MPT 1

Sample 1

III. Legal Argument

This court should rule in favor of the plaintiff's motion *in limine* on all three issues. First, Doris Gibbs' proposed testimony should not be allowed as inadmissible hearsay because it does not meet the requirements for an adopted statement by silence and it is unfairly prejudicial. Second, Dr. Miller's deposition trial should not be allowed as inadmissible hearsay because it is inadmissible hearsay and unfairly prejudicial. Third, the plaintiff should be allowed to introduce evidence of the defendant's insurance policy for the limited purpose of proving control and ownership.

A. Doris Gibbs' proposed testimony is inadmissible hearsay that cannot be attributed to the plaintiff as an opposing party statement because it fails to meet the requirements for an adopted statement by silence.

Under the Franklin Rules of Evidence (FRE), a statement made by an out-of-court declarant that is being offered to prove the truth of the matter asserted in the statement is defined as hearsay and is generally not admissible. R. 801. In this case, Ms. Gibbs' statement is an out-of-court statement that will be offered for the truth of the matter asserted, and thus should be excluded unless the FRE otherwise allows it in. The FRE lists enumerates several exceptions or exclusions to this rule. One such 'exclusion' that the rules expressly define as "not hearsay," is the opposing party statement. R. 801(d)(2). An opposing party statement is a statement being offered against an opposing party, and the statement was made by the party in an individual or representative capacity, or the statement is one the party manifested that it adopted or believed to be true.

In *Reed v. Lakeview*, the Franklin Court of Appeal acknowledged that the second part of this test could be met by a party's silence in the face of a statement by another. In other words, a party's silence when faced with a statement of fact can lead that statement to be attributed to them, and thus admissible as non-hearsay under the rules. The court set out four preconditions that must be met for a statement to be acquiesced by silence: (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. Moreover, the court explained that "context is exceedingly important," when analyzing whether a party has adopted a statement through silence.

The defendant in *Reed* sought to use the plaintiff's silence against her as an opposing party statement. In that case, the plaintiff was informed she was being fired and told "you know that you weren't doing your job competently," and the plaintiff failed to respond. The court found that this silence was sufficient for the plaintiff to adopt the statement as her own because the meeting between the parties was in a serious business setting and this was the type of statement you would expect a person to deny. Similarly, in *Hill v. Hill* the court found a similar

adoption by silence where a husband was told "you are having an affair," by his wife and failed to respond to the statement. In both cases, the courts recognized that the context and manner of the party's silence was enough to satisfy the four preconditions listed above. In contrast, the court in *State v. Patel* found that a party did not adopt a statement through silence when the statement was made at a loud party attended by over 100 people because it was unclear if the defendant had heard the statement at all, and even if he did someone in his position would not necessarily respond at a loud social event.

Here, opposing counsel will argue that Doris Gibbs' statement made to the plaintiff that "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," should be admissible as non-hearsay under FRE 801(d)(2) because of the plaintiff's silence in the face of the statement. This is incorrect. Although it can obviously be conceded that Mr. Dobson did not respond to Ms. Gibbs' statement, none of the other *Reed* preconditions are met here. Ms. Gibbs' statement does not satisfy all of the preconditions, and the context in which the statement was made favors not admitting it. First, it is not clear that Mr. Dobson even heard the statement. Ms. Gibbs explained that the conversation was happening in a reasonably noisy restaurant setting, and Mr. Dobson was drinking alcohol at the time. Second, it is not at all clear that the plaintiff understood the statement. Mr. Dobson was taking a drink while Ms. Gibbs' was talking, set his drink down, and then stared at Ms. Gibbs as she finished her statement. Following this, none of the parties spoke for "about a minute" (Roger Cole Memorandum). Third, the circumstances were not of the type that a person in the party's position would have responded. The present facts are most like that of *Patel*, where the court found that the context of a social, party setting was enough to make the defendant not want to respond to a statement. Here, the parties were at dinner together and socializing. This is not the context in which a party would normally make a big deal and deny the setting. This is in stark contrast to *Reed* or *Hill* where the subject matter was of a very serious sort and was made in a private, serious setting (an office or privately between spouses). Thus, Ms. Gibbs' statement is inadmissible hearsay under the FRE and must be excluded.

B. This Court should find that Dr. Miller's deposition testimony is inadmissible hearsay because Dr. Miller is unavailable to testify as a witness and his previous deposition testimony was not made to a party that had a similar motive and opportunity to develop it on cross or direct, and Dr. Miller's testimony should be excluded as unfairly prejudicial under Rule 403.

As stated above, the FRE explicitly lists certain exceptions to the general rule that a hearsay statement is inadmissible. One of these is only available where: (i) the declarant is unavailable to testify at trial; (ii) the witness has given former testimony at a prior trial, hearing, or lawful deposition, whether given during the current proceeding or a different one and (iii) the testimony is now offered against a party who had--or, a civil case, whose predecessor in interest had--an opportunity and similar motive to develop the testimony by direct, cross, or redirect.
In this case, the plaintiff's treating physician, Dr. Miller, is unavailable to testify at trial because he has passed away. However, prior to his death, Dr. Miller gave deposition testimony in a separate proceeding between the plaintiff and the City of Bristol. That case concerns the City's failure to properly accommodate the plaintiff after his injury. Dr. Miller's testimony at that trial

is not admissible under Rule 804(b) because it was not offered against a party who had a similar opportunity and motive to develop the testimony.

The court in *Thomas v. Wellspring* faced a similar issue. In that case, the court explained that the party against whom evidence was previously introduced must have had a "similar, not necessarily an identical, motive to develop the adverse testimony in the prior proceeding." In order to satisfy this "similar opportunity and motive to develop testimony," requirement, a two-part test is applied: (1) whether the question 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. The court in that case found prior testimony admissible because the statements in question were made at a prior trial, and were general in nature (not directed at a specific person). Similarly, the court in *State v. Williams* found prior testimony admissible where the prior testimony was made at a deposition, the same counsel represented the defendant in both cases, and the counsel in that case had plenty of time and opportunity to impeach the witness' testimony at the deposition.

In this case, Dr. Miller will not be available to testify at trial, but his prior deposition statements still should not come in under FRE 804(b) because the plaintiff's counsel at the deposition simply did not have the same motive to develop Dr. Miller's testimony. First, plaintiff was represented by different counsel at the deposition in the other case. That counsel admitted that his focus at the deposition was purely "on the level of accommodations given to Dobson." This is a vastly different motive than exists in the instance action, where the plaintiff's injury is directly at issue. This is much different than *Thomas* where the prior statements were made at a trial (not a deposition) and the statements in question were generalities rather than anything specific. The *Thomas* court even pointed out that it was easier to allow such evidence when the statement was made at trial, rather than at a deposition, as is the case with Dr. Miller's testimony. Here, the plaintiff's injuries are directly at issue and counsel must have the opportunity to develop any of Dr. Miller's opinions on such topic at cross. Moreover, the present case differs from *Williams* because in that case the party was represented by the *same attorney*, and the only difference between the cases was that one was a civil action, while one was criminal. In this case, the plaintiff is represented by different counsel and completely different issues are before the court; counsel in the previous proceeding was only interested in accommodation, rather than the degree of plaintiff's injury. Thus, Dr. Miller's testimony does not fit the exception for an unavailable witness' prior statement and should be excluded.

Moreover, even if Dr. Miller's testimony is found to be admissible as an exception to the hearsay rule, it still must not be admitted because it is unfairly prejudicial toward the plaintiff and fails a balancing test under FRE 403. Under Rule 403, a trial court has discretion to exclude otherwise relevant evidence where such evidence's probative value is substantially outweighed by a danger of unfair prejudice. In this case, Dr. Miller's former testimony broadly referenced the plaintiff's injuries, but did not go into detail at all about them. Dr. Miller's haphazard conclusion that the plaintiff's concussion "did not look that serious," and his statement that he is asking away from work for more time than necessary is extremely prejudicial toward the plaintiff who will not have time to develop this testimony on cross, and its probative value is extremely low. Thus, the testimony should be excluded anyway.

C. Plaintiff must be allowed to introduce evidence of the defendant's insurance policy because such evidence is admissible for the limited purpose of proving ownership or control, and the evidence would not be unfairly prejudicial toward the defendant.

Under the FRE evidence of a party's liability insurance is generally inadmissible to prove fault or negligence. R. 411. However, the rule explicitly states that "the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control." The advisory committee notes further explain that "evidence of insurance may be admitted to prove any fact other than fault or lack of fault," (importantly, in this jurisdiction courts may rely on the advisory committee notes in analyzing the Rules of Evidence. See *Smith v. State).*

In this case opposing counsel is improperly seeking the total exclusion of the existence of defendant's liability insurance on the property. Defendant is asserting that they neither own nor control the sidewalk in front of their business. Plaintiff must be allowed to rebut this evidence by introducing the defendant's liability policy which *explicitly covers sidewalks adjacent to the property*. The FRE explicitly and clearly says that a party may introduce such evidence for this purpose. Thus, the plaintiff may introduce the evidence.

Furthermore, as explained above, FRE 403 allows a court the discretion to exclude otherwise relevant evidence if the probative value of such evidence is substantially outweighed by: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needless presentation of cumulative evidence. Opposing counsel will almost certainly try and argue that introducing the defendant's liability policy is unfairly prejudicial and might result in juror confusion. This argument should not be given any weight. The mere existence of defendant's liability policy is not likely to a confuse the jury as long as it is properly limited to demonstrating ownership or control. Moreover, the probative value of this evidence is extremely high. The defendant is arguing that they do not own or control the sidewalk in question. If this argument succeeded, they would not likely be liable. The policy however, directly refutes this defense and gives the plaintiff an avenue for recovery. Thus, the evidence is very probative of whether the sidewalk was within the defendant's control, and it is not likely to confuse the issues as long as it is offered for this limited purpose.

Sample 2

To: Samantha Burton

From: Examinee

Date: July 25, 2023

Re: Dobson v. Brooks Real Estate Agency

I. Introduction

Hi Samantha, please find my draft of the argument section of the motion *in limine* attached.

II. Argument

A. Doris Gibbs's trial testimony should not be admitted because Mr. Dobson did not acquiesce by silence to her statement at their dinner.

"Four preconditions must be met for a statement to be acquiesced by silence: (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 (Fr. Ct. App. 2015).

i. Because the conversation with Ms. Gibbs at dinner took place in a social, non-serious setting, Mr. Dobson was not able to hear or understand the statement, nor were the circumstances such that someone in Mr. Dobson's position would have responded if the statement were not true.

In Reed, the court held that statements were acquiesced by silence, and thus admissible, because of the circumstances surrounding the statement and the nature of the conversation. The Reed court noted that those statements were made during a serious conversation in an office setting, meaning the plaintiff was able to hear and understand the statements. The Reed court further noted that the plaintiff should have expected the topic of conversation, her allegedly wrongful termination, to come up in an office setting with her HR director--therefore the plaintiff, who felt that she was being terminated unlawfully, would have responded to statements regarding reasons for her termination. The Reed court also distinguished Patel (Fr. Ct. App. 2010), in which the statement was made at a loud party with over 100 people, thus it was unclear whether the defendant had heard and understood the statement. The Reed court also noted that someone in the defendant's position in Patel, at a loud social event, would not necessarily be expected to respond to such a statement.

Here, unlike in Reed, the conversation was at dinner in a restaurant, where each party had had an alcoholic beverage, rather than in a serious office meeting. A social dinner at a

restaurant is much more like the loud party in Patel, which created an environment in which the defendant could not hear and understand the statement, nor was the defendant expected to respond to an accusatory statement. Moreover, Mr. Dobson was having dinner with a supportive neighbor in Ms. Gibbs, unlike in Reed, which involved a meeting with the plaintiff and and adverse party in the proceeding, her HR manager. Therefore, Mr. Dobson could not have expected the topic of his purported fault in the slip-and-fall to come up in conversation, even though the Dobsons scheduled the dinner to thank the Gibbs' for their generosity during his recovery. Because the conversation was in a social setting with a supportive neighbor, rather than in a serious office setting with an adverse party, the facts here resemble Patel moreso than Reed--therefore, Mr. Dobson should not be deemed to have acquiesced by silence to Ms. Gibbs's statement at dinner, and Ms. Gibbs's testimony should not be admitted as nonhearsay.

ii. Even if Mr. Dobson is deemed to have acquiesced by silence to Ms. Gibbs's statement at dinner, the statements should not be admitted because the danger of unfair prejudice substantially outweighs the probative value of the statements.

Rule 403 allows a judge to exclude evidence if the danger of unfair prejudice substantially outweighs the probative value of that evidence. Reed. "Unfair prejudice" creates an undue tendency to suggest decision on an improper basis or make an impermissible inference. Id. In Reed, the court found that the probative value of the evidence was high relative to the risk of unfair prejudice because of the circumstances under which the statement was made: a conversation between an employee and her HR manager in an employment proceeding. Here, unlike in Reed, the probative value is not high because the statement was not made in a conversation between adverse parties, or one where Mr. Dobson's fault in a slip and fall was likely to come up. Therefore, unlike in Reed, the risk of unfair prejudice (that a jury would assume negligence by Mr. Dobson), substantially outweighs the relatively low probative value of a conversation between Dobson and Gibbs.

Because Mr. Dobson was not able to hear or understand Ms. Gibbs's statement, and the circumstances of the conversation were not such that someone in Mr. Dobson's position would have responded if the statement were not true, he did not acquiesce by silence to her statement and her testimony on the conversation should not be admitted. Even if he did acquiesce by silence to her statement, Ms. Gibbs's testimony should still be excluded under Rule 403, because the danger of unfair prejudice from the statement substantially outweighs the probative value.

B. The prior deposition testimony of the emergency room physician who examined Mr. Dobson should be excluded because Mr. Dobson did not have a similar opportunity and motive to develop the physician's testimony in the prior proceeding.

To admit former testimony under FRE 804(b)(1), the proponent must satisfy three requirements of the rule: (1) the witness must be currently unavailable; (2) the former testimony was given as a witness at a trial, hearing, or lawful deposition; and (3) the testimony is being offered against a party who had a similar motive and opportunity to develop the challenged testimony at the earlier proceeding. State v. Holmes (Fr. Sup. Ct. 2009).

i. Because Mr. Dobson had a different attorney in the prior proceeding and that attorney failed to explore avenues by which the physician's story and credibility might be attached, Mr. Dobson did not have a similar opportunity and motive to develop the physician's testimony in the prior proceeding.

In Thomas v. WellSpring Pharmaceutical Co. (Fr. Ct. App. 2017), the court held that former testimony was admissible under FRE 804(b)(1) because Thomas's predecessor in interest had a similar opportunity and motive to develop the physician's testimony in the prior proceeding. The Thomas court cited State v. Williams, in which the same counsel represented the party seeking to exclude the evidence in both the prior case and the case at issue, and the defense counsel spent considerable time impeaching the witness and exploring his motive in the prior deposition, thus the party had a similar opportunity and motive to develop testimony and the evidence was admissible. The Thomas court noted that the decision to admit the former testimony was even easier than the Williams case, because in Thomas, the former testimony occurred at a trial, not a discovery deposition (where the motive is to merely obtain a preview of a witness's testimony). The Thomas court further noted that even in a deposition, a prudent attorney would explore how the witness's story and credibility might be attacked. Indeed, the attorney in Williams *did* spend considerable time impeaching the witness and exploring his motive in that deposition testimony. Here, unlike in Thomas, the prior testimony of Mr. Dobson's ER doctor occurred at a deposition, not a trial, thus the motives on cross-examination were different. Further, unlike in Williams, Mr. Dobson had a different attorney in his prior proceeding than he has in his current proceeding. That different attorney failed to adequately explore how the ER physician's story and credibility might be attacked, because he imprudently chose to focus only on the level of accommodations given to Dobson. And while Mr. Dobson's former attorney did spend time attacking the physician's credibility, he focused on prior malpractice suits against her, a collateral issue, rather than exploring her story to poke holes in it or assessing her perceptive credibility on the date of the actual ER treatment. Because the former testimony here occurred at a deposition rather than a trial, the facts of Mr. Dobson's case fall short of Thomas. Further, because a different, imprudent attorney failed to adequately explore the witness's story in the prior testimony, the facts here also fall short of Williams. Therefore, Mr. Dobson did not have a similar opportunity and motive to develop the physician's testimony in the prior proceeding, and that deposition testimony should be excluded. Further, even if Mr. Dobson is deemed to have had a similar opportunity and motive to develop the physician's testimony in the prior proceeding, the probative value of this testimony is substantially outweighed by the danger of unfair prejudice, thus it should also be excluded under FRE 403.

C. The Brooks Real Estate Agency property insurance policy should be admitted because it serves to prove control, a permissible purpose, rather than to prove negligence or fault.

FRE 411 and the Advisory Committee notes to that rule provide that evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

Here, Mr. Dobson seeks to admit evidence of the BREA property insurance policy solely to prove that BREA controls the sidewalk on which he slipped and fell. BREA claims that it does not control the sidewalk and therefore was not responsible for clearing it of ice. However, the deed shows that BREA owns the building on Elm Street, and the property insurance policy explicitly covers sidewalks adjacent to the property, where Mr. Dobson fell. Mr. Dobson does not seek to use the insurance policy to prove that BREA was negligent. As such, evidence of the policy is admissible for the limited permissible purpose of proving that BREA controls the sidewalk. Further, it also satisfies FRE 403 because its probative value substantially outweighs its danger of unfair prejudice. As such, the policy should be admitted.

III. Conclusion

Thank you for allowing me to complete this research for you. Please let me know if you need anything else or have any questions.

Sample 3

III. Legal Argument

This motion contests the admissibility of two pieces of evidence and argues for the admissibility of a third.

A. Trial testimony by Doris Gibbs about Mr. Dobson's silence in response to her statement should not be admitted under FRE 801(d)(2) as a statement by an opposing party because the circumstances surrounding his silence were not such that a person in his position would have likely responded to protest the validity of the statement. In the alternative, it should be excluded under 403.

Under Franklin Rule of Evidence 801(c), hearsay is a statement that the declarant did not make while testifying at the current trial or hearing and that a party offers into evidence to prove the truth of the matter asserted. FRE 801(d)(2) excludes from the definition of hearsay statements that are offered against an opposing party and was made by the party themself. Statements include statements that the party manifested that it adopted or believed to be true. Courts have included statements that were admitted by silence, referring to statements that a party acquiesces to by remaining silent. These may be introduced against that party. Reed v. Lakeview Advisers LLC (Fr. Ct. App. 2015).

For a statement to be considered acquiesced by silence, four preconditions must be met: (1) party must have heard the statement, (2) party must have understood the statement, (3) 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 (2015).

In determining whether the four preconditions are met, context very important and the court should carefully consider circumstances under which the statement and alleged acquiescence were made. For example, in State v. Patel (Fr. Ct. App. 2010), the court excluded an alleged statement by acquiescence where the statement was made at a loud party attended by over 100 people. The court found it was not clear D had heard and understood statement and additionally, that someone in Ds position would not necessarily have responded in such a loud and public social event.

Conversely, in Reed, which involved a plaintiff suing her employer for wrongful termination, the statements and acquiescence at issue were made made during a meeting between the plaintiff and her human resources representative about her termination. This was a serious conversation in an office and the court found that there was every reason to believe P understood them. Additionally, because the plaintiff believed she was being terminated unlawfully, one her position would reasonably have responded to being told that her termination was for reasons like lateness and failure to complete work. Similarly, in Hill v. Hill (Fr. Sup. Ct. 2010) involved a divorce action between a husband and wife. The court found the husband had acquiesced by silence by not responding to the wife accusing him of adultery during a serious conversation about their marriage and admitted the acquiescence as a statement by a party opponent.

Here, the statement that Dobson is being alleged to have acquiesced to was made by his neighbor, Doris Gibbs. Ms. Gibbs was helpful to Dobson after his injury, bringing by food and checking in on him. As a thank you after he recovered, Dobson and his wife invited Ms. Gibbs and her wife out to dinner at a restaurant At that dinner after they had each had a beer, Ms. Gibbs said, "We have all been clumsy before. I bet 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." She stated this in an understanding, statement of fact way that was not accusatory. There was usual background noise of a restaurant and Mr. Dobson appeared to be listening, he looked at her and set his beer down while she spoke. Mr. Dobson did not respond and no one said anything for a minute, then conversation resumed.

Like the party in Patel, Mr. Dobson was in a public, social setting when this statement was made. He was out to dinner with friends and his wife. Additionally, unlike in Hill and Reed, Ms. Gibbs statement was not made in an accusatory way and was made in a normal conversation, not one of high stakes like accusations of adultery or employment termination.It was reasonable that Mr. Dobson would not have responded. After all, he was taking Ms. Gibbs out as a thank you and would likely not want to contradict her and come off as rude. Further, Ms. Gibbs's statement was entirely based on her own assumptions about Mr. Dobson's behavior with no personal knowledge of the actual facts of Mr. Dobson's fall. This is very different from the statement in Reed in which the human resources agent was reporting the company's perspective.

Additionally, this testimony should be excluded because its probative value is substantially outweighed by the burden of unfair prejudice under Rule 403. Probative value is defined as the ability of a piece of evidence to make a relevant disputed point more or less likely to be true. Every piece of evidence may be prejudicial to a the party against whom it is admitted. Rule 403 is concerned only with prohibiting unfairly prejudicial evidence. Unfairly prejudicial evidence is evidence tht allows or encourages the jury to reach a verdict based on an impermissible ground or to make an impermissible inference.

Here, the evidence is not merely weakening Mr. Dobson's case, as the court held in Reed. Rather the evidence would improperly lead the jury to conclude that Ms. Gibbs knew what she was talking about in making her statement. In reality, she had no personal knowledge of Mr. Dobson's falls and her statement was pure speculation. As such, it is more prejudicial than probative and should be excluded.

<u>B. The deposition testimony of Dr. Miller should be excluded because Mr. Dobson did not have a similar motive and opportunity to develop the testimony in the prior proceeding and in the alternative, it should be excluded under Rule 403</u>.

Under Franklin Rule of Evidence 801(c), hearsay is a statement that the declarant did not make while testifying at the current trial or hearing and that a party offers into evidence to prove the truth of the matter asserted. To admit former testimony under Frankline Rule of Evidence 804(b)(1), the proponent must satisfy three requirements: (1) the witness must be cucrently unavailable; (2) the former testimony was given as a witness at trial, hearing, or lawful deposition; and (3) the tesitmony is being offered against a party who had - or in a civilc case, whose predecesssory interest had - a similar motive and opportounty to deelop the challenged testimony at the earlier proceeding. (State v. Holmder (Fr. Supp. Ct. 2009))

Here, the witness is undisputably unavailable as Dr. Miller is decesased. Additionally, the former testimony was given at a deposition. Finally, the party against whom the testimony is being offered is actually the same party. Dr. Miller's deposition was taken by Mr. Dobson's attorney Mr. Chen for Mr. Dobson's suit against the City for failing to given him sufficient accommodations to recover from his injuries from this same slip and fall.

Mr. Dobson, however did not have a similar motive and opootunity to devleop the challenged testimony. Regardless of whether the party against whom the testimony is being introduced is the same, the court must still consider whether there was a similar but not necessarily identical motive to develop adverse testimony at prior proceeding. (Jacobs v., Klien (Fr. Sup Ct. 2002). The court will apply a two-party test, asking whether the questioner was on the same side of the same issue at both proceedings, and whether questioner had a substantially similar interest in asserting that side of the issue. Here, Mr. Dobson was on the same side.

Turning to the question of interest, interest requires an evaluation of both motive and opportunity. For opportunity, the court will consider whether the party in the earlier case the opportunity to develop the testimony- not whether the party did indeed develop the testimony. The court will also consider motive. In State v. Williams, the court stated that while primary motive of deposition is to obtain preview of witness's testimony, this does not exclude the need to understand witness's story and credibility. A prudent attorney would explore such avenues in a deposition. The court in that case found that the attorney did pursue such avenues and that the defendant failed to explain how he was prevented from fully pursuing lines of questioning or how they would have been pursued differently at trial.

In Thomas v. WellSpring Pharamceutical Co., Franklin Ct. App. 2017, the former testimony occurred at a trial which the court said made it even easier than in Williams, where the testimony was a deposition, to find similar motive and opportunity. The court found that the first plaintiff's attorney had engaged in robust cross and that the plaintiff had same opportunity and similar motive on the same issue of the cold medicine side effects.

Here, Dobson did not have a similar motive and opportunity to develop the testimony in the prior deposition of Dr. Miller. Therefore, he fails the second part of the test. Chen focused his questioning in the deposition on the level of accommodations given to Dobson and on Dr. Miller's credibility by questioning about prior malpractice lawsuits. Chen made the strategic decision to not focus on the extent of injuries. What is at issue in this case is the extent of injuries, not Dr. Miller's assessment of the accommodations. Additionally, the two cases here are about very different things. In the first, Chen was targeting what accommodations were needed so Mr. Dobson could get paid by the city. Here, Mr. Dobson would be focusing on the extent of his injuries. While a prudent attorney may have explored all avenues as per State v.Williams, where the Chen did evaluate credibility which was the issue in Williams. The issue here is therefore distinct from Williams.

Additionally, this testimony should be excluded because its probative value is substantially outweighed by the burden of unfair prejudice under Rule 403. Probative value is defined as the ability of a piece of evidence to make a relevant disputed point more or less likely to be true. Every piece of evidence may be prejudicial to a the party against whom it is admitted. Rule 403 is concerned only with prohibiting unfairly prejudicial evidence. Unfairly prejudicial

evidence is evidence tht allows or encourages the jury to reach a verdict based on an impermissible ground or to make an impermissible inference.

Here, the testimony will unfairly diminish Mr. Dobson's injuries without actually providing anything of relevant value to Brook's case. It is undisputed that Mr. Dobson was injured and that can be proven by other evidence like medical records.

As such, this should be excluded

C. Brooks Real Estate Agency's insurance policy should be admitted under Rule 411 to show that Brooks exercises control over the sidewalks.

Under rule 411, liability insurance is inadmissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, like proving agency, ownership, or control. Additionally, the advisory notes to Rule 411 state that the illustrations in rule are merely illustrations. If relevant, evidence of insurance may be admitted to prove any fact other than fault or lack of fault.

Here, it is undisputed that Brooks Real Estate Agency has insurance for the building that covers the sidewalks adjacent to the property. Mr. Dobson is presenting this evidence to dispute Brooks's claim that it does not control the sidewalk and was therefore not responsible for the ice.

Brooks may argue that this should be excluded under Rule 403 because its probative value is substantially outweighed by the danger of unfair prejudice. This argument should fail however, because as discussed in Reed, the mere fact that evidence weighs against a party's case does not warrant exclusion under 403. Rather, here, the evidence is extremely probative to control of the sidewalk by Brooks and is not unfairly prejudicial. As such, it should be admitted.

D. Conclusion

In conclusion, the testimony of Ms. Gibbs and the prior testimony of Dr. Miller must be excluded. The liability insurance of Brooks, however, must be admissible under Rule 411.

MPT 2

Sample 1

To: Mr. Martin

From: Examinee on behalf of Bradley Wilson

Re: Claim Against the Den Breeder

Date: July 25, 2023

Dear Mr. Martin,

This letter serves to describe the potential rights and remedies that you may have against Simon Shafer, doing business as "The Den Breeder." We are sorry to hear about the health problems that your dog Ash is experiencing and hope that this letter is helpful to you as you examine this potential claim against Mr. Shafer. You asked us to determine whether you are able to keep Ash, whether you are able to recover the purchase price of $2,500 you paid for Ash from Mr. Shafer, and whether you are able to recover the cost of the veterinary bills of $8,000 for treating Ash's liver condition. Each of these items are discussed in detail below.

1. **Can Mr. Martin Keep Ash and Recover the Cost of the Corrective Surgery?**

Short answer: Likely Yes. Under §753(b)(3) of the Franklin Pet Purchaser Protection Act (FPPPA), a pet owner is able to retain the animal and also receive reimbursement from the pet dealer for veterinary services from a licensed veterinarian of the purchaser's choosing to cure the animal.

The governing law in Franklin regarding the purchase of pets is the Franklin Pet Purchaser Protection Act (FPPPA). The FPPA is also known as the "Pet Lemon Law" (Cohen). It governs the sale of household pets, including dogs (Cohen.). The FPPPA provides purchasers with a remedy if they provide a certification by a licensed veterinarian about the animal's condition. (Cohen). The veterinarian must provide this certification within certain time limits: 14 business days for an illness or symptoms of an infectious disease, or 180 calendar days for a congenital defect. Here, your veterinarian, Dr. Miller, has indicated that she is willing to provide such a certification (Miller Email), and you should attempt to get her to provide this certification as soon as you can because of the 180 day limitation for congenital defects. You have enough time now, as Ash is only three and a half months old, but this may be a priority soon due to his diagnosed congenital defect.
Your case is similar to a previous case in our state, *Cohen v. Dent*. In this case, Cohen purchased Buddy a Bulldog from Dent, Dent Bulldogs. THe dog started limping, was incapable of bearing weight on left rear leg, and the conidition was diagnosed as hip dysplasia, a congenital defect like liver shunts. (Cohen). The Vet in Cohen suggested surgery of $4000 to resolve the issue, and the

vet also signed a certification of unfitness of dog or cat for purchase, which your vet, Dr. Turner, indicated that she would sign. (Cohen, Turner Email).

The first issue to discuss are the provisions in the Dog Purchase Agreement between you and Mr. Shafer which provide timelines for how to handle the dog's replacement and notification of the diagnosis of the dog. When interpreting a contract, the court first looks to the language in the document itself. If the terms of the contract are unambiguous, the court applies those terms to the dispute at hand, unless they conflict with relevant statutes. (Cohen). Here, the terms of your contract with Mr. Shafer likely conflict with the FPPPA, which provides that a pet purchaser has a remedy under this section, because the timeframes in the contract are much shorter than those provided in the FPPPA.

In addition, the terms of the contract between you and Mr. Shafer are likely ambiguous and will be interpreted in your favor. (Cohen). A contract is ambiguous when it does not address refunds or other monetary damages. (Cohen). Here, your contract does not address refunds or monetary damages but merely states that they are entitled to replacement of the dog. A contract is ambiguous when it does not define a starting point for a remedy, and In Cohen, the contract was ambiguous because it stated a one-year remedy when a pet has a congenital condition, but fails to specify the start date for the year. Here, your DOg Purchase Agreement states that "if the dog shows signs of illness" the buyer must take to a licensed veterinarian. THis is ambiguous because there is no timeframe on the dog showing signs of illness, but merely states that the dog can be returned within 48 hours of purchase. However, this appears to limit the illness of the dog to within 48 hours of purchase, which is somewhat ambiguous because the phrasing "if the dog shows signs of illness" appears not to be limtied to a certian timeframe. A contract is also ambiguous if it does not address most of the key issues in the case. (Cohen). Here, the main issues you are seeking are a refund of Ash's purchase price as well as veterinary costs. but the Dog Purchase Agreement does not discuss these issues. When a contract contains ambiguous terms, the court must construe it most strongly against the party who prepared it, and favorably to a party who had no voice n the selection of its language. (Cohen citing O'day). Here, Shafer prepared the DOg Purchase Agreement, and it does not appear that you had any say in its terms. THerefore, the contract will likely be construed in your favor, rather than in Shafer's favor.

The FPPPA describes three remedies available to a purchaser, allowing the purchase to choose any of the three remedies. (FPPPA 753). These remedies are: (1) Return the animal and refund purchase price, (2), Return the animal an receive an exchange animal of purchaser's choice and vet costs related to certification of unfitness or original animal, and (3), retain the animal and receive reimbursement from the pet dealer for vet services from licensed vet of purchaser's choosing for purpose of curing or attempting to cure the animal. Here, your selection would likely be number three out of these options, because you wish to retain Ash as a pet, as well as seek damages for the cost of Ash's vet bills. Note that the selection of this option does not necessarily prevent you from recovering the purchase price of Ash, which will be discussed in the next section below.

2. Can Martin Recover what he paid for Ash from The Den Breeder or Mr Shafer?

Short answer: Likely Yes. Under Cohen, a Pet Owner is able to recover damages under both the FPPPA and the Uniform Commercial Code (UCC) when there has been a breach of the

warranty of marketability under UCC 2-714, and thus damages for the purchase price of Ash are likely recoverable in addition to the cost of his surgery.

Remedies under FPPPA are not limited to just the FPPPA's stated remedies, and other areas of law can be consulted to determine the available remedies. (Cohen). The Uniform Commercial Code (UCC) provides the law on how people who buy and sell goods can establish remedies against one another. Article 2 of the UCC governs the sale of animals (COhen). Dogs are considered "goods" under the UCC, and pet stores and breeders are "merchants" as defined in Article 2. Therefore, the UCC covers your purchase of Ash.

Under the UCC, a buyer of nonconforming goods may "recover as damages for 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. (Cohen). A dog is a nonconforming good when the person does not receive what they bargained for: a healthy dog. (cohen, citing Jackson). Here, you purchased Ash because you were looking for a dog of his specific type and because the puppies looked healthy and lively and active. SInce Ash is not actually healthy, Ash woudl be considered a nonconforming good under the UCC due to his congenital defect.

The sale of an animal creates an implied warranty of merchantability. (Cohen). Goods are merchantable if they "pass without objection in the trade under the contract description" and are "fit for their ordinary purpose'. This means that they fall within what is to be reasonably expected for the type of good that they are, so here, in the sale of a dog, you would expect that the dog is capable of being a companion animal and a pet. A veterinarian's certification that the dog is unfit for purpose can establish that the dog cannot pass without objection. (Cohen). A dog is not fit for its ordinary purpose when it cannot walk, run, or jump without pain. (COhen, citing Dalton). Here, Ash's diagnosis from Dr. Turner is that, despite being well fed and cared for, he is lethargic and weak, especially after eating, which you noticed about Ash. The diagnosis of a liver shunt confirmed that this is typical of this diagnosis. In addition, earlier testing may not have diagnosed this issue - 8 weeks may not have diagnosed it. So following the contract provisions may not have been enough to discover this congenital defect.

Under UCC 2-316, a contract can exclude or modify warranties in the following circumstances. To exclude the warranty of merchantability, the language must mention merchantability and must be conspicuous. Here, the Dog Purchase agreement does not mention the warranty of merchantability. In addition, the UCC 2-316(3)(a) provides that unless circumstances indicate otherwise, all implied warranties are excluded by saying as is, with all faults. However, the Dog Purchase agreement does not indicate that the dog is purchased as-is. In addition, under UCC 2-316(3b) there is no implied warranty when teh buyer before entering into the contract ahs examined the goods or the sample or model as fully as he desired or has refused to examine the goods, in which an examination ought in the circumstances to have revealed to the buyer. Shafer said that the dogs were healthy in his discussion with Martin. (Interview Transcript). the Dog Purchase Agreement also states that the dog si sold as a companion. These statements likely created an express warranty that Ash was fit for ordinary purpose being a companion dog. In addition, Shafer did not say anything about Ash's condition. (Interview Transcript). Here, you not an expert with regard to dogs and you are not merchant that regularly deals with the purchase and sale of dogs. In the circumstance of Ash's purchase, it does not appear that you should have inquired further about the dog's potential congenital

defect, especially in the situation where Shafer indicated that his dogs are healthy and your visual observation that the dogs were lively and active (Interview Transcript). THerefore, the warranty of merchantability has likely not been waived in this case.

Mr. Shafer may raise that the warranty of merchantability should nto apply here due to a case called Tarly v. Paradise, where the buyer sued for breach of warranty of merchantability when he bought a ragdoll cat with a congenital heart defect when their contract explicitly required an examination by a vet within 2 days of purchase. However, your purchase agreement does not require such an examination, it appears only to require notification of diagnosis. But since the contract is ambiguous, ti will likely be interpreted in your favor. Further, even if your contract did so require, an examination may not have revealed the defect. Puppies\s may not show signs of congenital defects until 8, 10, 12 weeks old, and vets reccomend delaying testing till 16 weeks. (Liver SHunt Basics) Therefore, the examination would not have disclosed the heart condition at the tie of sale. (Liver Shunt Basics)

UCC 2-714 discusses the types of monetary damages that a purchaser of a good can get from a seller. There are two different options for damages for breach of contract when the goods have been accepted, as they have been here because you are in possession of Ash. (1) Where the buyer has accepted goods and given notification, he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach, meaning that if the dog does not meet the standards set forth in the contract. THe second option provides the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. This means that the difference in value of the dog when purchased, ($2500) and its value had the defects been known, can be recovered if there is a breach of warranty, such as the warranty of merchantability. Under UCC 2-714, the measure of damages is the difference at the time of sale between the dog as warranted and the actual dog. Courts repeatedly refund the whole of the purchase price for the animal because no buyer would agree to purchase an animal it knew to have a congentital defect that might lead to death or might require expensive surgery. (Cohen, citing Dalton). Therefore, here, an award of the full purchase price is reasonable because there has been a breach of the warranty of merchantability. Therefore, you are likely able to recover not only the veterinary bills to repair Ash's liver defect, but also to recover the purchase price of $2,500 that you paid for him.

We hope that this assists you as you choose whether to bring a claim against Mr. Shafer.

Thank you,
Examinee

Sample 2

To: Mr. Anthony Martin

From: Applicant (Law Offices of Bradley Wilson)

Date: July 25, 2023

Dear Mr. Martin:

Thank you for seeking the legal services of the Law Offices of Bradley Wilson regarding your potential suit against Simon Shafer doing business as "The Den Breeder" (hereafter referred to as "Shafer") stemming from the congenital defect you discovered in your dog, Ash. The following letter seeks to answer your various questions about your rights under the contract and relevant Franklin law and raises potential issues we might have in bringing your case.

Did your contract (Dog Purchase Agreement) with The Den Breeder limit your recovery?

The Dog Purchase Agreement that you signed with The Den Breeder likely does not limit your recovery to the terms of the contract because the contract itself is not unambiguous. Since the contract is not unambiguous, a court will likely be willing to turn to other relevant Franklin laws to provide you additional sources of damages resulting from The Den Breeder's breach.

When interpreting a contract, the court will first review the language of the document itself and, if the contract terms are unambiguous, the court will apply the terms of the contract to the dispute provided they do not conflict with relevant statutes. *Cohen v. Dent* (Franklin Court of Appeal, 2020). The facts of *Cohen* are very similar to your case. In *Cohen*, a purchaser bought a bulldog from a breeder that was later discovered to have hip displaysia, a congenital defect. The purchaser sued the breeder for the cost of surgery and the value of the entire purchase price of the dog but wanted to keep possession of the dog. The contract between the purchaser and breeder purported to limit the purchaser's rights to exchange of the dog for a healthy dog.

In *Cohen*, the Franklin Court of Appeal found that a contract between a breeder and a purchaser was ambiguous where the contract provided what a buyer could do after purchasing a dog with a congenital condition and provided some detail about which conditions were eligible, but failed to specify a start date for the period in which the buyer could return the dog, failed to address refunds or other monetary damages, and required tests verifying the congenital condition "if needed" but did not define the term and stated no time limit in which the buyer needed to make their claim.

The Pet Purchase Agreement (PPA) you signed with The Den Breeder contains similar ambiguities as the contract in *Cohen*. The PPA states that if a dog is suffering from "serious disease clearly attributable to Breeder, which would prevent it from being a companion" the dog can be returned within 48 hours of the purchase for a replacement dog. However, the contract

fails to define "serious disease" or what constitutes the dog serving as a "companion," which are vital terms necessary to interpreting a purchaser's remedies under the contract. Further, the contract states that if a dog is diagnosed with a congenital defect that would "prevent the dog from being a companion" before the dog is one year old, the buyer must notify the breeder within 24 hours and provide a report from a veterinarian. However, the contract states no remedies in the event that this occurs and, again, does not define what constitutes a condition that would "prevent the dog from being a companion."

Moreover, the Franklin Supreme Court has stated in *O'day v. Schmidt* (Fr. Sup. Ct. 1947) that when a contract contains ambiguous terms, a court must construe it most strongly against the party who prepared it, and favorable to a party who had no void in the selection of its language.

Given that the language in the PPA is clearly ambiguous under the precedent, or prior legal holdings, in *Cohen* and *O'day*, we have a strong argument that your remedies are not limited to those provided in the FPPPA. As such, a court will likely look to other relevant statutes, including the Franklin Pet Purchase Protection Act and the Franklin Uniform Commercial Code, to provide you with additional remedies.

What remedies are available to you under the Franklin Pet Purchase Protection Act (FPPPA)?

Under the FPPPA, you have the right to keep possession of Ash and recover from The Den Breeder the roughly $8,000 cost of the liver shunt surgery.

The FPPPA provides remedies for purchasers where, within 180 calendar days of the sale of an animal, a licensed veterinarian certifies the animal unfit for purchase due to a congenital malformation that adversely affects the health of the animal. Here, within one month of bringing Ash home, you took Ash to Dr. Clare Turner, who soon afterwards discovered that Ash had liver dysfunction, specifically a portosystemic shunt, which she described as a congenital defect. You also noted that Ash was sluggish and inactive due to the condition, and "Liver Shunt Basics for Wolfhound Puppies" noted that liver shunts are viewed as congenital defects as well. Thus, it is clear that Ash suffers from a congenital defect and you took Ash to the veterinarian within the 180-day period. If Dr. Turner certifies that Ash is unfit for purchase, which is likely given the side effects and the necessity of repairing the condition, then you will meet the requirements for a remedy under FPPPA.

The FPPPA provides several remedies, which include the right to return the animal for a refund, the right to return the animal and receive a replacement animal, and the right to keep the animal and be reimbursed for veterinary costs incurred for the purpose of curing or attempting to cure the animal. The court in *Cohen* concluded that under the FPPPA, the purchaser had the right to keep the bulldog puppy and recover their costs of fixing the dog's defects.

What remedies are available to you under the Franklin Uniform Commercial Code (UCC)?

Under the Uniform Commercial Code, you have the right to recover from the Den Breeder the $2,500 purchase price for Ash pursuant to breach of implied warranty of merchantability.

The FPPPA provides and the court in *Cohen* confirmed that, where a contract is ambiguous, the remedies provided in the FPPPA do not foreclose other remedies. Therefore, you can also likely seek to recover the $2,000 purchase price of Ash under the Franklin Uniform Commercial Code. Article 2 of the UCC governs the sale of animals, and courts in Franklin have previously held that dogs are considered "goods" under the UCC and breeders are considered "merchants." (*See Cohen*). The UCC provides that a buyer of nonconforming goods may "recover as damages for any nonconformity of tender the loss resulting int eh ordinary course of events from the seller's breach as determined in any manner which is reasonable." This essentially means that where the goods are not as expected, buyer can recover the costs of those goods as reasonable. The court in *Cohen* noted that the purchaser did not get what she bargained for--a healthy dog--and as such she could recover for nonconforming goods. Similarly, since you did not receive a healthy dog, which is what you bargained for, you can recover for nonconforming goods stemming from Ash's congenital defect.

The sale of animals also creates an implied warranty of merchantability, which is met if goods are "fit for the ordinary purposes for which such goods are used." UCC Section 2-314(2)(c). In *Cohen*, the court found that where the bulldog could not run or walk or jump without pain, it was not fit for the ordinary purposes in which a dog is used. In *Dalton v. Jackson* (Fr. Ct. App. 1997), a court also found that where a parrot died two weeks after its purchase, it was not fit for ordinary purposes, which included the purpose of staying around and living. Here, we can argue that Ash's lethargy and other symptoms resulting from his congenital defect make him unfit for the purposes in which he is intended, that of companionship. Moreover, if Ash's condition is eventually deadly, he would be unfit for ordinary purposes if he perished as a result of his condition.

The Den Breeder may seek to argue that the contract limits your rights to recover under the UCC for a congenital defect because you did not bring the congenital defect to his attention soon enough. In *Tarly v. Paradise* (Fr. Ct. App. 1995), the court rejected a buyer's claim for breach of implied warranty because the contract expressly contained a requirement that the buyer have the animal examined within two days of purchase and the buyer failed to do so. The vet in *Tarly* testified that had the buyer had the animal inspected within two days of purchase, they likely would have discovered the defect at hand which became apparent four months later.

The situation here is different from *Tarly* because there is no express requirement in the PPA that buyers need get the dogs inspected within a specific time period. Moreover, as noted by Dr. Turner and the "Liver Shunt Basics for Wolfhound Puppies" pamphlet, there is no agreed upon time period for having dogs examined for liver shunt issues and the issues are not discoverable on visual inspection and sometimes do not manifest until the puppies grow older. Thus, it is possible that even despite getting Ash checked sooner or directly after you purchased him, you still would not have been able to reasonably discover his issue when he was younger.

Because the Den Breeder can likely be held liable for breach of the implied warranty of merchantability, you should be able to recover damages under the specific standard set forth in UCC Section 2-714, which provides for "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted." The court in *Cohen* noted that Franklin courts repeatedly find this value to be the full purchase price for the sale of animals who have a defect because buyers would not have

bought the animal had they known about the defect. Thus, you should be able to recover the full purchase price of Ash, $2,500.

In conclusion, it appears at this stage that you have a strong case against The Den Breeder. Provided that a court finds that the PPA between you and The Den Breeder is ambiguous, you can likely keep Ash and recover for the cost of the surgery under the FPPPA and the cost of the purchase of Ash under the UCC. Please contact us for further discussions or if you have any questions after reading this letter.

Best,
Applicant (Law Offices of Bradley Wilson)

Sample 3

Memorandum

TO: Bradley Wilson

FROM: Examinee

DATE: July 25, 2023

RE: Martin v. The Den Breeder

Dear Mr. Martin,

I am sorry to hear about the news regarding Ash's liver shunt. I hope she is able to get the care he needs, and I am happy to provide advice regarding the available remedies you may seek against The Den Breeder. Below are some questions pertaining to your claims along with a short answer before I provide further analysis.

I. Is the contract ambiguous?

Yes the contract is ambiguous because there are conflicts within the contract regarding the Mr. Martin's obligation to inspect his new dog and what remedies exist if a congenital defect exists in the dog.

When interpreting a written contract, courts will first review the language in the document itself to determine if there are any ambiguities that may affect one's understanding of the terms in the agreement. A contract will be considered ambiguous when there are uncertainties in the terms which directly affect the resolution of the dispute. Cohen v. Dent. Furthermore, when a contract is found to be ambiguous, the court will construe the contract 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.

Upon Mr. Martin purchasing Ash, he was required to sigh the "Dog Purchase Agreement" which was prepared by The Den Breeder. This is evidenced by the fact that the company's name is at the top of the agreement. Mr. Martin did not participate in the drafting of this agreement, nor did he seek independent counsel before signing this agreement. The contract is ambiguous because it does not clearly state the buyer's obligations after purchasing a dog, and the contract is not clear with respect to the available remedies.

The agreement states that the Buyer will take the dog to a veterinarian if the dog shows signs of illness to determine if the dog has any serious illness. However, the proceeding sentence then states that the Buyer must provide notice of a serious illness to the breeder within 48 hours of purchase. It is unclear what the Buyer's obligation is because one sentence only requires the Buyer to seek a veterinarian upon signs of illness, but notice of serious illness must be made within 48 hours of purchase. There are two different timelines that are presented in this

paragraph. One does not require the Buyer to do anything until a condition precedent occurs, but the other implies the Buyer should seek a veterinarian immediately since it only has 48 hours to notify the breeder. Not to mention, the contract does not define what constitutes a serious illness, so this creates further confusion when attempting to understand the buyer's obligations.

The second paragraph then states what the Buyer must do when the dog is diagnosed with a congenital defect before the dog turns one year old. It is worth noting that it is unclear whether congenital defect and serious illness are different conditions, but if that is the case then the entire preceding paragraph should not apply to Mr. Martin's current case with Ash. This paragraph is also ambiguous because it does not state the available remedy to the Buyer in the case of a congenital defect. The contract requires the Buyer to notify the Breeder in writing within 24 hours of diagnosis and provide a copy of a veterinarian report confirming the diagnosis. However, the contract is silent as to the available remedy in this event. The preceding paragraph stated the Buyer may return the dog for a replacement dog, but this remedy was only available if the dog had a serious illness. No such remedy exists if the dog is diagnosed with a congenital defect.

Since the contract will likely be considered ambiguous by a court, it will construe the contract favorably to Mr. Martin since he was the party who had no voice in the selection of the contractual language. The Den Breeder's claim that it has no legal obligation to pay Mr. Martin will likely fail because the contract does not address the available remedies in the event the dog is diagnosed with a congenital defect. Since the contract is silent on this issue, the remedies available at law under the Franklin Pet Purchase Act and the Uniform Commercial Code will be assist Mr. Martin.

II. Did The Den Breeder breach the Franklin Pet Purchase Act?

Yes The Den Breeder did breach the FPPPA because Ash has been diagnosed with a congenital defect within 180 days of purchase, provided Mr. Martin supplies the appropriate veterinarian certification.

The FPPPA governs the sale of household pets, including dogs, and the law provides purchasers with a remedy if they are able to provide a certification by a licensed veterinarian about the animal's condition. Assuming the certification is given, the purchase has three potential remedies available to them if the certification is provided within 180 days of purchase. Mr. Martin will be able to assert a claim under the FPPPA once the veterinarian certifies Ash's congenital defect. Mr. Martin took Ash to a licensed veterinarian, Dr. Claire Turner, and she responded with an email on July 18 that Ash has been diagnosed with a liver shunt which is deemed a congenital defect. She further stated at the end of the email confirming Ash's diagnosis that she is prepared to sign the form certifying her opinion. Therefore, Mr. Martin should be afforded the remedies available to him under the FPPPA assuming he has obtained the certification from Dr. Turner.

The Den Breeder will likely argue that such remedies are cut off since Mr. Martin did not satisfy the notice requirement in the Dog Purchase Agreement. The agreement stated that the Buyer must notify the Breeder in writing within 24 hours of the diagnosis and provide a copy of the veterinarian report. Mr. Martin stated he called The Den Breeder the next day after he received Dr. Turner's diagnosis, but he did not provide written notice. While this is in violation of the contract, it is unclear whether a purchaser can even waive their rights under the FPPPA if the

contract provides otherwise. Regardless, this defense should fail because the contract has significant ambiguity regarding the available remedies. Had the notice requirements been met, there was still no available remedy. Therefore, the court will likely find that no waiver existed, and all rights under the FPPPA may be asserted.

Upon providing the notice within 180 days with Dr. Turner's certification, there are three available remedies. Mr. Martin may seek (i) the right to return the animal and receive a refund, (ii) the right to return the animal and receive a replacement, or (iii) the right to retain the animal and be reimbursed for veterinary costs incurred for the purpose of curing or attempting to cure the animal. Mr. Martin has expressed his affection for Ash and how he has grown deeply attached to the dog, so the third option will likely be the best option. He can still keep Ash, and he can seek the cost of surgery from The Den Breeder. Furthermore, the FPPPA states that nothing in the law will limit any other remedies available to a purchaser at law, so Mr. Martin may also seek damages under the Uniform Commercial Code.

III. Did The Den Breeder sell nonconforming goods and breach the implied warrant of merchantability under the Uniform Commercial Code?

Yes, The Den Breeder sold Mr. Martin a nonconforming dog since it was not healthy, and this nonconformance made the dog not fit for its ordinary use which breached the implied warranty of merchantability.

Article 2 of the UCC governs the sale of goods, and the case law in Franklin has routinely stated that this includes the sale of animals such as dogs. Furthermore, Franklin case law states that breeders are deemed "merchants" for UCC purposes which means they may be subject to certain laws within the code pertaining to the sale of nonconforming goods or warranties.

Mr. Martin can argue Ash was a nonconforming good because he did not get what he bargained for, which was a healthy dog. This has been upheld as an example of a nonconforming good in the Cohen case where the buyer's dog had hip displaysia which did not allow the dog to live a healthy life. Furthermore, the sale of Ash created an implied warranty of merchantability since The Den Breeder is considered a merchant. Under UCC 2-314(a) and (c), goods are "merchantable" if they pass without objection and are fit for their ordinary purpose for which the good is used. In the Cohen case, the Court held the veterinarian certification was evidence that the purchased dog was "unfit for purchase" and established that the dog could not "pass without objection." It is likely the case that the certification offered by Dr. Turner will attest to similar facts since both dog purchases deal with a dog with a congenital defect requiring this certification for FPPPA purposes.

The Den Breeder will likely argue that the sale of Ash is similar to the case in Tarly v. Paradise, where the court held that no such implied warranty existed since an examination should have revealed it. In that case, a cat with a congenital heart defect was sold, but the court found no implied warranty because the contract required the buyer to consult a veterinarian within two days of purchase. The case against The Den Breeder is different because the Dog Purchase Agreement never explicitly required a veterinarian consult, and any required consult has already been shown to be ambiguous based on the contract terms. Furthermore, it is not clear that an examination would have even revealed Ash's condition. Dr. Turner stated that most reputable Irish wolfhound breeders test puppies before sale, and often include in the sale some

form of verification of this test. However, Dr. Turner also stated it is unclear when the best time to test the puppies even is because the test might be wrong if the puppy is too young.

Dr. Turner also attached a useful liver shunt basics form which likely strengthens the argument that no such waiver of implied warranty existed. Liver shunts are not detectable just by looking at a puppy. It requires a bile acid testing which Mr. Martin could not have done just by looking at Ash before purchasing him. Furthermore, there is a difference of opinions as to the best time to even test a puppy for liver shunts. The condition may not show until the puppy is 8, 10, or even 12 weeks old, and most specialists believe testing should be delayed until 16 weeks of age. This further shows that Mr. Martin never had the opportunity to fully examine Ash prior to purchase. Therefore, Mr. Martin never waived the implied warranty via inspection, so The Den Breeder breached this warranty by providing an unhealthy dog.

The Den Breeder may also argue the Dog Purchase Agreement waived the implied warranty of merchantability. Under UCC 2-316(2), the implied warranty may be disclaimed in the contract when it is written conspicuously and explicitly mentions the implied warranty, or uses language such as "as is". Neither argument is applicable to this agreement because the contract does not explicitly mention the implied warranty of merchantability in a conspicuous nature. It simply states that all dogs have a potential for congenital diseases, and the Breeder has tried to minimize these in good faith. Such language is likely insufficient to bring to the attention of the buyer that the dog was sold as is and without faults, so a court is unlikely to find a waiver.

III. What remedies are available to Mr. Martin?

Mr. Martin may seek all remedies he is currently seeking which includes retaining Ash, recoupment of the cost of surgery, and he may sue for the purchase price of Ash.

As previously stated, a breach under the FPPPA afford the purchaser one of three available remedies. The best available remedy for Mr. Martin based on his request was the third option which enables him to retain Ash and seek recovery of the cost of surgery. Mr. Martin can also seek the purchase price of Ash under contract remedy due to the sale of a nonconforming good and breach if implied warranty of merchantability.

Under UCC 2-714(2), the measure of damages is the difference at the time of sale between the dogs as warranted and the actual dog. The Court in Cohen stated that courts in other cases involving the sale of dogs have repeatedly refunded the whole purchase price of the animal on the assumption that no buyer would agree to purchase an animal with a congenital defect that might lead to death or require an expensive surgery. The Den Breeder cannot rely on UCC 2-714(1) and state this remedy is unreasonable because the Court in Cohen stated the specific rule relating to breach of warranty will overrule a general standard for sale of nonconforming goods. Therefore, Mr. Martin may seek all three available remedies since The Den Breeder will be liable under the FPPPA and for breach of the implied warranty of merchantability.