further, it is not clear whether there was any litigation which had begun between Mr. Dobson and his employer, although a dispute regarding appropriate accommodations for his injuries certainly had arisen. A reasonable explanation for Mr. Dobson's silence, apart from that it was a non-accusatory statement from a caring friend which did not merit response, is that Mr. Dobson's employment discrimination attorney advised him not to discuss the case.

Additionally, it is not clear that Mr. Dobson heard and understood the statement. While Ms. Gibbs thought he did, because he put his drink down and looked at her, they were in the dining room of a loud restaurant. In loud

situations with many people present, someone who is silent may not necessarily be expected to respond. *State v. Patel*. In *Patel*, the statement was made at a party attended by over 100 people. It is not clear how many people were in the dining room, but there was usual background conversation which may have obstructed Mr. Dobson's ability to clearly hear Ms. Gibbs.

Because the statement by Ms. Gibbs was non-accusatory, nor a passing of moral judgment, and Mr. Dobson may not have clearly heard it, a reasonable person in Mr. Dobson's position would not have responded if the statement were not true. Therefore, Mr. Dobson's silence cannot be admitted as a non-hearsay statement by a party. Ms. Gibbs statement, and Mr. Dobson's non-response, are both inadmissible hearsay.

In the alternative, this court should exclude Ms. Gibbs' statement and Mr. Dobson's non- response as substantially more misleading and confusing than probative under FRE 403. Ms. Gibbs statement being repeated at trial, lacking the care and nurturing nature it had when it was first stated, and Mr. Dobson's silence, lacking the context that the statement was made in a loud dining room, is substantially more misleading and confusing than it is probative. Unlike in *Reed*, where the interaction was between two parties to the case,

here, the interaction was between two close friends, one who has no relation to the case other than as caretaker to Mr. Dobson's injuries. The probative value of the statement, as compared to that at issue in *Reed*, is therefore much lower. While it may tend to prove acquiescence with the statement--that Mr. Dobson was in a hurry, or on his phone, at the time he fell--the value of that inference is substantially outweighed by the risk of misleading or confusing the jury.

2. The deposition testimony of Dr. Miller in a prior case should be excluded because Mr. Dobson lacked the opportunity to develop the testimony since he did not have a substantially similar interest in asserting the extent of his injuries in the accommodations case.

Under FRE 804(b)(1), former testimony is not excluded by the rule against hearsay where the declarant is unavailable if the testimony was given at a lawful deposition, whether during the current proceeding or a different one, and the testimony is now offered against a party who had an opportunity and similar motive to develop it by direct, cross-, or redirect examination. "[T]he party against whom the evidence was previously introduced must have had 'a similar, not necessarily an identical, motive to develop the adverse testimony in the prior proceeding.'" *Thomas v. Wellspring Pharmaceutical Co.,* quoting *Jacobs v. Klein.* The two-part test requires determining "whether the questioner is on the same side of the same issue at both proceedings, and whether the questioner had a substantially similar interest in asserting that side of the issue." *Jacobs.*

In *Thomas*, the introduction of trial testimony by Dr. Shaw in a subsequent trial against a different plaintiff but involving the same claim for relief was permitted. However, integral to the admissibility of Dr. Shaw's testimony was that the testimony was generic in nature -- it was not specific to either plaintiff, but rather to the types of side effects that may be expected with the medication that was at issue in both cases. *Thomas.* Each party would have had the exact same interest in cross-examining Dr. Shaw regarding the extent of the side effects was debilitating. This is unlike the instant case because, though both cases involve the same plaintiff, Mr. Dobson, the issues, and motivations are different, and the previous testimony was at deposition, rather than at trial. The focus of Attorney Chen's cross-examination in the deposition was the adequacy of accommodations because Mr. Dobson's injuries were not at issue and attacking the credibility of the doctor. Attorney Chen then concluded stating he would "ask the rest of [his] questions at trial." Neither the source nor cause of Mr. Dobson's injuries are at issue in the case against the employer. Therefore, Attorney Chen made a strategic decision not to cross-examine Dr. Miller about those issues. However, cross-examination in this case would certainly have centered on the cause and extent of Mr. Dobson's injuries.

Though opposing counsel may argue that the issue is not whether Mr. Dobson did develop the testimony, but whether he had the opportunity to develop the testimony, there is not clear case law regarding where there are separate issues with strategic decision by different counsel. Rather, opposing counsel rests its argument on *State v. Williams*, where deposition of an unavailable witness from a "related civil case" was permitted in a criminal case where same counsel represented the defendant in both cases. The issues from the civil and criminal case are not clear, but it is reasonable to distinguish an attorney who is representing a client with similar issues, witnesses, and motivations in each case, from an attorney with a limited and narrow scope of representation. Counsel in the tort case did not have the opportunity to cross examine Dr. Miller regarding the extent of injuries, and counsel in the employment discrimination case did not have the motive to cross examine Dr. Miller on those issues. Dr. Miller is now unavailable, and his deposition should not be admitted under FRE 804(b)(1).

In the alternative, this court should exclude Dr. Miller's previous testimony as substantially more prejudicial than probative under FRE 403. Unlike in *Thomas*, where Dr. Shaw's testimony was general in nature and the motives for cross-examination were the same, Dr. Miller's testimony, and the cross-examination, were very limited to the issues in the employment discrimination case: the sufficiency of the accommodations. It would be unfairly prejudicial to Mr. Dobson for Dr. Miller's limited deposition to be entered because Attorney Chen did not cross-examine about the issues irrelevant to the case. Further, Dr. Shaw's testimony was in trial whereas Dr. Miller's was at deposition which Attorney Chen clearly stated he would explore further issues at trial. Therefore, Dr. Miller's previous testimony is more unfairly prejudicial than probative.

3. Brooks Real Estate Agency's (hereinafter "BREA") insurance policy should be admitted for the limited purpose of proving that BREA exercised control of the sidewalk.

Under FRE 411, liability insurance is not admissible to prove negligence or fault, but may be admitted to prove agency, ownership, or control. Mr. Dobson seeks to admit BREA's insurance policy for the limited purpose of proving a fact in issue, namely that BREA did have ownership or control over the sidewalk upon which Mr. Dobson slipped. The policy is not being offered to prove negligence or another wrongful act.

Opposing counsel is anticipated to argue that the insurance policy will be inadmissible under FRE 403 because its probative value is outweighed by its risk of confusing the jury. However, because control of the sidewalk is at issue in this case, and the insurance policy is strong probative evidence of this fact, the probative value of the insurance policy covering the sidewalk does outweigh any likelihood to confuse the jury. In the alternative, the court should admit the policy with a limiting instruction that will completely cure any likelihood to confuse the jury. The instruction should state, with deference to this court's preferred wording, that "The jury has heard evidence that BREA has a liability policy which insures the sidewalk where Mr. Dobson slipped. The existence of an insurance policy may be considered only to establish whether BREA owned or controlled the sidewalk, and not to establish negligence or liability on the part of BREA." Further, the policy should be redacted to the extent that it includes any policy limits figures, to avoid the risk of unfair prejudice to BREA.

BREA's insurance policy should be admitted for the limited purpose of proving ownership and/or control of the sidewalk.

Representative Good Answer No. 2

MEMORANDUM

To: Samantha Burton From: Examinee Applicant Date: July 27, 2023

Re: Legal Argument Section of Motion in Limine

Dear Ms. Burton: Below please find the argument section to the motion in limine you intend to file for our client, Mr. Dobson for the case of *Dobson v. Brooks Real Estate Agency.*

III. Legal Argument

In accordance with the Franklin Rules of Evidence (FRE), applicable law and cases of Franklin, Doris Gibbs' testimony should be found inadmissible because of issues of hearsay, irrelevance, and undue prejudice; Dr. Miller's deposition testimony should be found inadmissible **BECAUSE XX**; and evidence of Brooks Real Estate Agency's ("Brooks") insurance policy should be found admissible for the sole purpose of proving ownership. The analysis and reasoning for each determination is discussed below in detail.

A. Doris Gibbs' Testimony is Inadmissible BECAUSE it is Hearsay not subject to any Hearsay Exceptions, and the Testimony Itself is Irrelevant and Poses a Risk of Misinterpreting the Ultimate Issue of this Case.

Ms. Gibbs' testimony should be excluded for two reasons: a) it is considered hearsay and no exceptions to hearsay apply and b) the testimony is irrelevant and, even if the judge determines the testimony relevant, the probative value is outweighed by the high danger of misleading the jury and confusing the issues.

I. Mr. Dobson's silence is not a "statement" for purposes of FRE 801.

Ms. Gibbs' testimony should be excluded because Mr. Dobson (the opposing party) never made a statement; as such, Ms. Gibb's testimony would be defined as hearsay not subject to any exclusions and would thus be inadmissible.

According to FRE 801(d)(2)(B), an opposing party's statement is considered "non-hearsay" and thus may be admissible if the statement is offered against an opposing party and is one the party manifested that it adopted or believed to be true. A "statement" includes a person's oral assertion, written assertion, or nonverbal conduct, *if the person intended it as an assertion*. FRE 801(a). Silence alone, however, does not automatically make a statement. In order for a statement to be acquiesced by silence, four preconditions must be met: (1) the party must have heard the statement, (2) the party must have understood the statement, (3) the circumstances must be such that a person in the party's position would likely have responded if the statement were not true, and (4) the party must not have responded. Reed v. Lakeview Advisers.

Although Mr. Dobson remained silent during his conversation with Ms. Gibbs, his silence should not be taken as an assertion for the purposes of a "statement." Here, there is no doubt that Mr. Dobson heard the statement, nor is there any doubt that he failed to respond. However, given the circumstances, it is unlikely that Mr. Dobson understood the statement, and that the circumstances were such that a person in Mr. Dobson's position would likely have responded if the statement were not true.

In State v. Patel, the court acknowledged that "context" was "exceedingly important in determining whether a party acquiesced to a statement by silence." For example, the court in that case found that because the defendant was at a loud party with over 100 people, it was unclear whether the defendant heard or understood the statement. Further, even if he had, because the defendant was at a large social event with several people around, it would be unreasonable to expect that a person in the defendant's circumstances would necessarily respond. Similarly, when Ms. Gibbs and Mr. Dobson were talking, they were at a public place- a restaurant, where there was usual background conversation in the restaurant. Because of this, and because Ms. Gibbs only "*thought* he (Mr. Dobson) was listening," it remains unclear whether Mr. Dobson actually heard or understood the statement. It is highly likely that Ms. Gibbs' words were drowned out by conversations of tables next to them. Further, in the only two cases that found that the person had heard or understood the statement (Reed and Hill), the conversation was direct - between only the speaker and the person who "acquiesced" the statement as true, with no other people around. This further emphasizes the point that due to the atmosphere of the restaurant - with conversations of other tables and being in public, it is hard to prove that Mr. Dobson heard or understood the statement.

The content of Ms. Gibbs' statement was that Mr. Dobson was clumsy, walking in a hurry, and on his phone. While the argument still stands that Mr. Dobson would not be expected to respond to this due to the atmosphere(the fact that he was in public restaurant, surrounded by others in conversation), one might argue that the situation here differs too greatly from that in Patel such that the holding from Patel cannot be used for reasoning in the case here. In Patel, the person was at a social party where everyone was mingling with over 100 people. Here, it is unclear how many people exactly were at the restaurant, but it is unlikely that the tables mingled with each other. The discrepancy may lead to the conclusion that the atmosphere *alone* cannot justify Mr. Dobson's silence. However, because "context" is given as a whole, there are other circumstances that suggest someone in Mr. Dobson's position would not necessarily be expected to respond.

Another context clue that is important is the "seriousness" of the conversation. For example, in Hill v. Hill, the court found that during a serious conversation between a husband and wife about their marriage, a husband acquiesced to the accusation of "you are having affair" through his silence. The court in Reed used the Hill court's reasoning, alluding to the seriousness of the conversation as a reason to find that a person in the defendant's position would be expected to respond. In Reed, the court found that because the defendant was having a serious conversation with her boss, during a meeting about termination, and in an office setting, anybody in Reed's position would be expected to respond to any negative accusations.

These cases, however, are distinguishable from the present case. In the present case, nothing about the conversation suggested a serious manner. In fact, the conversation was during dinner between neighbors and friends. Further, Ms. Gibbs even stated that her statements to Mr. Dobson were not said in an "accusatory" way, but rather as a "statement of fact and understanding." The fact that Ms. Gibbs was not meaning to be accusatory is key. A statement of fact itself does not necessarily warrant a response, whereas an accusation would (a person who is being accused would be expected to deny it). As such, because Ms. Gibbs' statement was more fact than accusation, a person in Mr. Dobson's position would not be expected to necessarily respond.

As such, because the third element is not met - that is, the circumstances fail to show that a person in Mr. Dobson's position would have responded - Ms. Gibb's statement cannot be acquiesced by Mr. Dobson's silence. Therefore Ms. Gibb's statement remains hearsay and is therefore inadmissible.

II. Even if the court should find Mr. Dobson's silence as a "statement," it should be excluded because it is irrelevant, and its probative value is substantially outweighed by the danger of confusing the issues.

Even if the trial court finds that Mr. Dobson's silence constituted a "statement" under FRE 801(a), nevertheless, Ms. Gibb's testimony should be excluded because it is irrelevant and has a danger of confusing the issues. On its face, Ms. Gibb's testimony about Mr. Dobson's "statement" is irrelevant. The issue in this case is Brooks' failure to meet its duty of properly maintaining its sidewalk. Relevant evidence should relate in some kind to Brooks' negligence. Mr. Dobson's "statement" that he was in a hurry and that he was on his phone is irrelevant to Brooks' failure to maintain the ice on the sidewalk. As such, the evidence should not come in at trial because it is irrelevant to the ultimate issue in the case.

Even if the evidence is considered "relevant," FRE 403 states that the court may still exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Here, introduction of Mr. Dobson's "statement" (through the testimony of Ms. Gibbs) creates a high danger of misleading the jury away from the ultimate issue of the case: that Brooks was negligent in failing to maintain its sidewalks and rid them of ice.

If the trial court finds that Mr. Dobson's silence constituted a "statement," Mr. Dobson would be admitting that a) he was trying to get to the store quickly and b) he was on his phone at the time. File, p. 6. Even if these

statements were true, they fail to address the underlying issue that Brooks was in fact negligent in failing to remove ice from their sidewalks. Bringing in Ms. Gibb's testimony and Mr. Dobson's "statement" has a high risk of confusing the jury and misleading them into thinking the issue is whether Mr. Dobson's fall was his fault when in fact the issue is ultimately dependent on Brooks' negligence in getting rid of the ice on their sidewalks.

Further, the court has held that "Rule 403 allows the judge to prohibit only the use of evidence that is *unfairly* prejudicial, that is, evidence that allows or encourages the jury to reach a verdict based on an impermissible ground or to make an impermissible inference." Reed. As the Advisory committee Note to Rule 403 states, this includes any evidence that may lead to confusion of issues. (Note that, because of the holding in Smith v. State, this court may rely on the Advisory Committee Notes in relying on the FRE). Admitting Mr. Dobson's statement increases the risk of confusing the jury on the ultimate issue and may lead them to make an impermissible inference. As stated before, the ultimate issue is that Brooks acted negligently in failing to maintain their sidewalks and free it from ice. However, admitting this statement may lead the jury to improperly infer that Mr. Dobson's fall was his fault rather than Brooks'. But the way Mr. Dobson walked on the sidewalk is irrelevant: there was still ice on the sidewalk, and it was Brooks' duty ensure that their sidewalks were safe and free of ice.

Therefore, for the reasons discussed above, Ms. Gibb's testimony regarding Mr. Dobson's "statement" (rather, lack thereof) should be excluded from trial.

B. The Deposition Testimony of Dr. Miller is Inadmissible because the motive and opportunity of the prior testimony of Dr. Miller is inconsistent with the motive and opportunity of the present case

Dr. Miller's testimony does not fall under FRE 804(1)'s exceptions because there was not a similar motive or opportunity from her testimony in the previous case compared to the present case.

According to FRE 804(1), an exception to hearsay includes former testimony by a witness that is now unavailable. In order for the former testimony of an unavailable witness to be admitted, the party who wishes to offer the testimony must show (1) that the witness is currently unavailable; (2) the former testimony was given as a witness at a trial, hearing, or lawful deposition, and (3) that the testimony is being offered against a party who had - or in a civil case, whose predecessor in interest - had a similar motive and opportunity to develop the challenged testimony at the earlier proceeding.

Here, it is clear that Dr. Miller is unavailable due to her unfortunate death. Further, there is no dispute that Dr. Miller's prior testimony was given during a lawful deposition. In Thomas v. WellSpring Pharmaceutical, the court acknowledged that if the party against whom the evidence is now being admitted is the *same* party against whom the evidence was previously introduced, the only question is whether the party had the same opportunity and motive to develop the testimony. Here, it is obvious that Mr. Dobson was the party against whom the evidence was previously introduced. Similarly, Mr. Dobson is the SAME party against whom the evidence is now being admitted. Therefore, whether or not Dr. Miller's testimony is admissible falls on whether there was a similar motive and opportunity in the previous proceeding.

I. Similar Motive.

In Jacobs v. Klein, the court developed a two-part test to address "similar motive:" (1) whether the questioner is on the same side of the same issue at both proceedings, and (2) whether the questioner had a substantially similar interest in asserting that side of the issue. Here, neither prong is met. Although Mr. Dobson was on the same side in both proceedings (plaintiff), the ISSUE is substantially different. In the previous case, the issue was employer accommodations in accordance to Franklin's Disability Act. The present case, however, is related to the source and cause of Mr. Dobson's injuries through Brooks' negligence. Additionally, the questioner's interest in the first case varied significantly from the interest in the second case, for the same reasons stated previously.

As such, motive is not present.

II. Similar Opportunity

In State v. Williams, the court looked to whether the party in the earlier case had the opportunity to develop the testimony. In Thomas, the court held that there was no indication that the defendant was denied the opportunity to attempt to undermine the witness or his testimony by asking any questions. However, Thomas is distinguishable because there was the SAME counsel representing defendant in both cases. Here, different counsel representing Mr. Dobson in his two cases

In the first case, Chen made the strategic decision not to examine Dr. Miller about her opinion about the extent of the injuries because his focus at the deposition was on the level of accommodations. However, defense counsel here would likely act questions about the extent of the injuries as they are much more relevant.

Therefore, there is no opportunity.

Because there was no opportunity and no motive, the former testimony hearsay exception is not applicable. As such, the doctor's testimony should be excluded.

C. The Insurance Policy on the Property of the Brooks Real Estate Agency is Admissibility because it determines Brooks' ownership and control over the sidewalk that Mr. Dobson fell on.

The insurance policy of Brooks is admissible for the purposes of proving Brooks' ownership of the sidewalk. Although proof of insurance is normally inadmissible to prove negligence or fault, the rule against admissibility of liability insurance is limited. FRE 411. More specifically, evidence of insurance may be admitted to prove any fact *other than* fault or lack of fault. For example, evidence of the insurance may be admitted for the purpose of proving a witness' ownership or control.

In the present case, Brooks claims that it does not control the sidewalk and therefore has no responsibility for clearing it of ice. However, according to the Brooks' insurance policy, the property insurance on Brooks' building "explicitly covers sidewalks adjacent to the property." Therefore, evidence of insurance is admissible exclusively for the purpose of rebutting Brooks' claim that they do not own and are not responsible for clearing the sidewalk adjacent to the building (the one in which Mr. Dobson fell on).

As always, even if the evidence is relevant, the evidence must additionally pass through the FRE 403 balancing test. Here, the probative value of the liability insurance is huge: it explicitly answers, without a doubt, that Brooks owns the sidewalk that Mr. Dobson fell on. There is little danger to the prejudicial value, other than the fact that it shows Brooks did in fact own the sidewalk. Though it is prejudicial to Brooks, as courts as held, minimal prejudice is to be expected to the party against whom evidence is admitted. However, it is only evidence that is *unfairly* prejudicial that the judge has discretion to exclude. Reed. Seeing as there is no unfair prejudice, this evidence is not only relevant, but highly probative and therefore should be admitted.

For the reasons above, this court should find that evidence of the insurance policy is admissible for the sole purpose of proving Brooks' ownership.

Maryland State Board of Law Examiners

JULY 2023 UNIFORM BAR EXAMINATION (UBE) IN MARYLAND – REPRESENTATIVE GOOD ANSWERS

MPT 2

Representative Good Answer No. 1

TO: Anthony Martin From: Examinee Date: July 25, 2023

Re: Advice Letter regarding Martin's Legal Rights

Dear Mr. Martin,

Upon reviewing relevant statute and case law, we believe you have a strong case to (1) keep the dog, Ash, (2) get a refund from Shafer, and (3) have Shafer pay for Ash's surgery.

1. CAN MARTIN KEEP ASH?

Short Answer: Yes, under the Franklin Pet Act (Pet Act), since Martin notified Schafer within 180 days of purchase that Ash had a congenital defect, Martin can request as a remedy that retain Ash.

A purchaser of an animal has a remedy if (1) within 14 days following a sale of an animal, a licensed vet certifies such animal to be unfit for purchase due to illness or presence or (2) within 180 days following the sale a licensed vet certifies such animal as unfit for purchase due to congenital malformation that adversely affects the health of an animal (Pet act).

If the Pet act applies, the purchaser can (1) return animal and receive a refund and reasonable vet costs, (2) return animal and receive an exchange of animal and reasonable vet costs, or (3) retain animal and receive reimbursement from pet dealer for vet services from a licensed vet of purchaser's choosing for the purpose of curing or attempting to cure the animal (Pet Act).

In Martin's case, since Martin has grown attached to Ash and wants to keep Ash, we recommend that Ash request option 3 as a remedy under the pet act since it allows Martin to keep his dog.

However, under the Pet Act, a pet dealer may contest a demand for refund, exchange, or reimbursement, and in which case the dealer, Shafer may require the purchaser, Martin, to produce the animal, Ash for inspection by licensed vet of dealer's choice (Pet Act).

a. The Pet Act applies due to ambiguity in Shafer's contract.

The Pet Act applies to the current situation because even though Schafer's contract is unambiguous as to the timeline for reporting a congenital defect, remedies are not provided and hence the remedies are ambiguous or nonexistence and then relevant statutes must be used to fill those gaps.

To interpret written contract, one first review language and apply unambigous terms unless the unambigous terms conflict with relevant statutes. Further, if contract terms are ambiguous, the ambiguity is resolved with relevant statutes (Cohen v Dent).

If a contract contains ambiguous terms, a court must construe it most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language (O'Day v Schmidt). In Cohen v Dent, the contract between dealer and purchaser of a dog was ambiguous as to the start date for the one-year remedy if the dog has a congenital condition and fails to address refunds or monetary damages but requires a buyer to choose a remedy (Cohen). Hence, since the Dent contract is ambiguous, a court rejected Dent's claim that the contract bars recovery by the purchaser of a dog with hip dysplasia (Cohen).

So, at present, Schafer's contract does state a timeline for raising defect concerns but not the available remedies. Schafer requires that the dog can be returned within 48 hours of purchase for a replacement if the dog is unable to be a companion or provide in writing within 24 hours of a diagnosis of a congenital defect that is found the

dog being one year old to Schafer. However, no remedies are provided once the defect is provided to Schafer. Hence, to fill the gaps and ambigous nature surrounding remedies, Franklin courts will apply relevant statutes such as the Pet Act.

More specifically, the Franklin Pet Act (Pet Act) governs sale of household pets, including dogs and provides purchasers with a remedy if they provide a certification by a licensed vet about the animal's condition (Cohen). And if a contract between seller and buyer of an animal is ambiguous, the Pet Act is a relevant statute that applies (Cohen). In Cohen v Dent, the purchaser of a dog with hip dysplasia had a right to keep the dog under the Pet Act and further that the seller pay for surgery needed to correct the hip because the contract was so ambiguous (Cohen).

The contract between Schafer and Martin does require that Martin notify Schafer in writing of the defect and Martin only called orally, yet this is likely sufficient to put Schafer on notice of the defect because to notify in writing within 24 hours is a hard standard to meet since mail does not arrive within 24 hours and so email is the only option besides via orally.

Therefore, since the contract between Schafer and Martin do not include remedies for finding a defect within 180 days, the Pet Act applies, and hence Martin can keep Ash, as well as seek further remedy as discussed below.

2. Can Martin have Shafer pay for Martin's dog, Ash's, surgery which costs over $8,000? Yes, under the Pet Act, a remedy for a defective dog purchased is that a reimbursement may be obtained for subsequent surgeries.

As stated in question 1, the Pet Act applies due to the contract failing to provide remedies for the identification and notice to Schafer of a defect before the dog turns 1 year old.

Under the Pet Act, a purchaser of an animal has a remedy if within 180 days following the sale a licensed vet certifies such animal as unfit for purchase due to congenital malformation that adversely affects the health of an animal (Pet act) and the purchaser as a remedy may retain the animal and receive reimbursement from the pet dealer for vet services from a licensed vet of purchaser's choosing for the purpose of curing or attempting to cure the animal (Pet Act).

Since after one month of getting Ash, Martin noticed issues with Ash, Martin took Ash to a licensed Vet, Dr. Turner who diagnosed Ash with a liver dysfunction or also called a congenital defect of the liver. Further the vet said that since the diagnoses was relatively early a surgical remedy was available that would cost over $8000, not included any post-surgical treatment. Further, Dr. Turner is prepared to sign a form certifying in her opinion that the diagnosis is appropriate, and that surgery and post-surgery is needed. With Dr. Turner's certification that the animal was unfit due to a congenital malformation that adversely affected the health of Ash, the Pet Act not only allows Martin to retain Ash but also recover vet fees due to the defect because the fees are aimed to cure Ash from the liver problem.

3. Can Martin obtain a refund of $2,500 from Shafer, which was the purchase price for Ash?

Short answer: Yes, under the UCC, Martin can obtain a refund from Shafer since he breached his implied warranty of merchantability.

a. The implied warranty of merchantability was not waived by Shafer.

The Pet Act does not limit the rights or remedies that are otherwise available to a purchaser under any other law and hence the UCC may further apply when seeking a remedy for the sale of goods.(Cohen).

Article 2 of the UCC governs the sale of animals (Cohen). Further, dogs fall into the category of goods and pet stores and breeders are "merchants" per the UCC (Cohen).

A warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind (UCC). Shafer is a merchant since he is a pet breeder and normally sells dogs.

For goods to be merchantable they must pass without objection in the trade under the contract description and are fit for ordinary purpose for which goods are used. To exclude or modify the implied warranty of merchantability the language must mention merchantability and in case of writing be conspicuous (UCC). Unless otherwise stated all implied warranties are excluded by expressions like "as is," "with all faults or other common language that makes plain no implied warranty exists (UCC).

Within the contract between Martin and Schafer, no terms state that the implied warranty of merchantability is waived rather, Schafer states that he minimizes the potential for defects in good faith, which is not a waiver.

Further, when a buyer before entering contract examines goods or refused to examine goods, there is no implied warrant with regard to defects which an examination would have revealed (UCC). However, Martin may have inspected Ash but the defect would not have been known or realized since it does not appear until Ash ages beyond 8, 10, or 12 weeks or possibly older.

Hence, the implied warranty of merchantability was not waived.

b. Martin received nonconforming goods.

If a buyer accepts goods and gives notification, he may recover damages for nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach (UCC). Damages for breach of warranty is the difference at time and place of acceptance between the value of goods accepted and value they would have had if they had been warranted (UCC).

And as such, a buyer of nonconforming goods may recover for damages for a nonconforming tender if the loss results from the ordinary course of business such as a seller's breach (Cohen). In Cohen, the dog with a hip dysplasia is nonconforming tender (a nonconforming good) because the buyer of the dog did not get what she expected, a healthy dog (Cohen).

A warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind (UCC). A sale of an animal creates an implied warranty of merchantability and goods are merchantable if they "pass without objection in the trade under the contract description and are fit for the ordinary purpose for which such goods are used" (Cohen).

In the Cohen case, the certification by a vet that the purchased dog was "unfit for purchase" establishes that the dog could not pass without object and hence not fit for ordinary purpose (Cohen). Like Cohen, Martin obtained a dog from Schafer that was unfit for purchase since it developed a congenital defect and a licensed vet is willing to certify that. Hence, the UCC applies because Schafer breached is implied warranty of merchantability by providing Martin with nonconforming goods.

Further, under UCC 2-714(2), damages for nonconforming goods includes the full purchase price for the animal, on the assumption that no buyer would agree to purchase an animal it knew to have a health defect that might lead to death or require expensive surgery to correct (Dalton). Hence, a claim that the full purchase price is not reasonable is not valid when a breach of warranty exists as a pet seller may claim (Cohen).

Schafer may argue that 2-714(2) is an unreasonable remedy but Schafer knows that a defect is possible and hence the claim for a refund for the purchase price for a dog with a defect is not unreasonable.

Therefore, Martin may recover the purchase price of Ash under the UCC because Schafer breached an implied warranty

4. CONCLUSION

In conclusion, even though Martin only orally notified Schafer of the defect, Martin abided by the contract terms of notifying Schafer within Ash turning 1 year old that the dog had a defect that would prevent Ash from being a companion. And hence, since the Schafer contract did not provide remedies only a timeline on alerting Schafer of a defect, the Pet Act and UCC apply which allow Martin to (1) keep Ash, (2) recover vet costs for curing the defect, and (3) recovering the purchase price of Ash.

Please reach out with any questions.

Thanks,

Examinee

Representative Good Answer No. 2

Law Offices of Bradley Wilson

2405 Main St

Creedence Franklin

Dear Mr. Martin,

I understand that you are looking for legal advice on what rights you have in relation to your dog Ash that you purchased from "The Den Breeder" who is owned by Simon Shafer. I understand your two goals to be (1) Keep Ash, (2) Have Simon Shafer cover the costs of Ash's corrective surgery for his "liver shunt" condition.

Keeping Ash is allowed under the Franklin Pet Purchaser Protection Act (FPPPA) The Franklin pet purchasers protection act allows you the remedy of retaining Ash and receiving reimbursements from the pet dealer for veterinary services from a licensed veterinarian of your choosing for the purposes of curing or attempting to cure Ash's liver shunt. §753.

The Franklin Pet Protection act provides options to pet owners who receive a certification from a licensed veteran Ian within 180 days from the pets purchase that their pet is unfit for purchase due to a congenital malformation that adversely affects the health of the animal. You purchased Ash on June 12th of this year, so you are still within the 180-day limitation of this protection. Both the email from your vet and the provided article consider liver shunts to be congenial defects.

To fully satisfy your requirements of the FPPPA you will need to reach out to your veterinarian and request that she provide you a certification that Ash is unfit for purchase due to a congenital malformation that adversely affects the health of the animal. This does not mean that you are giving Ash up, it is simply paperwork that we need to further your case.

The FPPPA gives pet owners multiple options once they obtain the certification from their vitrain, two options require giving back the animal however FPPA §753(b)(3) allows that you retain Ash and receive reimbursement from The Den Breeder for veterinary services from a licensed vitrain of your choosing to cure or attempt to cure Ash's liver shunt. Although you have the ability to choose the vet you would like to provide Ash's care, if Simon contest's, which is likely to happen based on his behavior so far, Simon can require you to bring Ash to a licensed vet of his choosing to be examined. This will provide a second opinion on if Ash has a Liver Shunt, the vitrain that Simon picks would not be the one actually doing the corrective surgery.

The provisions under FPPPA give you the right to keep Ash and to request that Simon pay. the cost of surgery necessary to correct the liver shunt (Cohen).

The contract signed with The Den Breeder

You provided us with the contract you signed with the Den Breeder when you purchased Ash. This contract will have little to no limitation on what compensation that you can receive from the Den Breeder.

Similar to Cohen V Dent, where the breeder attempted to avoid paying for surgery citing disclaimers in the contract signed for the puppy Simon has refused to pay for Ash's surgery however courts ruled against the breeder and i believe that they will likely rule in your favor as well.

Similarly to the contract in Cohen, the contract Simon had you sign for Ash is ambiguous, meaning that the terms of the contract are not clear. The contract you signed has various dates and timelines but nothing in the timeline is clear telling you what you need to do and when. Since Simon drafted the contract, it will be construed most strongly against him and favorably to you since you had no voice in the selection(O'Day v. Schmidt). The contract Simon contains ambiguities that directly affect what you will be able to recover, it has a disclaimer against genetic or congenital diseases but states that the dog is in good health, then requires you to take Ash to a vet to determine if he has any serious illness, no timeframe is provided for that but you are given the option to return the dog within 48 hours for a replacement dog. The 48-hour timeline is then confused by a one-year limitation for congenital defects. All of this confusion will be construed to your benefit and a court will likely reject any claim that Simon may bring that your contract bars a recovery.

Additionally even if you had gotten Ash examined at the time of purchase, veterinarians are split on if his condition could be adequately diagnosed.

The provisions under FPPPA give you the right to keep Ash and to request that Simon pay. the cost of surgery necessary to correct the liver shunt (Cohen). Since the contract contains significant ambiguity there would not be a waiver of these rights and you may receive the cost of Ash's surgery under FPPPA (Cohen).

In addition to the remedies you have under the FPPPA, you also are covered under the uniform commercial code (UCC) for the purchase of Ash, and can receive damages through both the FPPA and the UCC.

Cohen v. Dent determined that pet owners can recover under both the FPPPA and the Uniform Commercial Code.

Article 2 of the UCC governs the sale of animals. Dogs such as Ash are considered "goods" and breeders are looked at as "merchants". Under the UCC a buyer of a non-conforming good (aka dog) may recover as damages any nonconformity of tender the loss resulting in the ordinary course of events from the sellers breach as determined in any manner which is reasonable" UCC §2-714. Ash is a nonconforming good since you did not get the healthy dog you asked for. (Jackson).

The sale of an animal creates and implied warranty of merchantability. Goods are merchantable if they "pass without objection in the trade or under the contract description and are fit for the ordinary purpose for which such goods are used" UCC §2-314(2)(a), (Cohen). The certification that you. will request from your vet (see above) that Ash is "unfit for purchase" means that Ash could not "pass without objection" and since he is sick Ash is not fit for his purpose as a companion dog that he was purchased for (Dalton).

Your recovery under the UCC may be bared depending on the timeframe that you notified Simon of Ash's diagnosis. Assuming you notified him within the 48-hour window you will be able to fully recover, if you notified him later than that we may face some issues with that one requirement.

Assuming that you notified Simon within the 48-hour window, this would be a breach of warranty case allowing you. to recover under §2-714(2)which gives you the difference at the time you accepted Ash between the value of the dog you accepted and the value that you would have received if Ash was a healthy dog. In cases involving animals the courts have repeatedly refunded the entire purchase price of the animal on the assumption that "no