July 2023 MEE Questions

MEE Question 1

GS gas is a commonly used pesticide injected into the soil before farmers plant crops. After two weeks, 90% of GS will have risen from the soil into the air, and crops can be safely planted. GS is highly toxic and can be fatal to people in a confined area, where even slight exposure can cause serious respiratory problems. Some scientists believe that GS likely causes cancer. Several studies have linked GS exposure to cancer in mice, but no study has definitively linked GS exposure to cancer in humans.

Ten years ago, State A's health department researched GS. It found that GS injected into the soil eventually rises above ground and can then drift to nearby land up to one mile from each application point. It also found that before GS rises into the upper atmosphere, it can remain near ground level for several days in concentrations much higher than the department's suggested "safe" exposure limit. It therefore banned GS use in farming.

Two years ago, however, the health department lifted the GS ban in a county where most farms produce valuable crops that are very difficult to grow without effective pesticides. After the only other effective pesticide was taken off the market, the department lifted the GS ban because of several factors, including the need for GS in order to grow the county's traditional crops, the lack of viable substitute crops, the lack of other effective pesticides on the market, the estimated cost of crop losses county-wide if GS were not allowed ($500 million annually), and the low population density in the county. The department requires all farmers using GS to attend a safety seminar that presents information on various risks of GS use (including the risks described in the department's findings supporting its earlier GS ban) and instruction on prudent GS application.

A married couple moved to this county 10 years ago and rented a house on land adjacent to fields that were owned by a local farmer. The couple has rented and lived in the house for the past 10 years.

When the health department lifted the ban on GS in the county, the local farmer attended the department's safety seminar and then began applying GS to the fields according to the application safety recommendations presented in the seminar. The farmer has used GS at the beginning of the last two planting seasons. The couple's house is less than a mile from several points where the farmer applied GS.

Last year, the wife was diagnosed with cancer and the husband began experiencing severe respiratory problems during the planting season. The wife believes that GS caused her cancer, and the husband believes that GS caused his respiratory ailments. Although cancer rates in the county are consistent with the state rate, reports of severe respiratory problems in the county have increased by 50% since the department lifted the ban on GS. The rate of respiratory illness in the county during planting season is now well above the rate of respiratory illness in other counties in the state at the same time of year.

The wife has sued the farmer to recover damages for her cancer, alleging negligence. The husband has also sued the farmer, alleging trespass and seeking injunctive relief to stop the farmer's GS use within one mile of the couple's house.

1. What must the wife prove to establish her negligence claim? Will she likely prevail? Explain.

2. What must the husband prove to establish his trespass claim? Will he likely prevail? Explain.

3. Assuming that the husband prevails, is it likely that the court will permanently enjoin the farmer from using GS within one mile of the couple's house? Explain.

MEE Question 2

Parent LLC and Sub LLC are both manager-managed LLCs, each with a sole manager. Parent LLC is the sole member of Sub LLC and selects Sub's manager. Parent obtains recycled plastic from various sources. Parent then sells some of this plastic to Sub at prevailing market prices. Sub uses the plastic to make upscale shoes, which it then sells.

The two companies work closely together. Sub sets its shoe production schedule and creates marketing programs based on Parent's projections of its access to recycled plastic. The local newspaper once characterized the two companies as "partners promoting business sustainability."

The two companies' collaboration is also reflected in their management structures and operations. They share personnel for human resources, accounting, and government relations. In addition, Parent's technical staff regularly works with Sub in designing and testing new processes for using recycled plastic. The two companies have no arrangement for sharing the costs of these services.

Last November, Sub entered into a delivery agreement with VanCo pursuant to which VanCo would deliver shoes made by Sub to Sub's customers. At the request of Sub's manager, who was away from the office, the agreement was signed by Greta, the manager of Parent, who happened to be visiting the Sub offices that day. Greta, who was not employed by Sub, signed the agreement and wrote beneath her signature: "as agent of Sub."

Recently, Sub ran into financial difficulties after a slowdown in the upscale shoe market. Sub is no longer able to pay its creditors and has stopped payments due under the delivery agreement with VanCo. Therefore, Sub, which for a time had been regularly distributing its profits to Parent as the sole member of Sub, has discontinued making distributions to Parent. Although Sub's operating agreement requires that its manager "consult with Parent's management group" before discontinuing distributions to Parent, Sub's manager discontinued these payments without consulting with Parent.

Assume that Sub is liable to VanCo under the delivery agreement and is unable to satisfy the claims by VanCo.

1. Is Parent liable to VanCo as a partner of Sub? Explain.

2. Is Parent bound by the agreement between Sub and VanCo signed by Parent's manager? Explain.

3. Should the fact that Parent and Sub are separate organizations be disregarded so that Parent is liable for Sub's obligations to VanCo? Explain.

MEE Question 3

In 2008, Tom died in State A survived by his 64-year-old wife, Betty, to whom he had been married for 35 years. He was also survived by his estranged daughter from a previous marriage.

Tom had created a valid testamentary trust stating as follows:

> (1) Betty and I have had a wonderful marriage; she is the love of my life, and my primary purpose in creating this trust is to ensure that there will be sufficient funds to provide for her care and support for the rest of her life.
>
> (2) During Betty's lifetime, 80% of trust income shall be paid to her annually, and the balance of income shall be accumulated and added to trust principal to ensure further growth in the principal that will generate more future income for her.
>
> (3) Upon Betty's death, all trust assets shall be paid to my daughter. Sadly, I have no other relatives, so I have little choice but to bequeath the trust to my daughter rather than have the trust property escheat to the state.
>
> (4) No beneficiary may alienate or assign her interest in this trust, nor shall such interest be subject to the claims of her creditors.

Until 2019, 80% of trust income was sufficient, as Tom had anticipated, to provide for Betty's care and support. In 2019, when Betty was 75 years old, she was diagnosed with a health problem that necessitated her move to a nursing home. Initially, her income from the trust and Social Security enabled her to pay for her nursing-home care and other support needs.

Betty is now 79. Nursing-home fees have dramatically increased, a circumstance that Tom had not anticipated. Even with all available resources and government benefits, Betty can no longer afford current and likely future nursing-home fees.

Betty has asked the trustee to terminate the trust and invest the entire trust principal in an annuity, payable to her. A financial adviser has identified two annuities. Annuity A would provide payments sufficient for Betty's care and support for the rest of her life.

Annuity B would provide payments to Betty that are 3% less than the payments under Annuity A but still sufficient for her care and support. It would also include a cash payment payable to the testator's daughter at Betty's death. This payment would be substantially less than the amount the daughter would receive under the trust.

Betty has asked the trustee that, if the trust cannot be terminated, she be paid 100% of trust income so that she can at least meet her current nursing-home expenses and remain in her current nursing home for the time being.

State A's Trust Code includes the following provisions:

> § 1 A trust may be terminated upon consent of all the beneficiaries, if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.
>
> § 2 Upon termination of a trust under Section 1, the trustee shall distribute the trust property as agreed by the beneficiaries.
>
> § 3 For purposes of Section 1, a spendthrift provision in the trust is not presumed to constitute a material purpose of the trust.
>
> § 4 If not all beneficiaries of a trust consent to a proposed termination of the trust pursuant to Section 1, the court may nonetheless approve the termination if the court is satisfied that, if all the beneficiaries had consented, the trust could have been terminated under that section, and the interests of a beneficiary who does not consent can be appropriately protected in accordance with the testator's probable intention.
>
> § 5 A court may modify the dispositive terms of a trust if, because of circumstances not anticipated by the testator, modification will further the primary purpose of the trust. To the extent practicable, the modification must be made in accordance with the testator's probable intention.

1. If the daughter consents to the termination of the trust and the purchase of Annuity A (wholly for the benefit of Betty), may a court authorize the trustee to terminate the trust and purchase Annuity A? Explain.

2. If the daughter does not consent to the termination of the trust and the purchase of Annuity B (for the benefit of Betty and the daughter), may a court authorize the trustee to terminate the trust and purchase Annuity B? Explain.

3. If a court does not authorize the termination of the trust, may it, without the daughter's consent, authorize the trustee to pay 100% of the trust income to Betty? Explain.

MEE Question 4

On January 4, 2023, Diner Inc. sued Tech Inc. in federal district court in State A. Diner Inc.'s complaint read in full (excluding captions and signatures) as follows:

Complaint

1. Diner Inc. (Diner) seeks damages for breach of contract by Tech Inc. (Tech). The contract is governed by the law of State A.

2. This Court has jurisdiction based on diversity. Diner is incorporated in State C, and Tech is incorporated in State D. The amount in controversy exceeds $75,000.

3. Venue is proper in the District of State A because each party maintains its principal place of business in State A and all the material facts in this matter occurred in State A.

4. On January 15, 2018, Diner and Tech entered into an oral contract in State A. Under the terms of the contract, Tech agreed to design software for a voice-recognition ordering system for Diner's locations. Diner paid $125,000 for the software.

5. On November 30, 2018, Tech delivered software for a voice-recognition ordering system. However, the software did not enable Diner's computers to recognize orders for all the items on a typical Diner menu. It permitted recognition only of "combination meal" orders identified by number, such as "combo #2."

6. On December 1, 2018, Diner notified Tech that the software failed to allow recognition of orders for all menu items and that this failure constituted a breach of contract. Tech refused to correct this breach.

7. As a result of this breach of contract, the software was useless to Diner and Diner is entitled to a return of the contract price plus other damages.

Tech's answer, excluding captions and signatures, read in full as follows:

Answer

1. Tech admits the allegations in paragraphs 1–5 of the Complaint.

2. Tech denies the allegations in paragraphs 6–7 of the Complaint.

One month after filing its answer, Tech filed a motion asking the court to grant summary judgment for two reasons. First, Tech argued that Diner's action was barred by the applicable four-year statute of limitations governing contract disputes. Second, Tech contended that its contract with Diner required it to produce voice-recognition software capable of recognizing only "combination meal" orders and that it fully performed that obligation.

In support of its motion, Tech cited the applicable statute of limitations, which states that actions for breach of contract must be brought within four years after the breach occurred. Tech also attached to its motion the affidavit of its president, who asserted (1) that she and Diner's president had agreed that the voice-recognition software would cover "only combination meals identified by number" and (2) that in any event, any breach occurred no later than November 30, 2018, when Tech delivered the software to Diner, which was more than four years before suit was filed.

Diner opposed Tech's motion for summary judgment and made a cross-motion for partial summary judgment on the issue of a contract breach. Diner asserted that the terms of the contract covered all menu items and that Tech's admission of the allegations in paragraph 5 of the Complaint (i.e., that the software did not cover all menu items) established Tech's breach of contract. In support of its cross-motion, Diner submitted the deposition testimony of eight witnesses to the agreement (including two Tech employees), who testified that they were present when the company presidents met and entered into the contract and that they heard the two presidents agree that the voice-recognition system would "cover all menu items."

Neither party offered a copy of a written contract because there was no written contract.

1. Did Tech properly raise the statute of limitations defense? Explain.

2. Assuming that the court reaches the issue of contract breach, how should it resolve the summary-judgment motions on that issue? Explain.

3. Is there any significant action that the court should take on its own initiative unrelated to the merits of the parties' summary-judgment motions? Explain.

MEE Question 5

On February 1, Company acquired from Supplier a machine for use in Company's business. The price of the machine was $30,000. Supplier agreed that, in exchange for a down payment of $6,000 and a promise to pay the remaining $24,000 in 12 monthly payments of $2,000, Supplier would immediately deliver the machine to Company but retain title to it until Company paid the remaining $24,000. This arrangement was memorialized in a writing signed by both parties. The writing clearly described the machine. Company paid the down payment, and Supplier delivered the machine. Supplier did not file a financing statement with respect to this transaction.

On March 2, Company borrowed $1,000,000 from Lender. The loan agreement, which was signed by both parties, stated that, to secure its obligation to repay the loan, Company granted a security interest to Lender in "all of Company's personal property." Also on March 2, Lender filed a financing statement reflecting this transaction, listing Company as the debtor and Lender as the secured party and indicating "all of Company's personal property" as the collateral. The financing statement was filed in the proper filing office.

On April 3, Company borrowed $750,000 from BigBank. The loan agreement, which was signed by both parties, stated that, to secure its obligation to repay the loan, Company granted a security interest to BigBank in "all of Company's present and future equipment." On May 4, BigBank filed a financing statement reflecting this transaction, listing Company as the debtor and BigBank as the secured party and indicating "all of Company's present and future equipment" as the collateral. The financing statement was filed in the proper filing office.

By August 1, Company had defaulted on its obligations to Supplier, Lender, and BigBank. Each of those creditors is claiming an interest in the machine supplied to Company by Supplier and is asserting that its interest has priority over any interest of either of the other creditors.

1. (a) Does Supplier have an enforceable interest in the machine? Explain.

   (b) Does Lender have an enforceable interest in the machine? Explain.

   (c) Does BigBank have an enforceable interest in the machine? Explain.

2. What is the order of priority of the enforceable interests in the machine? Explain.

MEE Question 6

Just after midnight, police in State A received a report of four men lurking in the alley behind a pharmacy that had been burglarized two weeks earlier. Five minutes later, Officers One and Two stopped a car operating illegally without headlights one block from the pharmacy. Four men were in the car: Adam, Ben, Carl, and Dillon.

Officer One told Adam, the driver of the car, "You were driving illegally without headlights. Step out of the car and hand me your driver's license." Although Officer One did not say so, he suspected that Adam had been involved in the prior burglary and in fact planned to arrest him. As Adam got out of the car, Officer One saw a bulge in Adam's jacket. He pat-searched Adam for weapons and felt nothing suspicious. Wanting to conceal his plan to arrest Adam, he said to him, "Just hold on here a couple of minutes. You're not free to leave now, but you will be as soon as I finish ticketing you for the headlight violation and verify that your license is valid. By the way, where were you guys coming from when we stopped you?" Adam responded, "I say nothing without a lawyer." Officer One said, "Relax, I'm just making small talk. We'll release you in a few minutes whether or not you answer questions. I'm just curious where you guys were tonight." Adam replied, "We were coming from behind the pharmacy."

Ten minutes into the traffic stop, based on incriminating evidence that other officers had just found behind the pharmacy, Officers One and Two arrested all four men on suspicion of burglary and drove them to the police department.

Officer Two took Ben into a room and said, "I need to tell you that you have all the rights the Constitution gives you, along with any Miranda rights you might have. Do you understand?" Ben replied, "Yes, but to avoid prison, I'll admit that me and my buddies broke into the pharmacy a few weeks ago. If you agree not to charge me, I promise to testify against the others."

Officer Three took Carl to a different room. He read this statement aloud: "You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to an attorney and to have the attorney with you for questioning. If you cannot afford an attorney, one will be provided for you." Officer Three then gave Carl a copy of the statement and watched Carl silently read it. Carl said that he understood his rights, and through two hours of questioning, he sat staring sternly at Officer Three and said nothing. Finally, Officer Three said, "I'm not assuming you're exercising a right to remain silent; I don't read minds. So again, were you involved in the burglary?" Carl then said, "OK. I was there two weeks ago, but I was only sort of a lookout."

Officer Four sincerely but incorrectly thought that another officer had advised Dillon of his Miranda rights. Officer Four took Dillon to the county jail, and while there, Officer Four spoke privately with Cellmate, an inmate and police informant. Officer Four urged Cellmate to introduce himself to Dillon, gain his trust, and ask him about the burglary. Officer Four promised in exchange to give Cellmate $50 and to convince the prosecutor to offer him an early-release deal. Three hours later, Cellmate informed Officer Four,

"I did everything you asked, and Dillon bragged that he broke into the pharmacy two weeks ago and tried again last night."

Two days later, State A charged all four men with burglary and agreed to try them separately. Each moved the trial court to suppress evidence solely on the ground that admission of his statement into the criminal trial would violate his rights under *Miranda*. Specifically,

1. Adam moved to suppress the incriminating statement he made to Officer One.

2. Ben moved to suppress the incriminating statement he made to Officer Two.

3. Carl moved to suppress the incriminating statement he made to Officer Three.

4. Dillon moved to suppress the incriminating statement he made to Cellmate.

How should the trial court rule on each motion to suppress? Explain.

MULTISTATE ESSAY EXAMINATION DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin.

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

If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions.

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

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

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

Examinees testing in UBE jurisdictions must answer questions according to generally accepted fundamental legal principles. Examinees in non-UBE jurisdictions should answer according to generally accepted fundamental legal principles unless your testing jurisdiction has instructed you to answer according to local case or statutory law.

July 2023
MPT-1
Item

Dobson v. Brooks Real Estate Agency

Dobson v. Brooks Real Estate Agency

FILE

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Burton & Mendel LLP
Attorneys at Law
2024 Kendall Avenue
Bristol, Franklin 33726

MEMORANDUM

To: Examinee
From: Samantha Burton
Date: July 25, 2023
Re: Dobson v. Brooks Real Estate Agency

Our firm is representing Peter Dobson in litigation against Brooks Real Estate Agency. Mr. Dobson slipped and fell on ice that the Brooks Agency failed to remove from the sidewalk in front of its building. He suffered a broken leg, a broken arm, and a concussion as a result of the fall, and ultimately missed three months' work.

The trial is in four weeks. I intend to file a motion *in limine,* that is, a pretrial motion seeking a ruling on the admissibility of certain evidence. As you know, the Franklin Rules of Evidence are identical to the Federal Rules of Evidence.

I need you to prepare the argument section of the brief in support of the motion *in limine*, setting forth our position regarding each of the following items of evidence:

(1) Anticipated trial testimony by Doris Gibbs describing an interaction she had with Mr. Dobson, her neighbor. We need to seek a pretrial ruling that her testimony is inadmissible.

(2) The deposition testimony of the emergency room physician who examined Mr. Dobson after his fall and gave deposition testimony in connection with a separate case arising out of the same injuries. The physician has since died. We need to seek a pretrial ruling that the deposition testimony is inadmissible in our case.

(3) The insurance policy on the property of the Brooks Real Estate Agency. In the course of discovery, Brooks has claimed that it does not control the sidewalk and therefore was not responsible for clearing it of ice. We want to introduce the insurance policy on the property showing that the agency is insured against liability resulting from conduct occurring on the sidewalk.

Be sure to follow the attached guidelines for writing persuasive briefs. Draft only the "legal argument" section; another associate will draft the statement of facts and caption.

Burton & Mendel LLP
Attorneys at Law

OFFICE MEMORANDUM

To: All Associates
From: Samantha Burton
Date: September 5, 2019
Re: Guidelines for Persuasive Briefs in Trial Courts

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

I. Captions [omitted]

II. Statement of Facts [omitted]

III. Legal Argument

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

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

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

Do not assume that we will have an opportunity to submit a reply brief. Be sure to anticipate and respond to opposing arguments in the body of your brief. Structure your argument in such a way as to highlight your case's strengths and minimize its weaknesses.

TRANSCRIPT OF INTERVIEW WITH PETER DOBSON
January 11, 2023

Att'y Burton: Hello, Mr. Dobson. I understand you would like to retain our firm to handle a negligence action for you.

Dobson: Yes, I suffered some pretty bad injuries. I was in the hospital for two days and out of work for three months.

Burton: What happened?

Dobson: I was here in Bristol. It was a snowy day, but the sidewalks looked clear. I must have slipped on some ice, and I fell. I broke my arm and my leg and had a concussion.

Burton: I am so sorry.

Dobson: It has been a long recovery and very painful.

Burton: When did your fall and injuries occur?

Dobson: Last winter, on February 18, 2022.

Burton: Could you give me a few more details?

Dobson: Sure. I was walking from my house on Maple Grove Way and going to the grocery store on Oaklawn. My route took me down Elm Street. There was some snow on the ground but not a lot of it. I was walking on the sidewalk. I was walking carefully since it was winter. All of a sudden, my legs shot out from under me, and I was on the ground. And I hurt—a lot! It turns out there was ice on the sidewalk, and I slipped and fell on it. Luckily another person saw me fall and called 911. The ambulance came and took me to the hospital. Now I am finally recovered and I need your help.

Burton: Before we talk more about your injuries, I understand this is not the only lawsuit you filed related to this incident.

Dobson: That is correct. The City of Bristol is my employer. I sued the City after it denied me more time away from work and other accommodations for my injuries. My lawyer in that case is Robert Chen. I can put you in touch with him.

Burton: Thank you. I assume that I have your permission to speak with attorney Chen.

Dobson: Of course.

Burton: And again, what were your injuries?

Dobson: I had a broken arm, a broken leg, and a concussion.

Burton: Do you know who owns the property adjacent to the sidewalk on which you fell?

Dobson: Yes, it is owned by the Brooks Real Estate Agency.

Burton: So we may be able to file a negligence action, alleging that Brooks Real Estate Agency breached its duty of care by not keeping the sidewalk clear of ice, and that as a result of its negligence, you sustained multiple injuries. We may be able to claim as damages the medical costs you incurred, your lost wages for the time you were off work, and your pain and suffering.

Dobson: That sounds great. Just let me know what you need from me.

Burton: We will be in touch soon.

Burton & Mendel LLP
Attorneys at Law

FILE MEMORANDUM

From: Samantha Burton
Date: January 13, 2023
Re: Dobson v. Brooks Real Estate Agency

Following my initial interview with Peter Dobson, and with his permission, I contacted Robert Chen, the attorney who represents Dobson in his suit against the City of Bristol. Here is what I learned from Attorney Chen: The suit against the City is a disability discrimination claim related to Dobson's employment by the City. After the accident (which is also the basis of our negligence claim against Brooks Real Estate Agency), Dobson believed that the City was not accommodating him appropriately. Dobson hired Chen, and Chen then filed suit on behalf of Dobson alleging discrimination under Franklin's Disability Act. Essentially, Dobson's claims against the City are that he was not given sufficient time away from the office and was not given other accommodations to which he was entitled given the severity of his injuries. The City has defended against the action, claiming that Dobson's injuries did not require the accommodations Dobson sought. The source and causation of Dobson's injuries are not at issue in that case, as they are in Dobson's claims against the Brooks Real Estate Agency. Discovery has been completed, and a trial date has been set.

Attorney Chen suggested I review Dr. Miller's deposition in *Dobson v. City of Bristol.* Dr. Miller treated Dobson when he was admitted to the hospital for his injuries. At the deposition, Dr. Miller testified about the extent of Dobson's injuries and the adequacy of the limited accommodations the City made for him. 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 given to Dobson. Chen, in an attempt to attack Dr. Miller's credibility, instead focused his examination of Dr. Miller on prior malpractice lawsuits against her. Dr. Miller died after the deposition but before trial.

Burton & Mendel LLP
Attorneys at Law

FILE MEMORANDUM

From: Roger Cole, Investigator
Date: January 25, 2023
Re: Conversation with Doris Gibbs, information about Dr. Miller, and information about Brooks Real Estate Agency

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At your request, I have investigated certain matters in the Peter Dobson case.

First, I had a conversation with Doris Gibbs. Ms. Gibbs was on the list of potential witnesses supplied by the Brooks Real Estate Agency's lawyer in the Dobson matter, so I wanted to find out what information she might have about the case.

Ms. Gibbs was more than happy to speak with me. She told me that she was a neighbor of Mr. Dobson. She brought food over to the Dobsons' home shortly after Mr. Dobson was released from the hospital. She also visited several times while Mr. Dobson was at home recovering from his injuries.

Soon after Mr. Dobson had regained the use of his arm and leg and was able to leave his home, he and his wife invited Ms. Gibbs and her wife out to dinner to thank Ms. Gibbs for her generosity during Mr. Dobson's recovery. Of course, the question of how Mr. Dobson was injured came up at that dinner.

During dinner, after they had each had a beer, Ms. Gibbs said to Mr. Dobson: "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." She said that she didn't say this in an accusatory way, but only as a statement of fact and of understanding. She told me that she had fallen several times when not looking where she was going or when distracted. According to Ms. Gibbs, Mr. Dobson failed to respond to the statement she made at the dinner. She said that she thought he was listening—he set his drink down and looked at her while she was speaking. She also said that there was the usual background sound of conversation in the restaurant. After she made the statement, no one said anything for about a minute. After that, the couples chatted about other things. The dinner concluded amicably.

Ms. Gibbs says she knows nothing else about Mr. Dobson's fall. She was not there when the accident occurred and has no personal knowledge about anything related to it.

Second, I confirmed that Dr. Lena Miller died of a heart attack on November 17, 2022. Her obituary was in the Centralia *Herald*, and I found her death certificate in the County Office of Vital Records. I put a copy of the death certificate in the client's file.

I reviewed the deed for the building on Elm Street occupied by Brooks Real Estate Agency and confirmed that it is owned by Brooks Real Estate Agency. And, finally, I reviewed the insurance policy for the building. The property insurance on the building explicitly covers sidewalks adjacent to the property.

DEPOSITION OF DR. LENA MILLER

Taken on September 22, 2022, in the case of PETER DOBSON v. CITY OF BRISTOL

Plaintiff Peter Dobson is represented by attorney Robert Chen. Defendant City of Bristol is represented by city attorney Tanya Lopez.

* * * * *

Att'y Lopez: Dr. Miller, did you examine Mr. Dobson at the hospital on the day of the accident and were you able to review his medical records in preparation for this deposition?

Dr. Miller: Yes. I'm not his regular doctor, but I was on call at the emergency room when he was admitted.

Lopez: What was your diagnosis at the time you examined him?

Miller: Based on the X-rays and MRI imaging, I determined that Mr. Dobson had broken his arm and his leg. But they were both hairline fractures.

Lopez: What does that mean?

Miller: It means that he should not have been incapacitated for very long. He should have been able to walk on the leg after a couple of weeks with a walking cast. His arm might have been in a sling but for no more than six weeks. Depending on his job, he would have needed to be off work for no more than six weeks.

Lopez: What about the concussion?

Miller: It didn't look that serious. He should have been fully recovered in less than a week.

Lopez: What about pain and suffering?

Miller: My observation is that he was not in that much pain. He should have been fine with some ibuprofen and rest.

Lopez: Do you think he is asking for more time away from work than he really needs?

Miller: In my opinion, yes.

[Direct examination on adequacy of accommodations omitted.]

Lopez: I have no further questions. Any cross-examination?

Att'y Chen: Dr. Miller, you have been sued for malpractice on five occasions, is that not true?

Dr. Miller: Yes—I settled all of them only because my insurance company told me to.

[Cross-examination by Att'y Chen on adequacy of accommodations omitted.]

Att'y Chen: Thank you, Dr. Miller. I will ask the rest of my questions at trial.

FRANKLIN RULES OF EVIDENCE

Rule 403: Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may 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.

Rule 411: Liability Insurance

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.

ADVISORY COMMITTEE NOTES TO FRANKLIN RULE OF EVIDENCE 411

The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and absence of liability insurance as proof of lack of fault. At best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse. More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds.

The second sentence points out the limits of the rule, using well established illustrations to the general exclusion. Those are only illustrations. If relevant, evidence of insurance may be admitted to prove any fact other than fault or lack of fault. A court may admit evidence if offered for a permissible purpose. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402 and 403.

Rule 801: Definitions; Exclusions from Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

. . .

(2) ***An Opposing Party's Statement*****.** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

Rule 804: Hearsay Exceptions; Declarant Unavailable

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

. . .

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; . . .

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) ***Former Testimony*****.** Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Reed v. Lakeview Advisers LLC
Franklin Court of Appeal (2015)

Margaret Reed sued her former employer, Lakeview Advisers LLC, alleging age discrimination under the Franklin Age Discrimination Act. Reed prevailed at trial. At that trial, the court had sustained Reed's objection to the admissibility of a purported admission by silence that Lakeview sought to introduce. We hold that the trial court abused its discretion in excluding the testimony.

Reed was 60 years old and had been employed by Lakeview for 20 years as a marketing analyst. On May 1, 2010, she received a notice that her employment was being terminated. She was told to report to the Human Resources Department (HR) to learn the specifics of the termination. Reed went to HR and spoke with its director, Beth Adler. Adler told Reed that she was being fired for failing to meet the requirements of her employment, specifically, that she was often late to work and did not complete projects on time. Adler concluded by saying to Reed: "You know that you weren't doing your job competently." When Adler made these statements to Reed, Reed did not respond.

Franklin Rule of Evidence 801(d)(2) – Hearsay and acquiescence by silence

This case turns on a provision of Franklin Rule of Evidence 801(d)(2), which excludes from the definition of hearsay any statement made by a party and offered by an opposing party. Included within the definition of a statement made by a party is a statement that "the party manifested that it adopted or believed to be true." Courts reviewing this language have included within its ambit statements that were "admitted by silence." In other words if, through silence, a party acquiesces in a statement made by another, that statement may be introduced against the party. For example, in *Hill v. Hill* (Fr. Sup. Ct. 2010), a wife and her husband were having a serious conversation about their marriage. In the course of that conversation, the wife said to the husband: "You are having an affair." The husband failed to respond to that statement. The trial court, as well as our Supreme Court, determined that the husband had acquiesced by silence in the statement. Once a party acquiesces by silence in a statement, that statement can be introduced against that party by any opposing party as if it were a statement made directly by the party.

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.

Context is exceedingly important in determining whether a party acquiesced to a statement by silence. The court should consider carefully the circumstances surrounding the statement. Thus in *State v. Patel* (Fr. Ct. App. 2010), this court considered whether a statement made to the defendant was acquiesced to by silence. The court ruled that the statement would not be deemed admitted because it was unclear whether the defendant had heard and understood the statement, which was made at a loud party attended by over 100 people. More importantly, at a loud social event with many persons present, someone in the defendant's position would not necessarily be expected to respond.

By contrast, the statements here were made during a serious conversation. Reed heard Adler's statements, and we have every reason to believe that Reed understood them. The statements were made in an office setting, where serious matters were discussed. Indeed, Reed could expect that the reason for her termination would be discussed. One in Reed's situation, who felt that she had been terminated unlawfully, would have responded to the statements made by Adler—that Reed was being terminated for failing to meet the requirements of her employment, that Reed was often late to work and did not complete projects on time, and that Reed knew that she was not performing her job competently. Consequently, we determine that these statements are admissible as non-hearsay. Adler's statements were admissible through silence against Reed. Accordingly, the trial court erred in excluding them from evidence.

Franklin Rule of Evidence 403—Balancing unfair prejudice vs. probative value

In the alternative, Reed argues that the statements should be excluded under Franklin Rule of Evidence 403, which allows a judge to exclude evidence if the danger of unfair prejudice substantially outweighs the probative value of that evidence. Rule 403 applies to every piece of evidence proffered at trial, except those to which some other balancing test applies. "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. Reed's claim is that the admission by silence will be unfairly prejudicial to her case. Every piece of evidence may be prejudicial to the party against whom it is admitted. 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. The Advisory Committee Note to Rule 403 states: "Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." (In this jurisdiction, courts may rely on the Advisory Committee Notes in analyzing the Rules of Evidence. *Smith v. State* (Fr. Sup. Ct. 2000)). In this case, allowing the admission by silence into evidence had a tendency to weaken Reed's case. But that is not the type of prejudice with which Rule 403 is concerned. Moreover, given the circumstances under which the statement was made, the probative value of the interaction between Reed and the HR director is relatively high. The trial court abused its discretion in excluding the evidence.

Reversed.

Thomas v. WellSpring Pharmaceutical Co.
Franklin Court of Appeal (2017)

In 2011, Lynn Thomas sued WellSpring Pharmaceutical Co., claiming that she had been harmed by an over-the-counter cold remedy it produced called ExitCold. Thomas was one of about 100 persons who used ExitCold, experienced severe side effects, and thereafter sued WellSpring. Several of the "ExitCold cases" have gone to trial. In the case at bar, WellSpring filed a motion *in limine* seeking to admit the testimony of Dr. Todd Shaw from a trial in one of the other ExitCold cases. The plaintiff in that case was Jason Murphy. The trial court granted WellSpring's motion *in limine*. The jury found in WellSpring's favor, and Thomas appealed. We affirm.

To admit former testimony under Franklin Rule of Evidence 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—or in a civil case, whose predecessor in interest had—a similar motive and opportunity to develop the challenged testimony at the earlier proceeding. *State v. Holmes* (Fr. Sup. Ct. 2009). Here, there is no dispute that Dr. Shaw, now deceased, is unavailable. Likewise, there is no dispute that Dr. Shaw's testimony was given at a trial, hearing, or lawful deposition.

Obviously, 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, however, the party against whom the testimony is being introduced (Thomas) is *not* the same party against whom the testimony was previously introduced (Murphy). WellSpring and Thomas vigorously dispute whether Murphy, who is not a participant in the *Thomas v. WellSpring* lawsuit, is properly considered a "predecessor in interest" who had a "similar motive to develop" Dr. Shaw's testimony in the prior proceeding. Thomas argues that Murphy was not a "predecessor in interest" to her and that there was no agency relationship between the two plaintiffs. Thomas also argues that Murphy did not have a similar motive when his case was tried to fully develop facts relating to Thomas's injuries when Dr. Shaw testified.

A. Predecessor in interest

No Franklin court has explicitly taken the position that an agency relationship is a prerequisite to qualifying as a "predecessor in interest" for purposes of Rule 804(b)(1). However, there must be some similarity of interest between the party in the instant case against whom the testimony is sought to be introduced and the party against whom the testimony was introduced in the prior matter. Any other interpretation would nullify the language of Rule 804(b)(1) requiring that there be a "predecessor in interest." *Jacobs v. Klein* (Fr. Sup. Ct. 2002). Franklin courts have not limited the relationship between the parties to the literal meaning of "predecessor in interest" but have required there to be a similarity of interest. Here the parties (Thomas and Murphy) are both suing WellSpring over the side effects caused by ExitCold. The claims for relief are identical. We therefore hold that the introduction of Dr. Shaw's testimony meets the "predecessor in interest" requirement of 804(b)(1).

B. Similar opportunity and motive to develop testimony

Regardless of whether the party against whom the testimony is now being introduced is the same or a different party, the 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." *Jacobs*. In assessing "similar motive," the court applies a two-part test: "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." *Id.*

As to opportunity, the question is whether the party in the earlier case had the opportunity to develop the testimony—not whether the party did indeed develop the testimony. Indeed, in *State v. Williams* (Fr. Sup. Ct. 2013), a criminal case, the Franklin Supreme Court allowed the admission of the deposition testimony of an unavailable witness from a related civil case. The same counsel represented the defendant in both the criminal and civil cases. 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 defense counsel saw fit to ask during the deposition. As to whether the deposition testimony was developed with a similar motive, the court found that, even if the primary motive of a discovery deposition is to obtain a preview of a witness's testimony, this does not exclude the need to understand how the witness's story and credibility might be attacked, that a prudent attorney would explore such avenues, and that the defense

counsel did just that by spending considerable time impeaching the witness and exploring his motive. Further, the defendant did not explain how he was prevented from fully pursuing lines of questioning or how they would have been pursued any differently at trial.

This is a much easier case than *Williams* because the former testimony occurred at a trial, not a deposition. Dr. Shaw's testimony related to the side effects of ExitCold. The testimony was general—it was not directed at the side effects experienced by any particular individual. Murphy, the plaintiff in that proceeding, had the opportunity and similar motive to cross-examine Dr. Shaw, as the issue in the litigation was the same as plaintiff Thomas has here: whether ExitCold caused debilitating side effects. Indeed, in the previous trial, Murphy's attorney engaged in a robust cross-examination of Dr. Shaw on that issue.

C. Rule 403

The plaintiff further argues that, even if the evidence is admissible under Rule 804(b)(1), the trial court should have excluded it under Franklin Rule of Evidence 403 because the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. We believe that the probative value of Dr. Shaw's testimony is extremely high and that there is very little danger of unfair prejudice in this case.

For these reasons we conclude that the trial court did not abuse its discretion in granting the motion *in limine* and allowing the admission of Dr. Shaw's prior testimony.

Affirmed.

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

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

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

July 2023
MPT-2
Item

Martin v. The Den Breeder

Martin v. The Den Breeder

FILE

LIBRARY

Law Offices of Bradley Wilson
2405 Main Street
Creedence, Franklin 33805

MEMORANDUM

To: Examinee
From: Bradley Wilson
Date: July 25, 2023
Re: Interview with Anthony Martin

I talked with Anthony Martin yesterday. He was asking for advice about a lawsuit he may want to file. As you know, I have a trial starting on Monday and I do not have time to get back to Martin quickly, so I need you to write a letter advising him about his potential claim.

Martin bought an Irish wolfhound puppy from a breeder called "The Den Breeder," a sole proprietorship operated by a man named Simon Shafer. At the time of purchase, Martin signed a contract and paid $2,500. A month later, Martin learned from his veterinarian that the dog showed signs of a "liver shunt," a condition that can be surgically corrected. When Martin talked with Shafer about it, Shafer refused to take responsibility or to pay any of the costs of treating the condition.

Martin wants to keep the dog, whom he has named Ash. At the same time, he is very angry at Shafer and wants to recover what he paid for the dog and to have Shafer cover the cost of corrective surgery. He wants our advice on his legal rights.

Please review the attached materials and prepare an advice letter to Martin. You can assume that Shafer is both a "seller" and a "dealer" under the relevant statutes. Do not include a separate statement of facts in the letter. Instead, incorporate relevant information into the advice that you give. Write in a way that someone unfamiliar with legal concepts will be able to understand. In your discussion, identify both the strengths and potential weaknesses of Martin's prospective claim.

Law Offices of Bradley Wilson
2405 Main Street
Creedence, Franklin 33805

MEMORANDUM

To: Associates
Date: August 5, 2021
Re: Advice letters

The firm follows these guidelines in preparing advice letters to clients:

- Identify each issue separately and state as a question.
- Following each issue, provide a concise one- or two-sentence statement giving a "short answer" to the question.
- Following the short answer, write a more detailed explanation and analysis of each issue.
- Do not write a separate statement of facts but integrate the facts into your analysis.
- Explain how the relevant authorities combined with the facts lead to your conclusions. Make sure to include legal citations.
- Bear in mind that, in most cases, the client is not a lawyer. If you must use technical terms or jargon, make sure to provide a concise definition.
- Pay particular attention to the structure and sequence of your discussion, so that your client can follow your reasoning and the logic of your conclusions.

Transcript of Interview with Anthony Martin, July 24, 2023

Att'y Wilson: Thank you for coming in. I am glad you could meet me after hours.

Anthony Martin: I'm glad you could make the time. I know you're busy.

Wilson: It's no problem. Tell me how I can help you.

Martin: OK. About a month and a half ago, I bought a dog that turned out not to be healthy. I spent a lot of money to buy him. And I learned that he needs surgery, and it's going to cost a lot of money. I am angry at the breeder.

Wilson: Tell me about the dog.

Martin: He is a male Irish wolfhound. I call him Ash. He's about three and a half months old now. And he is a great dog—friendly, happy, easygoing. Just what I wanted.

Wilson: Where did you buy him?

Martin: I had been looking for a wolfhound for a while and got a referral to a breeder who raised both Scottish and Irish wolfhounds. The man's name is Simon Shafer. He calls his business "The Den Breeder." His place is way out on the county line, out in the country.

Wilson: Tell me about the sale.

Martin: I called Shafer up and said I was interested in an Irish wolfhound. He said he had a new litter of eight-week-old puppies. We set up a time for me to see them. When I got there, I could see right off that Ash was the right dog, and he seemed to take to me. We made a connection. So I asked Shafer whether I could buy him. Shafer said yes, of course, and told me the price: $2,500.

Wilson: That sounds like a lot.

Martin: Well, not for an Irish wolfhound. And Ash really seemed like a special dog. I was willing to pay it.

Wilson: Did you ask about his health?

Martin: Yes, I did. Shafer said that his dogs were healthy; and they certainly looked lively and active. I didn't think to ask more.

Wilson: When did you pay him?

Martin: I paid him a few days later when I went back to pick up Ash.

Wilson: Did you sign anything?

Martin: Yes. At that point, Shafer had me sign a contract. He called it a "dog purchase agreement." Here it is. And Shafer had the "AKC Dog Registration Application,"

which would allow me to register Ash with the American Kennel Club. The form looked properly filled out. I gave Shafer the check for $2,500, he gave me the papers, and I left with Ash.

Wilson: Did Shafer say anything else about Ash's condition?

Martin: No, nothing else.

Wilson: What happened next?

Martin: I got Ash home, and we started getting used to each other, including house training and everything. But after about a month, I began to notice that Ash was having some trouble, especially after eating. He seemed confused and disoriented and for hours would just lie down without moving. It seemed like he was . . . depressed, if that's the right word.

Wilson: What did you do?

Martin: I took Ash to my veterinarian and asked her to look him over. That's when I learned what a liver shunt is and what effect it can have. My vet said she should test him for it, and she did. After a few days, she confirmed that Ash had a liver shunt. I brought you a printout of an article she recommended that explains it.

Wilson: Thank you. Who is your vet?

Martin: Dr. Turner. Claire Turner. I asked her what could be done about the liver shunt, and she said there was surgery that could correct the condition. A few days later, she sent me an email confirming the diagnosis and giving me an estimated price for the surgery: over $8,000, if you can believe it.

Wilson: That's . . .

Martin: More than three times what I paid for Ash, yes. I was really angry. I called Shafer the next day and told him what I wanted: to keep Ash, to get a refund, and to have him pay for the surgery. Shafer refused. He said that I should have gotten Ash tested as soon as I bought him and that a test would have shown the disease. Since I waited so long to let him know, he said that he had no legal obligation to pay me.

Wilson: All right. I see why you came in to talk with me. I do know that there are laws in Franklin that protect people who buy pets. Let me look into them and either I or someone in my office will get back to you.

The Den Breeder
Dog Purchase Agreement

Buyer agrees to purchase an Irish Wolfhound puppy from Breeder for the sum of $2,500.

All canines have the potential for genetic or congenital disease. Unfortunately, these diseases cannot always be eliminated. Breeder tries to minimize (not eliminate) these conditions in good faith.

To the best of Breeder's knowledge, the dog is in good health at the time of sale. If the dog shows signs of illness, Buyer agrees to take the dog to a licensed veterinarian to determine whether the dog has any serious illness. Should it be determined that the dog is suffering from a serious disease clearly attributable to Breeder, which would prevent it from being a companion, the dog may be returned to Breeder within 48 hours of purchase, at Breeder's expense, for replacement of the dog. This dog is sold as a companion.

If, before the dog is one year old, the dog is diagnosed with a congenital defect that would prevent the dog from being a companion, Buyer must notify Breeder in writing within 24 hours of the diagnosis and provide a copy of a report from a veterinarian confirming that diagnosis. Breeder may then seek a diagnosis from a veterinarian of Breeder's choice, and Buyer must make the dog available for that purpose.

Dated: June 12, 2023

Simon Shafer
Simon Shafer, Breeder

Anthony Martin
Anthony Martin, Buyer

Email from Dr. Claire Turner
July 18, 2023

From: Claire Turner <cturnervet@franklin.med>
To: Anthony Martin <amartin@franklinres.org>
Subject: Diagnosis and treatment of male Irish wolfhound puppy, Ash

Mr. Martin:

Thank you for bringing in your puppy, Ash, a male Irish wolfhound, for treatment. This email confirms our conversation about his diagnosis and treatment.

I examined Ash on July 16, 2023, at my clinic. He appeared well fed and cared for. You reported that he seemed lethargic and weak at home, that he seemed disoriented and lacked coordination, and that he would spend time pacing and circling. During his overnight stay in our clinic, we were able to confirm these observations.

We performed bile acid testing on Ash, a procedure that requires fasting and blood draws over a period of 12–16 hours. Ash tolerated the test well and without pain. He is a calm dog with a great temperament. The test results indicate liver dysfunction, specifically a portosystemic shunt, a congenital defect of the liver. I've attached a document describing liver shunts in wolfhound puppies.

Based on test results and observation, I believe with some confidence that surgical remedies can correct Ash's condition. Liver shunt is a known condition, and surgical procedures are now well-known and relatively reliable. I must add that no surgical intervention is without risk, but we have diagnosed this condition relatively early and have reason for a positive outlook. The cost will come to at least $8,000, and Ash will require post-surgical treatment as well.

You asked whether earlier testing would have detected this condition, specifically at the time of Ash's purchase. It is my understanding that most reputable Irish wolfhound breeders test puppies before sale and provide the results of the test to purchasers. However, I must add that differences of opinion exist about when to test a puppy. It is possible that testing at roughly eight weeks might not show a liver shunt condition that would emerge later.

I am prepared to sign the form certifying my opinion. Thank you again for introducing us to Ash. I look forward to hearing from you.

Email Attachment: *Liver Shunt Basics for Wolfhound Puppies*

Getting an Irish wolfhound puppy is exciting! There are all sorts of new things to learn, and one of those is what a liver shunt is (also called PSS for portosystemic shunt), and why it is important to test wolfhound puppies for this condition. A simple and inexpensive blood test can tell the breeder and you if the puppy has this deformity before the puppy goes to its new home.

The liver is a highly complex organ with vital functions. It filters blood and removes toxins that are created during the normal digestion of food. During pregnancy, the mother's liver does all the work for the puppies. Blood vessels bypass or "shunt" around the puppy's liver and allow the blood to be detoxified by the mother's liver. Shortly after birth, these vessels close naturally, and a normal puppy's liver takes over the detoxification process.

A liver shunt problem arises when these blood vessels do not close. As a result, the puppy's blood continues to bypass the liver. That prevents the puppy's liver from filtering toxins from the blood, which can create symptoms such as depression, seizures, blindness, and disorientation. These symptoms are worse shortly after a meal when toxins are at their highest level. There are both medical and surgical treatment options for liver shunts with varying degrees of success. Most affected puppies start showing signs within weeks of being in their new home.

Liver shunts that do not close are viewed as congenital defects. The tricky part of a liver shunt condition is that pups may not show signs until they are 8, 10, or 12 weeks old or even older. There are also different ways the shunts can form, which create varying levels of clinical signs. No one can tell just by looking at a puppy whether it has a liver shunt condition or not.

Veterinary science disagrees over when to test for a liver shunt. Most specialists recommend delaying a test until 16 weeks of age. Moreover, occasional false positives and negatives occur. Even so, you should ask your puppy's breeder whether the breeder has performed a liver shunt test and, if so, what the results show.

Excerpts from the Franklin Uniform Commercial Code

§ 2-314 Implied Warranty: Merchantability; Usage of Trade

(1) Unless excluded or modified (Section 2-316), a warranty that the 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 . . . .

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

. . .

(c) are fit for the ordinary purposes for which such goods are used; . . . .

§ 2-316 Exclusion or Modification of Warranties

. . .

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it, the language must mention merchantability and in case of a writing must be conspicuous . . . .

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him . . . .

§ 2-714 Buyer's Damages for Breach in Regard to Accepted Goods

(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 as determined in any manner which is reasonable.

(2) 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 . . . .

Excerpts from the Franklin Pet Purchaser Protection Act

§ 753 Sale of animal

(a) A purchaser has a remedy under this section if

(1) within 14 business days following the sale of an animal subject to this article, a licensed veterinarian certifies such animal to be unfit for purchase due to illness or the presence of symptoms of a contagious or infectious disease; or

(2) within 180 calendar days following the sale of an animal subject to this article, a licensed veterinarian certifies such animal to be unfit for purchase due to a congenital malformation that adversely affects the health of the animal.

(b) In the circumstances stated in subsection (a) of this section, the pet dealer shall afford the purchaser the right to choose one of the following options:

(1) return the animal and receive a refund of the purchase price including sales tax and reasonable veterinary costs directly related to the veterinarian's certification that the animal is unfit for purchase pursuant to this section;

(2) return the animal and receive an exchange animal of the purchaser's choice of equivalent value and reasonable veterinary costs directly related to the veterinarian's certification that the original animal is unfit for purchase pursuant to this section; or

(3) retain the animal and receive reimbursement from the pet dealer for veterinary services from a licensed veterinarian of the purchaser's choosing, for the purpose of curing or attempting to cure the animal.

(c) If a pet dealer wishes to contest a demand for refund, exchange, or reimbursement pursuant to this section, such dealer may require the purchaser to produce the animal for examination by a licensed veterinarian designated by such dealer.

(d) Nothing in this section shall in any way limit the rights or remedies that are otherwise available to a purchaser under any other law.

Cohen v. Dent
Franklin Court of Appeal (2020)

On September 3, 2018, Marla Cohen purchased a three-month-old bulldog, which she named Buddy, for $7,000 from Larry Dent, a dog breeder doing business as Dent Bulldogs. Four months later, in January 2019, the bulldog began limping and was incapable of bearing weight on his left rear leg. After an examination and tests, Cohen's veterinarian diagnosed Buddy with hip dysplasia. The veterinarian suggested surgery to correct the hip dysplasia, at a cost of roughly $4,000. To date, that surgery has not occurred.

The veterinarian signed a "Certification of Unfitness of Dog or Cat for Purchase" using a state-approved form. Cohen sent a copy of that certification to Dent and informed Dent that her puppy was suffering from hip dysplasia. Dent sent back a copy of the inartfully drafted contract, which states:

> There is a one-year guarantee on the following congenital problems. Severe Hip Dysplasia, Bad Heart, Liver and Kidneys. For this guarantee to be valid a customer cannot euthanize a dog if expecting a seller to replace a dog as most breeders want their dogs back. Also the customer must submit, when needed, X-rays or blood tests, etc. to be conclusive of a congenital problem.

Relying on this language, Dent refused to pay for the surgery and suggested that Cohen return Buddy to him in exchange for a new puppy. Cohen refused to return Buddy because she and her family had become attached to the dog.

Cohen then sued Dent, claiming that Dent had breached their contract by selling her a bulldog with a congenital disorder. She sought damages for the surgery necessary to correct the hip dysplasia. In addition, she alleged that, had she known of Buddy's condition, she would not have purchased him, and sought to recover the entire purchase price of $7,000.

At trial, relying on the Franklin Pet Purchaser Protection Act (FPPPA), Dent asserted that Cohen's remedies were limited by their contract. The trial court ruled in Dent's favor, finding that the contract limited Cohen to returning the dog and requesting a replacement. Cohen appealed.

When interpreting a written contract, we first review the language in the document itself. If the terms of the contract are unambiguous, we apply those terms to the dispute

at hand unless they conflict with relevant statutes. If the terms of the contract are ambiguous, we resolve those ambiguities in part in reliance on those same statutes. Accordingly, we review the contract in this case and then turn to the impact of the FPPPA and the Franklin Uniform Commercial Code.

Ambiguity of the Contract

Dent concedes that he drafted the contract between Cohen and Dent and did not ask a lawyer to review it. In fairness to Dent, the contract does suggest what a buyer may do after purchasing a dog with a congenital condition and provides some detail about which conditions are eligible for that remedy.

That said, the contract contains ambiguities that directly affect the resolution of this dispute. It appears to state a one-year remedy when a pet has a congenital condition but fails to specify the start date for that year. It appears to require the buyer to make a choice between several remedies but does not address refunds or other monetary damages. It appears to require the buyer of the animal to provide test results verifying a congenital condition but only requires them "if needed" and states no time limit within which the buyer must make a claim.

In short, this contract does not answer most of the key issues in this case. When 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* (Fr. Sup. Ct. 1947). Thus, we reject Dent's claim that the contract bars any recovery by Cohen. We next consider the impact of the relevant statutes.

Franklin Pet Purchaser Protection Act

The Franklin Pet Purchaser Protection Act (FPPPA), codified as § 753 of the Franklin Animal Welfare Code, governs the sale of household pets, including dogs. Sometimes referred to as the "Pet Lemon Law," the FPPPA provides purchasers with a remedy if they provide a certification by a licensed veterinarian about the animal's condition. The purchaser 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. In this case, both parties agree that Buddy's hip dysplasia is a congenital defect and that Cohen acted within the statutory period.

The FPPPA describes three remedies available to a purchaser:

— the right to return the animal and receive a refund;

— the right to return the animal and receive a replacement animal; or

— the right to retain the animal and be reimbursed veterinary costs incurred for the purpose of curing or attempting to cure the animal.

At the very least, these provisions give Cohen the right to keep Buddy and to request that Dent pay the cost of surgery necessary to correct the hip dysplasia. We do not decide today whether a purchaser can waive these rights in a contract that unambiguously provides otherwise. However, where the contract contains significant ambiguity, as it does here, we find no waiver. Cohen may assert her rights under the FPPPA.

Dent now asserts that the FPPPA constitutes Cohen's only remedy and that the options for relief it identifies foreclose any other remedies. But the explicit language of § 753(d) of the Pet Lemon Law undercuts that assertion: "Nothing in this section shall in any way limit the rights or remedies that are otherwise available to a purchaser under any other law." We thus turn to the provisions of the Uniform Commercial Code.

Uniform Commercial Code

Article 2 of the UCC also governs the sale of animals. Our cases have uniformly held that dogs are "goods" and that pet stores and breeders are "merchants" as defined in Article 2, § 2-104. Further, 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 seller's breach as determined in any manner which is reasonable." UCC § 2-714. Buddy must be considered a "nonconforming good" because Cohen did not get what she bargained for: a healthy dog. *See Jackson v. Mistover Kennels* (Fr. Ct. App. 2005) ("Bo-Peep," a Maltese, held to be a nonconforming good where the buyer paid a premium for a "teacup" Maltese and received a standard Maltese).

Further, the sale of an animal creates an implied warranty of merchantability. Goods are merchantable if they "pass without objection in the trade under the contract description" and "are fit for the ordinary purposes for which such goods are used." UCC § 2-314(2)(a) and (c). The certification by the veterinarian that Buddy was "unfit for purchase" establishes that Buddy could not "pass without objection." Moreover, Buddy is not fit for the ordinary purpose for which he was purchased. Cohen testified that her dog cannot walk, run, or jump without pain. *See Dalton v. Jackson* (Fr. Ct. App. 1997) (A parrot who died two weeks after purchase deemed unfit for ordinary purpose: "At least one purpose is to stay around as a live bird.")

Finally, Dent relies on this court's decision in *Tarly v. Paradise* (Fr. Ct. App. 1995). In *Tarly*, a buyer sued for breach of the warranty of merchantability when he bought a Ragdoll cat with a congenital heart defect, hypertrophic cardiomyopathy. The parties' contract explicitly required an examination by a veterinarian within two days of purchase. The buyer did not obtain an examination but later sued after the heart condition became apparent four months later. On appeal, the court noted unrebutted testimony that showed that an examination would have disclosed the heart condition at the time of sale. The court ruled against the buyer, holding that no implied warranty existed "with regard to defects which an examination ought in the circumstances to have revealed to him." UCC § 2-316(3)(b). By contrast, in the case at hand, the contract has no explicit requirement of inspection within a limited time frame. Dent's reliance on *Tarly* is misplaced.

Under UCC § 2-714(2), the measure of damages is the difference at the time of sale between the dog as warranted and the actual dog. And in other cases involving the sale of animals, our courts have repeatedly refunded the whole of the purchase price for the animal, on the assumption that "no buyer would agree to purchase an animal it knew to have a congenital defect that might lead to death or might require expensive surgery to correct." *Dalton*.

Dent argues that an award of the full purchase price under UCC § 2-714(2) is "unreasonable" under § 2-714(1), which provides that a court may award damages for "nonconformity of tender . . . in any manner which is reasonable." *Id*. This argument misconstrues the relationship between the sections. Section 2-714(1) is a general rule governing awards of damages for nonconformity of tender. By contrast, § 2-714(2) is a more specific rule that applies to those cases in which damages may be awarded for a breach of warranty. Because this is a case involving breach of warranty, the trial court should apply the more specific standard under § 2-714(2) and not the more general standard under § 2-714(1).

In conclusion, Cohen is entitled to receive remedies under both the FPPPA and the Uniform Commercial Code. Reversed and remanded.

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

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

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

July 2023

New York State
Bar Examination

Sample Essay Answers

July 2023 NEW YORK STATE BAR EXAMINATION

SAMPLE ESSAY ANSWERS

The following are sample candidate answers that received scores superior to the average scale score awarded for the relevant essay. They have been reprinted without change, except for minor editing. These essays should not be viewed as "model" answers, and they do not, in all respects, accurately reflect New York State law and/or its application to the facts. These answers are intended to demonstrate the general length and quality of responses that earned above average scores on the indicated administration of the bar examination. These answers are not intended to be used as a means of learning the law tested on the examination, and their use for such a purpose is strongly discouraged.

ANSWER TO MEE 1

I. The issue is whether the wife can recover for the farmer's use of GS under a negligence theory when the farmer attended a safety seminar on GS and cancer rates in the county are consistent with those in the state.

To demonstrate negligence, a plaintiff must demonstrate that an individual owed them a duty, that the individual breached that duty, and that the breach was the cause-in-fact and legal cause of cognizable harm to the plaintiff.

Generally, an individual owes a duty to anyone who their actions may foreseeably impact. To determine whether the individual breached that duty, the court applies the reasonably prudent person standard, asking whether the individual acted as a reasonably prudent person would under the circumstances. In measuring this standard, the court may apply the Hand formula, weighing the burden of taking more precautions against the gravity of the harm the likelihood of that harm. Furthermore, evidence of compliance with the law is a defense to a breach of duty.

If an individual breached that duty, that breach must be the legal and factual cause of the plaintiff's injury. That is, but-for the individual's actions, the plaintiff's injuries would not have occurred. Even where this cause-in-fact is present, the individual must also show that her injuries were in the scope of the risk of the individual's actions.

Finally, the individual must show a cognizable harm such as physical injury that rises above mere speculation.

Here, the farmer did owe the woman a duty, as he was her neighbor. Thus, it was foreseeable that his use of GS may affect the woman. The woman must also show breach. To do so, she must show that a reasonable person would not have used GS gas or otherwise would have taken some precaution to prevent any exposure to the woman. Applying the hand formula, however, the woman probably cannot show this breach. Indeed, the farmer already attended a safety seminar and received instructions on prudent GS use, complying with the law.

Furthermore, the state has found that the burden of not using GS will impact state corp production. Assuming that the farmer grows the special crop with which the state is concerned, the farmer's use of GS has great benefit to the state. Furthermore, the risk of cancer from GS is a mere hypothetical link only; scientists are not all agreed that GS causes cancer, nor are the risks fully known. Thus, the woman cannot show that the farmer not using GS would greatly have decreased a risk of cancer, though she can show that cancer is very harmful.

The woman also cannot prove causation. She has no medical evidence that her cancer was in fact caused by the GS; thus, cause-in-fact is not present. Furthermore, the farmer could successfully argue that the GS was not the proximate cause of the woman's cancer, as cancer has not yet been scientifically proven to be in the scope of the risk of GS use.

The woman can prove harm, as cancer is a cognizable, physical injury.

Therefore, because the woman cannot show breach or causation, she cannot succeed with her negligence claim.

II. The issue is whether the husband can demonstrate that the farmer's use of GS rises to trespass when the farmer used GS within a mile of the man's home and the gas is known to rise into the air and drift.

Trespass is a property tort that a plaintiff can demonstrate by showing that an individual had a general intent to intrude on his property using either his body or another object. Property in this definition broadly encompasses any property interest an individual may have. Thus, when an individual rents land, they have a property interest in the land, and trespass can occur.

The intent component requires that the individual trespassing has knowledge to a substantial certainty. They need not know that they are trespassing; they need only to know that they are committing the act that is trespassory in nature.

Typically, trespass must involve a tangible intrusion. Where intrusions are intangible, the torts of public or private nuisance are more appropriate.

Here, the man argues that the farmer's use of GS gas rises to the level of trespass. To show trespass, the man must show that the GS is touching his property without his permission and that the farmer intends this interaction. The man can show that the property is his. Even though the property is a rental, the man has a privacy interest in the property.

Furthermore, the man has to show that the farmer knew the GS would touch the property. The man likely can show that through the farmer's seminars and instructions, the farmer knew that GS can rise into the air and spread up to a mile. Thus, by using GS, the farmer knew to a substantial certainty that it would infringe on the air around the man's home.

The man's claim fails, however, because the GS gas, though perhaps infringing on the man's property, is not tangible. Instead, the man ought to bring a nuisance claim, as the GS gas is too intangible to show a physical trespass.

III. The issue is whether the court will permanently enjoin the farmer from using GS if the husband can demonstrate that the GS use is trespassory.

A suit for trespass can plead a permanent injunction or monetary damages as relieve. A permanent injunction is a judicial order in equity demanding that the affected party change his behavior to comply with the law. In determining whether to issue a permanent injunction, courts consider whether the injunction will be judicially manageable and enforceable over time. Furthermore, as consistent with equity, courts consider public policy implications and fairness in issuing the injunction. The less feasible a permanent injunction is, the less likely a court is to impose one. Overall, permanent injunctions are generally disfavored.

Here, the man can seek a permanent injunction as a remedy to trespass. If the court chooses to issue a permanent injunction, it will require the farmer to stop using GS gas permanently.

The court will consider that, in issuing this permanent injunction, it will constantly have to monitor the farmer's pesticide use, potentially for decades. Additionally, the court will likely consider that State A public policy has allowed farmers in this county to use the pesticide specifically because of the special crop's importance. The remedy could affect both the farmer's business and the state economy. Thus, a permanent injunction here likely is not feasible.

Therefore, a court will probably not award a permanent injunction because it is not manageable but instead would grant the man monetary damages upon success.

ANSWER TO MEE 1

1. The issue is what the wife must prove to establish her negligence claim and whether she is likely to prevail.

To bring a suit for negligence, a plaintiff must show (1) duty, (2) breach, (3) causation, and (4) damages.

a. *Duty*

As part of a prima facie case of negligence, a plaintiff must show that the defendant owed a duty of care to the plaintiff. The prevailing standard for the duty of care is that a

defendant owes a duty to act as a reasonably prudent person would with respect to foreseeable plaintiffs in order to avoid foreseeable harm. A minority view suggests that defendants owe a duty of care to act as a reasonably prudent person to everyone.

Here, the farmer owes a duty of care to both the wife and husband because they are the farmer's neighbors. It is foreseeable that actions taken by the farmer with respect to his land, including the use of chemicals that are capable of being evaporated into the atmosphere, may implicate or otherwise harm those in the immediate vicinity of the land. It is foreseeable that when using chemical compounds that are capable of traveling by air, that the air conditions of those living adjacent to the property would be impacted and that harm might foreseeable result from such action. When using dangerous chemicals, it is foreseeable that a kind of harm that might result from negligent administration of such chemicals would be illnesses and chronic medical conditions such as cancer.

Therefore, the wife can show that the defendant-farmer owed a duty to act as a reasonably prudent person would in administering the pesticide to his crops to ensure that the foreseeable plaintiffs-his neighbors-would not suffer foreseeable harm. Under either the majority view (foreseeable plaintiffs and foreseeable harm) or the minority view (a duty of care is owed to everyone) the farmer owes a duty to the wife.

b. *Breach*

A defendant breaches the duty of care when his conduct falls below the standard of care of that of a reasonably prudent person. Among the factors considered when analyzing whether an individual breached their duty of care and therefore acted negligently is whether the individual complied with applicable safety standards and the customs and practices of a particular industry. While noncompliance with safety regulations may be evidence of breach under a theory of negligence per se, compliance with safety regulations is not itself conclusive to show that a defendant acted with the necessary and requisite care. Likewise, failure to follow customs and practices in an industry may be evidence of breach, but the converse-complying with customs and standards-does not prove that a defendant acted prudently and reasonably.

Here, the farmer appeared to follow all of the instructions and training provided to him by the county. He attended the safety seminar offered by the health department and applied the chemical to the fields in conformity with the safety recommendations outlined in the seminar. There is nothing to suggest that the defendant failed to act with the requisite care or was otherwise negligent in abiding by the instructions of the safety regulations. While compliance with safety regulations is itself not enough to show that someone acted with necessary care, no other evidence seems to suggest that the farmer was negligent.

The wife might try to argue that given the volatility and danger of the GS gas, it is impossible to act with the requisite care to avoid the high danger and risk of harm to

others. However, such an argument would not be availing because that would be the standard provided for under a strict liability tort action. Because the wife has chosen to bring suit under negligence, she must affirmatively show that a breach occurred and that the farmer failed to abide by the standard of care. Therefore, the wife will be unlikely to prevail because she cannot show breach.

c. *Causation*

Causation in a negligence action requires that both actual and proximate causation be shown. Actual causation is "but for" causation, which states that a plaintiff must show that but for the defendant's conduct, the plaintiff would not have been harmed. Proximate causation turns on foreseeability, which is that the plaintiffs harm was the type that foreseeably flows from the defendant's misconduct.

Here, the wife would struggle to show either forms of causation. It is not clear from the statistical data in the county that an incidence of cancer is linked to the use of GS. Cancer rates in the county are uniform with those counties where GS is not used. While it might be foreseeable that a plaintiff may suffer from cancer due to the use of a chemical shown to cause cancer in lab mice (but not humans), the causation is too attenuated in this particular instance given the limited data available. Therefore, the wife also cannot show causation, further making her negligence action unlikely.

d. *Damages*

To recover for a negligence action, a plaintiff must suffer actual harm in the form of either property damage or personal injury. Pure economic loss cannot be recovered. Among the forms of recovery available to personal injury include compensatory damages for medical expenses, loss of revenue from career, and pain and suffering.

Here, if the plaintiff were to be successful on the other 3 prongs of negligence, she would be able to recover on account of her cancer diagnosis. She would be able to recover for medical expenses and lost wages. However, as mentioned earlier, she is unlikely to prevail in a negligence suit and therefore her damages calculation would be mooted.

2. <u>The issue is what must the husband prove to establish his trespass claim and whether he is likely to prevail.</u>

To establish a claim for trespass, a plaintiff must show that the defendant interfered with the plaintiff's land and did so with the intent to enter the plaintiffs land. Encroachment on another's land for the purposes of trespass must be physical though it need not be corporeal. That is, emission of harmful substances like gases or water that invade another's land provide for an actionable form of trespass. The defendant need not have

intended to specifically interfere with another's land, but must otherwise intend to engage in the conduct that caused the trespass.

Here, the husband can show that the gasses in the air traveled to his property. The available evidence and data shows that application of GS leads to aeration of the gas into the upper atmosphere and can travel to land up to one mile from each application point. The couple's house is less than a mile from several application points and therefore the husband would be likely to show that the farmer engaged in the conduct of applying the GS and that the GS traveled to the plaintiff's land, interfering and otherwise invading the land. Therefore, the husband can prove that there was a trespass on his land is likely to prevail on a trespass cause of action.

3. The issue is. assuming the husband prevails. whether it is likely the court will permanently enjoin the farmer from using GS within one mile of the couple's house.

To obtain the equitable relief of a permanent injunction, a court must balance the harm of the defendant's conduct against the public policy and state interest in allowing such conduct to proceed. Similar to the elements of a preliminary injunction action, the equities are balanced to determine whether or not the conduct is more productive and beneficial to society than it is harmful. The severity of the harm the conduct causes is counterbalanced against the usefulness of such conduct.

Here, the county can show that the necessity of GS is great. Valuable crops are produced in the county and cannot be grown without pesticides. No other effective pesticide is available to farmers other than GS. Substitute crops are not available and the cost of crop losses to the county would be half a billion dollars. In other words, the need for GS is quite high and a permanent injunction might pose a great burden to the community and public policy writ large. On the other hand, in terms of the risk of GS usage, the plaintiffs would be able to show that increased incidence of respiratory illness is a severe consequence of the use of the pesticide. The data shows increased respiratory illness in the county well above that of other counties. The county's rejoinder to this would be that the county is not densely populated and therefore the risk of harm, while individually quite large, is not widespread, thereby reducing the risk prong of the balancing. Overall, a court is unlikely to permanently enjoin the GS use given its productivity.

ANSWER TO MEE 2

1. Parent is not liable to VanCo as a partner of Sub.

The issue is whether Parent LLC and Sub LLC formed a partnership in its business activity. In general, a partnership is formed where two or more partners carry out business as co-owners together. A partnership can be formed among other corporate entities, such as LLCs. The fact of profit sharing creates a rebuttable presumption of the existence of a partnership. The subjective intent of the parties is not relevant in this inquiry.

Based on totality of circumstances here, Parent LLC and Sub LLC have not created a partnership. First, while Parent LLC is the sole member of Sub LLC and selects Sub's manager, the business transactions between the two parties are at a prevailing market price. Parent obtains recycled plastic from various courses and tell sells some to Sub at prevailing market prices. Sub then uses the plastic to make upscale shoes and sells them. Although Sub sets its production schedule based on Parent's access to recycled plastic, such business activity is reasonable for any company with a dominant supplier with materials and does not necessarily suggest a partnership relationship. Second, it appears that there is no profit sharing between the two parties, even though they share certain personnel for certain operations. Even though Sub distributes its profits to Parent as a member, Parent does not share its profits with Sub. In addition, Sub has discontinued these payments with consulting with Parent. Thus, although a local newspaper called the two companies "partners promoting business sustainability," Parent and Sub LLC have not formed a partnership.

Partners are jointly and severally liable for the partnership's debts, but here there is no partnership between Parent LLC and Sub LLC. In addition, creditors must exhaust partnership assets before seeking to recover from individual partners. As a result, Parent is not liable to VanCo as a partner of Sub.

2. Because Greta lacks authority, Parent LLC is not bound by the agreement between Sub and VanCo.

In general, a principal is liable for the contracts entered into by its agent if the agent acts with actual or apparent authority. Actual authority exists where the conduct of the principal makes the agent reasonably believe that the agent has the authority to enter the transaction. Actual authority can be implied or express. And apparent authority exists where the conduct of the principal makes the third party reasonably believe that the agent has the authority to enter the transaction. Here, as the manager employed by Parent LLC, Greta is an agent on behalf of principal Parent LLC.

Although the Parent LLC and the Sub LLC work closely together, Greta lacks actual or apparent authority to bind parent LLC to the Sub-VanCo contract. First, Greta lacks actual authority to enter the transaction. Here, Greta signed the agreement not at the request of her principal Parent LLC, but at that of third party Sub LLC. Nothing suggests that any conduct by Parent LLC has led Greta to reasonably believe he can enter such agreements. Second, Greta also lacks apparent authority to enter the transaction. Here, he specifically signed the agreement "as agent of Sub" (at the request of Sub LLC). As a result, it is unreasonable for VanCo to think that Greta has the authority to bind Parent LLC in this transaction.

Because Greta lacks authority, Parent LLC is not bound by the agreement between Sub and VanCo.

3. The fact that Parent and Sub are separate organizations should not be disregarded so that Parent is liable for Sub's obligations to VanCo.

LLC is a *limited liability* company and members are generally not liable for the debts of the LLC. However, in limited circumstances, courts will allow creditors to "pierce the corporate veil" and directly recover from a member of an LLC. The three common grounds are (1) alter-ego, (2) undercapitalization, and (3) fraud. The first ground exists where the member and the LLC totally disregard corporate separateness, such as by the commingling of accounts and a lack of separate corporate meetings for the company. The second ground exists where the member grossly undercapitalizes the company such that the company cannot afford reasonable, prospective liability. The third ground exists where the member purposefully uses the LLC to avoid its own liability. In addition, courts typically do not allow veil piercing in contract actions.

Here, the two companies work very closely together, but Sub LLC is not the alter-ego of Parent LLC. Even though they share personnel and have no cost-sharing arrangement, they frequently enter into arms- length transactions for plastics with each other. In addition, Sub LLC and Parent LLC are managed by separate managers, even though Parent LLC is the sole member of Sub LLC and selects Sub's manager. In addition, Sub has discontinued profit payments to Parent (as its member) without consulting with Parent in accordance with Sub's operating agreement. Taken together, the boundaries are not so lacking to justify veil-piercing. And nothing suggests the other two ground for veil piercing exists here.

Thus, because it is a contract action and the corporate separateness are not sufficiently lacking, the fact that Parent and Sub are separate organizations should not be disregarded so that Parent is liable for Sub's obligations to VanCo.

ANSWER TO MEE 2

1. Is Parent liable to VanCo as a partner of Sub?

Partners in a partnership are presumed to be liable to each other's creditors or liability claims. Whether there is a partnership depends on the objective factors instead of the subjective intent of the partners. The litmus test for the existence of partnership is the sharing of the profits. Other factors to be considered is the sharing of operative expenses and personnel. If there's a partnership, one partner may be held liable for debts or obligations that incurred after the partnership is formed with this partner, but not liable for obligations before the partner joins the partnership.

Here, Parent and Sub does not appear to meet the litmus test: while Sub distribute money to Parent if it has excess profits, there is no indication that money flows the other way, i.e., the Parent does not share its profits with Sub. Sub's distribution of profits seems like ordinary dividend payout to its member. While some of Parent's revenue comes from supplying to Sub, the two companies have no arrangements for sharing the costs or the profits thereof. They share personnel for human resources, accounting, and government relations, and cooperate in their technical work, but they each have their sole managers and conduct different type of business (the Parent is in plastic recycling and the Sub in shoemaking). The media presentation of "partners promoting sustainability" does not control. Therefore, the relationship between the two entities are more like traditional parent entity and subsidiary, not a partnership. Therefore, Parent is not liable to VanCo, at least from the partnership route.

2. Is Parent bound by the agreement between Sub and VanCo signed by Parent's manager?

A principal may be bound by an agent to a contract signed by the agent if the agent acted with actual or apparent authority. Actual authority can be express or implied. An agent acts with apparent authority if the third party to the contract reasonably believes, from a manifestation of the *principal* (not the agent), that the agent has authority to enter into the contract on the principal's behalf.

Here, the contract is between Sub and VanCo, but is signed by Greta, who is a manager of the Parent. While they share some of the personnel, Parent's manager is not employed by Sub. Greta's responsibility thus does not cover signing contracts on behalf of Sub, and circumstances do not imply that she has actual authority to do so. Greta signed the agreement at the request of Sub's manager, who was not in the office, not because Parent authorized her to do so. Therefore, Parent would only be liable if the third party reasonably believes that Parent has authorized Greta to do so.

The fact pattern does not suggest that the Parent was in touch with VanCo in any form. Therefore, it does not appear that VanCo would have reasonably believed that Greta was acting on behalf of a principal other than Sub when she signed it.

VanCo might also want to pursue the route of holding Greta liable. However, that would be a stretch because an agent is only liable when they purports to work on the principal's behalf but actually did not have power to bind the principal. Here, Greta was acting as "agent of Sub" and Sub was properly bound to the contract. Greta fully disclosed the identity of her actual principal - Sub, in that occasion and thus does not trigger liability under inadequate disclosure of principal. Even if Greta is liable, the elections of remedies doctrine requires VanCo to pick one, Greta or Sub, to recover- but not Parent.

3. Should the fact that Parent and Sub are separate organizations be disregarded so that Parent is liable for Sub's obligation to VanCo?

Assuming that Parent is now the deep pocket and that VanCo wants to go after it. Another route is to argue that Parent and Sub are, in essence, the same entity, i.e., a piercing-the-corporate- veil type argument. The typical LLC form are limited liability companies that typically shields its members from liability beyond the original investment. However, if the member and the LLC are so closely intertwined that for equity reasons the court really see the two as one, the court may "pierce the veil" of the LLC form and allow creditors to get ahold of the member's assets. Piercing the corporate veil is an extraordinary remedy. Some courts apply the "unity of interests" test and will pierce if the two entities are so unified in interest and action that one is really just the *instrument* of another. Some courts look into the formalities and consider whether the member has respected the LLC's corporate form and independent identity, or has just treated the LLC as an alter ego. In general, courts would consider factors like undercapitalization, shared personnel and offices, minutes for meetings and appropriate voting, separate assets like bank accounts, etc.

It seems unlikely that the court will resort to this remedy. While the Sub shared some personnel with the Parent, these are mostly back-end functions that are often shared by related companies. They are managed separately and pursue different kind of business development. The Parent does sell to the Sub, a somewhat red flag that may suggest unfair self-dealing, but the Parent is selling to the Sub at prevailing market prices. The costs are separately accounted for. While Greta dubbed in for Sub's manager, this incident, if isolated and unusual, should not make the two entities' identities commingled. Moreover, there is no indication that the Sub is underfunded in any way to avoid liability- its financial difficulties appear fairly reasonably attributable to the slowdown in its market.

Therefore, the court is likely to respect the boundaries between the two entities and find that Parent is not liable for Sub's obligation to VanCo.

ANSWER TO MEE 3

1. The issue is whether a court can authorize the trustee to terminate the trust and purchase Annuity A if the daughter consents to the termination.

Per Section 1 of State A's Trust Code, a trust may be terminated upon consent of all beneficiaries, if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. The material purpose of Tom's trust, as stated under (1), is to ensure that there will be sufficient funds to provide for Betty's care and support for the rest of Betty's life. The benefit to the daughter is not a material purpose because in (2), Tom said he bequest the rest to the daughter simply because he had no other relatives and did not want to have the trust property escheat to the state. Another purpose is the spendthrift provision in (4): No beneficiary may alienate or assign her interest in this trust, nor shall such interest be subject to the claims of her creditors. However, a spendthrift provision is not presumed to constitute a material purpose of the trust per Section 3 of the Trust Code. Thus, the trust will be terminated if the court concludes that continuance of the trust is not necessary to achieve the material purpose of the trust: to ensure that there will be sufficient funds to provide for Betty's care and support for the rest of Betty's life.

Given that nursing home fees have dramatically increased, and even with all available resources and government benefits, Betty can no longer afford current and likely future nursing home fees. In comparison, Annuity A would provide payments sufficient for Betty's care and support for the rest of her life. Once the trust is terminated under Section 1, the trustee per Section 2 will distribute the trust property as agreed by the beneficiaries and purchase Annuity A to support Betty. Therefore, given the daughter's consent, the court will conclude that continuance of the trust is not necessary to achieve the material purpose of the trust: to ensure that there will be sufficient funds to provide for her care and support for the rest of Betty's life.

2. The issue is whether a court can authorize the trustee to terminate the trust and purchase Annuity B if the daughter does not consent to the termination.

Per Section 4 of State A's Trust Code, if not all beneficiaries of a trust consent to a proposed termination of the trust, the court may nonetheless approve the termination if the court is satisfied that, if all the beneficiaries had consented, the trust could have been terminated under section 1, and the interests of a beneficiary who does not consent can be appropriately protected in accordance with the testator's probable intention. Therefore, even if the daughter does not consent, the court might still authorize the termination of the trust and purchase of Annuity B if two conditions are satisfied: (1) if all the beneficiaries had consented, the trust could have been terminated under that section, and

(2) the interests of a beneficiary who does not consent can be appropriately protected in accordance with the testator's probable intention.

For the first condition to meet, the court needs to establish that section 1's condition need to be meet: the trust will be terminated with consent of all beneficiaries if the court concludes that continuance of the trust is not necessary to achieve the material purpose of the trust: to ensure that there will be sufficient funds to provide for Betty's care and support for the rest of Betty's life. Given that nursing home fees have dramatically increased, and even with all available resources and government benefits, Betty can no longer afford current and likely future nursing home fees. In comparison, while Annuity B would provide payments to Betty that are 3% less that the payments under Annuity A, it is still sufficient for Betty's care and support. Therefore, purchase of Annuity B, instead of continuance of the trust, better ensure that there will be sufficient funds to provide for Betty's care and support for the rest of Betty's life, the material purpose of the trust. Therefore, the first condition of Section 4 is met.

For the second condition to meet, the court needs to establish that the interests of a beneficiary who does not consent can be appropriately protected in accordance with the testator's probable intention. There is not much interest for the estranged daughter according to testator's probate intention, other than just allowing the daughter, instead of the state, to receive the money: Tom admits under trust clause (3) that he bequest the rest to the daughter simply because he had no other relatives and did not want to have the trust property escheat to the state. If Annuity B is purchased, it would include a cash payment payable to the daughter at Betty's death. This payment would be substantially less than the amount the daughter would receive under the trust. Here, the court can go both way: receiving much less probably means the interests of the daughter is not appropriately protected, but this protection should be construed in the testator's probable intention: it seems Tom does not care how much the daughter receives. So, the second condition likely is met.

Therefore, because both conditions are met, a court can authorize the trustee to terminate the trust and purchase Annuity B even if the daughter does not consent to the termination.

3. The issue is whether the court can authorize the trustee to pay 100% of the trust income to Betty without the daughter's consent, if the court does not authorize the termination of the trust.

Under Section 5 of State A's Trust Code, a court may modify the dispositive terms of a trust if, (1) because of circumstances not anticipated by the testator, (2) modification will further the primary purpose of the trust. (3) To the extent practicable, the modification must be made in accordance with the testator's probable intention. Here, (1) the increase in nursing home is not anticipated by Tom. (2) Modification, by authorizing the trustee to pay 100% of the trust income to Betty, will further the primary purpose of the trust by

meeting Betty's current nursing-home expenses and remain in her current nursing home for the time being. (3) The modification is made in accordance with the testator's probable intention because Tom does not care how much the daughter receives.

Therefore, the court can authorize the trustee to pay 100% of the trust income to Betty without the daughter's consent, if the court does not authorize the termination of the trust.

ANSWER TO MEE 3

1. If the daughter consents to the termination of the trust and the purchase of Annuity A (wholly for the benefit of Betty), the issue is whether a court could authorize the trustee to terminate the trust and purchase Annuity A.

Under State A's Trust Code, a trust may be terminated if all beneficiaries consent if the court concludes that continuance of the trust is not necessary to achieve any "material purpose of the trust." Sec. 1. If a trust is terminated pursuant to all beneficiaries' consent and the continuance is not necessary for a material purpose, the trustee is to distribute the trust property as agreed by the beneficiaries. Sec. 2. Finally, the Trust Code notes that a spendthrift provision alone is "not presumed to constitute a material purpose of the trust."

Here, the only beneficiaries to the trust are Betty and the daughter. Thus, if they both agree to terminate the trust, Sec. 1 applies. In that situation, as long as the continuance of the trust is not necessary for a "material purpose," the court should authorize the trustee to terminate the trust and distribute its assets according to their agreement.

The issue is whether the trust serves a material purpose. Its fourth paragraph contains an inalienability clause, prohibiting any beneficiary from alienating or assigning her interest in the trust. That provision is likely void as against public policy, because it is a complete restriction on alienability. However, the interest not being "subject to the claims of...creditors" is generally a valid spendthrift clause. However, under Sec. 3 of the Trust Code, that clause alone does not constitute a material purpose.

Rather, the testator's intent was primarily to "ensure that there will be sufficient funds to provide for [Betty's] care and support for the rest of her life." He was estranged from his daughter and only bequeathed the trust principal to her so it would not escheat to the state, as he had no other relatives. The changed circumstances for Betty requiring her to spend more on health care would likely support that primary purpose, and it would not serve a material purpose of the trust to prevent that.

Accordingly, if all beneficiaries (the daughter and Betty) consent, a court may authorize the trustee to terminate the trust and purchase Annuity A.

2. If the daughter does not consent to the termination of the trust and the purchase of Annuity B (for the benefit of Betty and the daughter). the issue is whether a court may authorize the trustee to terminate the trust and purchase Annuity B.

Under section 4 of State A's Trust Code, a court may approve the termination of a trust even if not all beneficiaries consent to a proposed termination pursuant to Section 1. To do so, the court must be satisfied that (1) "if all the beneficiaries had consented, the trust could have been terminated under that section," and (2) "the interests of a beneficiary who does not consent can be appropriately protected in accordance with the testator's probable intention."

Here, both those conditions are likely met. First, if the daughter and Betty both consented, the trust likely could have been terminated under Section 1, because it likely serves no material purpose to continue it, as discussed above. Second, the interests of the beneficiary who does not consent--the daughter--may likely be protected under Annuity B according to the testator's probable intention.

Tom was clear in his trust that his primary purpose was to ensure Betty would have sufficient funds for her "care and support for the rest of her life." He had a wonderful and loving marriage with her. Meanwhile, he was estranged from his daughter and only included her as a beneficiary so the trust would not escheat to the state.

Annuity B would successfully provide Betty with payments that would suffice for her care and support and include a cash payment payable to the daughter at Betty's death. While that payment would be substantially less than under the trust, Tom did not necessarily want daughter to get anything: his purpose was protecting Betty's care and support, so his intentions are met by this arrangement. Thus, the daughter's interests would be protected in accordance with Tom's probable intention.

Accordingly, a court may likely authorize the trustee to terminate the trust and purchase Annuity B.

3. If a court does not authorize the termination of the trust. the issue is whether it may. without the daughter's consent. authorize the trustee to pay 100% of the trust income to Betty.

Under Section 5 of the Trust Code, a court can modify the terms of a trust if, "because of circumstances not anticipated by the testator, modification will further the primary purpose of the trust." The modification must be made "in accordance with the testator's probable intention "to the extent practicable.

Here, Betty's circumstances changed as a result of circumstances Tom likely did not foresee. He died in 2008 after a 35-year marriage to Betty. While 80% of the trust income was sufficient until 2019, Betty grew older and was diagnosed with a health problem that required nursing home care. Additionally, the costs for that care have "dramatically increased, a circumstance that Tom had not anticipated." Betty can no longer afford current and future fees.

Because Tom's stated "primary purpose" in creating the trust was to ensure "sufficient funds to provide for [Betty's] care and support for the rest of her life," it would probably be his intention to modify the trust now, over a decade later, to help her meet the unforeseen increase in the costs of her care. Additionally, the request for 100% of trust income (rather than just 80%) would likely adhere to Tom's intent to provide sufficient funds for her care.

Accordingly, a court would likely authorize the trustee to pay 100% of the trust income to Betty.

ANSWER TO MEE 4

1. Tech did not properly raise the statute of limitations defense

Tech did not properly raise the statute of limitations (SOL) defense, and therefore, its motion for summary judgment (MSJ) on that ground should be denied. At issue is whether the SOL is an affirmative defense that must be raised in a pre-answer motion or in the answer.

Federal rule of civil procedure 12(b) lists affirmative defenses that can be raised in a pre-answer motion or answer. For some of the listed defenses, they must be raised at the pre- answer or answer stage in order to retain them--if they are not made at that stage, they are waived. The only one that can be raised at any time is a motion to dismiss for lack of subject matter jurisdiction. A statute of limitations defense is best suited under a motion to dismiss for failure to state a claim upon which relief can be granted. That is because the statute of limitations bars the action from coming forward, and therefore no relief may be granted to a plaintiff who is bring a barred claim. A 12(b)(6) motion must be raised at the pre-answer or answer stage or else the defendant waives that defense.

Here, the defendant only responded to the allegations in the complaint, and did not raise any 12(b) defenses. They merely accepted and denied the complaint's allegations.

Therefore, the defendant waived the 12b6 defense, which includes defenses such as the statute of limitations expiring. Although the SOL had validly expired, the defendant must raise it in the first instant in order to preserve the defense.

Therefore, the SOL defense was not properly raised and the defendant has waived its right to use it.

2. The Cross-Motions for Summary Judgment Should be Denied

Both motions for summary judgment should be denied. At issue is whether what was said in the oral contract between the two presidents is a genuine issue of material fact.

A motion for summary judgment under Rule 56 of the FRCP allows a party to move for a ruling on the merits by the court when there is no genuine issue of material fact to be decided by the fact finder, and no reasonable finder of fact could find for the other party. The court may consider affidavits and pleadings in deciding an MSJ. Issues of credibility of witnesses are not properly decided on MSJ, rather, they must be decided by the fact finder at trial. Relevant to the party's MSJs here is the admissions in the answer--under Rule 12, a party may admit, deny, or claim no knowledge of the allegations in the complaint. Any allegation that is admitted or not responded to in the complaint is treated as admitted fact by the court.

Here, the MSJs on the breach of K claim are divided over what the two presidents said when they met. The defendant offers the affidavit of one witness who says that the agreement was only for combo meals identified by number, and the plaintiff offers eight affidavits claiming the opposite. Although the plaintiff has submitted more affidavits, the different accounts of the witnesses in the affidavits presents an issue of witness credibility--which witnesses does the court believe and which don't they. That is not proper to decide on a MSJ, and therefore, the court should deny both motions and proceed to trial.

Additionally, the plaintiff alleges that the defendant admitted the allegations in the complaint by admitting to paragraph 5. However, paragraph 5 does not state anything about the conversation, but rather just says that the defendant delivered a system that only recognized combo meals by number. According to the defendant, this was consistent with the oral agreement. Therefore, the admission of paragraph five does not operate to foreclose a genuine issue of material fact the way plaintiff suggests.

Therefore, the plaintiff and the defendant's MSJs must both be denied.

3. The Court must Dismiss for Lack of Subject Matter Jurisdiction

The court must sua sponte dismiss this case for lack of subject matter jurisdiction (SMJ). At issue is whether the companies' principal places of business (PPB) being located in the same state violates the complete diversity rule.

For a federal court to properly have SMJ over a diversity case, the plaintiffs and the defendants must be completely diverse in citizenship from one another and the amount in controversy must be over 75,000 dollars. Corporations are citizens of BOTH the states where they are incorporated and where their principal place of business is. The principal place of business is wherever the corporate nerve center is. If a federal court finds that it lacks subject matter jurisdiction at any time, it must on its own motion dismiss the case. A federal court that issues a ruling where it does not have subject matter jurisdiction renders that ruling void.

Here, the plaintiff is a citizen of state C, its state of incorporation, and state A, where its PPB is. The defendant is a citizen of state D, its state of incorporation, and state A, where its PPB is. Thus, the defendant and plaintiff are both citizens of the same state, state A, which ruins complete diversity. The court must sua sponte dismiss for lack of subject matter jurisdiction before rendering a verdict in the MSJ pending, because any ruling made on the MSJs would be void without proper subject matter jurisdiction.

ANSWER TO MEE 4

1. The issue is whether Tech properly raised the statute of limitations defense.

Whether a suit is barred by the statute of limitations is an affirmative defense. Any affirmative defense that a defendant wishes to use must be asserted in its answer or the defense is waived. An affirmative defense that is not raised in an answer is not waived if it is asserted in an amended answer used as of right or with leave of court.

Because Tech did not raise the statute of limitations issue in its initial answer or in any amended answer, it waived the statute of limitations defense and cannot raise it in a motion for summary judgment. Tech did not properly raise the statute of limitations defense.

2. The issue is how the court should resolve the summary-judgment motions on the breach of contract issue.

A court may grant a motion for summary judgment when there is no dispute as to any material fact and the party is entitled to judgement as a matter of law. When evaluating a party's motion for summary judgment, the court must view the facts in the light most beneficial to the nonmoving party.

Tech asserts that its contract with Diner required it to produce voice-recognition software capable of recognizing only combination meal orders. Diner asserts that its contract with Tech required Tech to provide a voice-recognition system that would cover all menu items. Although Tech admits that its software did not enable Diner's computers to recognize all orders and only enabled Diner to recognize combination meal orders, this admission does not conclusively decide the case. A factual dispute exists over the contents of the oral contract and whether Tech was supposed to provide software that covered all menu items.

Tech's motion for summary judgment cannot be granted because Diner has submitted deposition testimony from several witnesses that the contract covered all menu items. Therefore, viewing the evidence in the light most favorable to Diner, the court cannot conclude that the contract only required Tech to create software capable of recognizing combination menu items.

Likewise, Diner's cross-motion for partial summary judgment cannot be granted because Tech submitted an affidavit from its president asserting that the voice recognition software would only cover combination menu items. Viewing the evidence in the light most favorable to Tech, the court cannot conclude that Diner's contract required Tech to create software for all menu items.

Both motions for summary judgment should therefore be denied.

3. The issue is whether the court should dismiss the case sua sponte for lack of subject matter jurisdiction.

Although some issues such as personal jurisdiction and venue can be waived by the defendant, subject matter jurisdiction is the basis by which the federal court has the power to hear the action and can never be waived by the parties. The issue of subject matter jurisdiction can be raised at any time by either party, or by the court on its own accord. If the court lacks subject matter jurisdiction, it must refuse to hear the action.

Diversity jurisdiction requires that an amount in controversy of $75,000 be met and that there be complete diversity of all of the parties. Corporations are deemed to be domiciles of the states where they are incorporated and the states where they have their principal places of business for purposes of diversity jurisdiction.

The court lacks subject matter jurisdiction over this action because both parties maintain their principal places of business in State A. They are therefore both domiciliaries of State A, and diversity jurisdiction is lacking. Because breach of contract is a state law claim and there are no other claims that would form the basis for federal question jurisdiction, the court lacks subject matter jurisdiction and must dismiss the case.

ANSWER TO MEE 5

1a) Issue of whether Supplier has an enforceable interest in the machine

A party can have an enforceable security interest against another party even if there is no formal security agreement signed. To have an enforceable interest against a debtor (in this case Company), there must be attachment. For collateral to attach to an agreement, 1) the lender or secured party must provide value 2) the debtor must have rights in the collateral, and 3) the debtor must authenticate a security agreement that describes the collateral to be attached, or pursuant to an agreement, the secured party must have possession of the collateral. Additionally, a purchase money security interest (PMSI) exists when a debtor makes a purchase from the secured party or lender, and the lender retains collateral in that purchase (or when money from a loan is used to buy an item and the lender has a security interest in the item that was bought with their loan).

Here, supplier has an enforceable security interest in the machine that has attached to their agreement. Supplier provided value by allowing Company to pay the full price of the machine over time, the debtor has rights in the machine as they have possessory rights and the right to obtain ownership with full payment, and an agreement was signed and authenticated by the debtor that described the collateral.

Additionally, this is a PMSI as supplier retained an interest in the machine.

To have rights, against other parties, a security interest must also be perfected. A security interest can be perfected when there is attachment and a method of perfection is followed. Though one method of perfection is filing a financing statement, Supplier did not file a financing statement with respect to this transaction. Additionally, though a PMSI in consumer goods automatically attaches, the machine is not a consumer good as it is not used personally or for household used, but use used for Company's business.

1b) Issue of whether Lender has an enforceable interest in the machine

As described in 1a), there are three requirements for collateral to attach and for a secured party to have an enforceable interest against the collateral. Here, Lender provided value by providing a loan. Additionally, Company has rights in its "personal property." However, while the agreement was signed by Company, one requirement for a valid security agreement is that it specifically describes the collateral- this means the description cannot be too vague. Here, though "all of Company's personal property" would likely encompass equipment, it is likely to vague to be enforceable. Thus, Lender does not have an enforceable interest in the machine as the security interest did not properly attach.

However, assuming proper attachment, Lender filed a proper financing statement that would have perfected its security interest in the machine (but, since no attachment, they do not have an interest and there is no perfection).

1c) Issue of whether BigBank has an enforceable interest in the machine

As described in 1a), there are three requirements for collateral to attach and for a secured party to have an enforceable interest against the collateral. Here, BigBank provided value by providing a $750,000 loan. Additionally, Company has rights in its present and future equipment. The security agreement was authenticated by Company and was not too vague as collateral can include present and future equipment.

Thus, the question is whether the machine counts as equipment. Equipment is a catch-all category of goods that is not consumer goods, farming goods, or inventory. Since the machine is not a consumer good used in a personal manner, is not used on a farm, and is not used in products or a product sold by Company, it is equipment. It also meets the traditional view of equipment as being used in a business but not for inventory. Thus, BigBank has an enforceable interest in the machine.

Additionally, since the interest attached and BigBank properly filed a financing statement reflecting the transaction and the "equipment," BigBank's interest has perfected. This gives BigBank interests in the machine against other parties.

2. Order of Priority of the enforceable interest in the machine

As mentioned, to have rights, against other parties, a security interest must also be perfected. A security interest can be perfected when there is attachment and a method of perfection is followed. One common method is filing a financing statement. When there are multiple perfected interested, the first to file the financing statement or the first the perfect has priority over the other perfected interested. A perfected interested will have

priority over unperfected interests. As for security interests that have only attached, priority is given to the first to attach.

As explained in question 1), only BigBank perfected their security interest. Thus, BigBank has priority over Supplier and Lender. Next, since Supplier has an enforceable interest in the machine, and Lender does not, Supplier has priority over Lender. Finally, Lender does not have an enforceable interest as their interest did not properly attach.

If Supplier did perfect their security interest when their interest attached, as a PMSI, they would have priority (they also would have perfected first). If Lender properly attached, they would have priority over BigBank. as Lender filed their financing statement before BigBank. However, since only BigBank has perfected, they have priority. Supplier is next in line as they are the only other lender with an enforceable interest.

ANSWER TO MEE 5

1(a). The issue is whether Supplier has an enforceable interest in the machine.

UCC Article 9 governs secured transactions in which the secured party takes an interest in personal property that serves as collateral. Collateral covered by UCC Article 9 includes goods such as equipment. Equipment is a catchall category that includes property used in a business such as machinery. Here, the machine qualifies as equipment because it is used in Company's business. To have an interest in collateral enforceable against the debtor, the interest in the collateral must have attached to the collateral. Attachment occurs when all three of the following requirements are met: (1) the debtor has rights in the collateral, (2) the debtor authenticates a signed security agreement or the secured party maintains control or possession of the collateral, and (3) the secured party gives value to the debtor. To be valid, the security agreement must be signed, names the parties, and includes a non-super generic description of the collateral. The description can refer to the collateral by its type as recognized under the UCC, such as "all equipment," but it cannot simply say "all assets" or "all personal property."

Here, Supplier's interest in the machine has attached. Indeed, upon the transfer, Company has rights in the collateral. Additionally, the parties memorialized the credit arrangement in a writing signed by both parties that clearly described the machine. This writing meets the requirements for a signed security agreement because it is signed, names the parties, and includes a non-- super generic description of the collateral. Supplier gave value to Company in the form of the machine, which the Supplier

delivered to Company. Therefore, the Suppler has an enforceable interest in the machine as of February 1.

1(b). The issue is whether Lender has an enforceable interest in the machine.

Here, Lender does not have an enforceable interest in the machine. Although Company does have rights in the collateral and the secured party gave value to Company in the form of the $1,000,000 loan, the signed security agreement created by the parties fails to meet the requirements to attach the property. Indeed, as stated above, a signed security agreement must not contain a super generic description of the collateral, such as "all Company's assets" or "all Company's personal property." Here, the security agreement indicated "all of Company's personal property" as the collateral. This is a super generic description; therefore, the Lender's interest did not attach to the machine. Lender does not have an enforceable interest in the machine.

1(c). The issue is whether BigBank has an enforceable interest in the machine.

If the party includes an after-acquired property clause in the security agreement, then the interest will attach to all present and future property covered by the description of the collateral in the agreement.

Here, BigBank's interest in the machine has attached. Indeed, Company has rights in its present and future equipment. The loan agreement was signed and included a non-super generic description of the collateral, because it referred to it by its UCC-ascribed category name. Such present and future equipment includes the machine, which had already been acquired. Further, BigBank gave value in the form of the $75,000 loan. Therefore, BigBank has an enforceable interest in the machine.

2. The issue is what the order of priority of the enforceable interests in the machine is.

Generally, the rule of first-in-time, first-in-right underlies the determination of priority. However, the order of priority is in part determined by which interests have perfected, as well if any of the perfected interests are purchase money security interests (PMSI). A perfected security interest takes priority over an unperfected security interest. As between perfected security interests, the first to file or perfect has priority. As between un-perfected but attached security interests, the first to attach has priority. A PMSI arises when a good is sold on credit or where the party buys the property that the secured party takes an interest in using the loan from the secured party. A perfected PMSI takes priority over a perfected non-PMSI security interest, even if created later.

An interest can be perfected in a number of ways, including filing a financing statement, automatic perfection of PMS is for consumer goods, and possession or control, although

the particular methods allowed depend on what category the collateral falls into under the UCC Article 9. An interest in equipment can be perfected through filing a financing statement or possession. An interest cannot perfect if it has not attached.

Here, Supplier did not file a financing statement, nor did it retain possession or control. Therefore, its interest has not perfected. Even though it is a PMSI because it is a sale of equipment on credit, automatic perfection is limited to consumer goods, which are goods for personal use, home use, or family use. Therefore, Supplier's interest has not perfected.

Additionally, Lender's interest has not perfected despite filing a financing statement because its interest did not attach for the reasons described above. An interest cannot be perfected if it is not attached.

BigBank, on the other hand, did properly perfect its interest by filing the financing statement in the proper filing office.

Therefore, because BigBank has a perfected security interest, its interest has priority, even though the interest attached after Supplier and Lender's interests. Next in the order of priority is Supplier as an unperfected security interest. Lender's interest is irrelevant because it is not enforceable because it was not attached.

ANSWER TO MEE 6

Adam and Officer One

The court should deny Adam's motion to suppress.

A court should grant a motion to suppress an individual's incriminating statement when it was made in violation of the suspect's *Miranda* rights. Miranda provides that individuals who are undergoing custodial interrogation must be informed of their right to remain silence, that anything they say can and will be used against them, and their right to an attorney and to be provided one without cost. Miranda is designed to make up for the inherently coercive nature of custodial interrogation. Custody is determined by whether a reasonable person would feel free to leave in the circumstances. Ordinarily, traffic stops are not considered to be custodial stops, because an ordinary person would know that he is free to leave. However, if an individual is specifically informed that he is not free to leave, this can create a reasonable impression that he is in custody. "Interrogation" for Miranda purposes are statements or questions made by the police that they know are likely to result in an incriminating response.

Here, the statement should not be suppressed because while there was interrogation, there was not custody. There was interrogation because Officer One asked where Adam was coming from, and this was designed to elicit information regarding whether they were at the pharmacy (and did in fact result in such information). But Adam was not in custody. First, Officer One pulled Adam over. This does not normally constitute custody. The officer then performed a "stop-and-frisk" on Adam because he had reasonable suspicion that Adam had a weapon, because he may have robbed the pharmacy. Officer One did tell Adam that he was not free to leave now, but that he would be free to leave in a few minutes regardless of whether Adam answered questions or not. In that situation a reasonable person would know they were free to leave, and the ordinarily compulsion in custodial interrogation is not present.

Therefore, the motion to suppress should not be granted.

Ben and Officer Two

The court should deny Ben's motion to suppress.

The Miranda rights are all of the rights explored above regarding Adam and Officer One.

When police give the Miranda rights, they need not give them verbatim, but are permissible if they are conformed to the substance of the Miranda rights (the right to remain silent, the right to counsel or be provided counsel, and the right to be informed that anything you say can and will be used against you). If the Miranda "warning" did not sufficiently conform to the proper Miranda warning, the statement will be suppressed as if no warning were given at all. However, even without a Miranda warning, a statement is admissible if it was a voluntary statement which was "blurted out" not in response to interrogation.

Here, Officer Two's Miranda warning was undoubtedly ineffective. It did not convey any of the substance of Ben's Miranda rights. However, the defective statement will be saved because Ben was not undergoing custodial interrogation. He was in custody--a reasonable person would not have felt free to leave the station--but he was not undergoing interrogation. As explored above, interrogation is when the police ask a question or make a statement designed to elicit an incriminating response. The question posed was simply if Ben understood his (defective) warning, and thus was not calculated to elicit such a response.

Therefore, the court should deny Ben's motion.

Carl and Officer Three

The court should deny Carl's motion to suppress.

A defendant may waive their Miranda rights if the waiver is knowing and voluntary. A waiver is presumed knowing and voluntary if the defendant is given an adequate Miranda warning that conforms with the duty to inform the defendant of the Miranda rights (explored above). A defendant may not invoke the right to silence through silence itself. Instead, the invocation of the right to silence must be made clearly and unambiguously--one must speak to exercise the right to remain silent. If the defendant has not invoked a right to remain silent or right to counsel, the police may continue interrogation and may seek clarification regarding whether the right was invoked.

Here, the court should find that Carl knowingly and voluntarily waived his Miranda rights. He was given a warning that paralleled the Miranda rights as created by the Supreme Court in Miranda itself. He was given a copy of the statement and given time to read the statement. Then, he did not unambiguously invoke his right to silence. He did stay silent for a long time--two full hours of questioning--but this is not enough to invoke the right to silence. The officer asked for clarification regarding whether he intended to invoke his right. Carl could have clarified that he wished to be silent, but instead confessed to a crime. This will not result in suppression.

The court should deny Carl's motion to suppress.

Dillon and Cellmate

Dillon's statement to the Cellmate should not be suppressed.

Two rights are relevant here: The Fifth Amendment rights established by Miranda and the Sixth Amendment right to counsel. The Sixth Amendment right only applies after charges are brought, so would not apply at the time of the statement to the cellmate. As to the Fifth Amendment right, it is again designed to protect against the inherently coercive nature of custodial interrogation. Custodial interrogation occurs when the defendant is asked questions (or statements are made) which are calculated to produce incriminating responses, and where the defendant would not feel free to leave. If the defendant does not know that his partner in conversation is a police officer or working at the behest of the police, there is nothing for the Miranda right to protect, because there is no inherently coercive custodial interrogation.

Here, Dillon made the statement to his Cellmate. Of course, the Cellmate was an informant acting at the behest of Officer Four. But this is a red herring, and basically immaterial. The statement was voluntarily made and Dillon would not have felt the coercive pressure of a police interrogation. Dillon was bragging, and did not apparently feel any pressure, according to Cellmate. Even though in jail, he is not considered to be "in custody" for purposes of Miranda. Cell-block interrogations are regularly authorized by Miranda. There is also no Sixth Amendment concern because charges had not been

filed, so though the interrogation was regarding the same crime as Dillon was picked up for (which could in theory present a Sixth Amendment issue) there is no such issue here.

Dillon's statement should not be suppressed.

ANSWER TO MEE 6

1. **The issue is whether Adam's incriminating statement to Officer One is inadmissible as a *Miranda* violation**

The state is required to give suspects Miranda warnings as an enforcement mechanism of the Fifth Amendment Right against Self-Incrimination, incorporated against the states through the Fourteenth Amendment. Miranda warnings are required where an individual is subject to custodial interrogation. Determinations of custody require a fact-intensive analysis that hinges on whether a reasonable person would believe they were free to leave. This requires something more than a seizure, but less than a custodial arrest, although a custodial arrest affirmatively demonstrates an individual is in custody. Interrogation includes not only questioning by the police but conduct or statements that would reasonably elicit an incriminating response from the individual. Upon reasonable suspicion, an officer can perform a "Terry stop" and ask limited questions of an individual, such as their name, and does not require Miranda warnings because it does not rise to the level of custody. A statement is voluntary if it is not the result of coercive interrogation techniques.

Here, Officer One seized Adam, the driver, and the remaining passengers of the car when he stopped the vehicle for a traffic infraction of driving without headlights on. Although this was a pretext to investigate the burglary and he planned to arrest Adam, that future plan does not automatically make the stop rise to the level of custody. He extended the traffic stop in order to ask questions of Adam, making the stop last ten minutes. He explicitly told Adam he wasn't free to leave then, but that he could leave once the stop was over whether or not he answered questions. This is a grey area; however, a court could find that the extension of the traffic stop beyond just checking licenses and registration extended into custody because Adam felt he could not leave. Officer One certainly interrogated Adam by asking him questions about where they were coming from. Given that the officer specified that Adam could go, regardless of whether he answered the questions, makes it more likely a court would not find Adam was in custody. The statement was also voluntary. Therefore, a court could find this was merely a Terry stop, Adam was not in custody, and therefore the statement is admissible.

2. **The issue is whether Ben's incriminating statement to Officer Two is inadmissible as a *Miranda* violation**

Substance of the warnings

In addition to the above requirements, to satisfy Miranda, an officer must provide the substance of the Miranda warnings, even if not the exact language required. In order to communicate the substance of the warnings, the officer must inform the individual of his right to remain silent and his right to an attorney, and that if he is indigent an attorney will be provided to him. Merely telling the suspect that he has constitutional rights and that Miranda rights exist is not sufficient.

Here, Officer Two's warnings did not satisfy the requirements of Miranda, as it was merely a conclusory statement about his constitutional rights and did not convey the required substantive information. However, given the below, this did not render the incriminating statement inadmissible.

Interrogation

As discussed above, in order for a Miranda violation to occur, the officer must have subjected the individual to an interrogation. This requires a question, statement, or conduct, that is likely to elicit an incriminating response. Spontaneous statements volunteered by an individual in custody that has not been interrogated are not inadmissible where the individual has not been provided Miranda warnings.

Here, Officer Two had only asked Ben if he understood his rights. This was not an interrogation. Ben spontaneously volunteering incriminating information to this question did not transform the officer's question into an interrogation. The statement was also voluntary for these same reasons. Therefore, Ben's statement is still admissible, despite the deficient Miranda warnings.

3. **The issue is whether Carl's incriminating statement to Officer Three is inadmissible as a *Miranda* violation**

In addition to the above-described requirements, Miranda rights are not self-executing. Once properly informed of Miranda rights, an individual must unequivocally invoke his right to remain silent or his right to a lawyer. Merely staying silent does not invoke one's right to remain silent under Miranda. While the length and circumstances of an interrogation are relevant to a determination of voluntariness, only extreme lengths of interrogations and deprivations of rights will render a statement involuntary.

Here, Officer Three's Miranda warnings to Carl were sufficient to inform him of his rights. Carl only said that he understood his rights, and remained silent for the next two

hours. This was not sufficient to invoke his Miranda rights, and the officer was not required to cease questioning him. Although the interrogation lasted two hours, this was not long enough to render his statement involuntary. His answer to the Officer's question operated as a waiver of his Miranda rights and his statement is therefore admissible.

4. **The issue is whether Dillon's incriminating statement to Cellmate is inadmissible as a *Miranda* violation**

In addition to the above requirements, Miranda warnings are not required if the interrogation is not conducted by a known police officer. The requirements of Miranda recognize the coercive environment of police interrogation and are not required when the suspect is not aware that he is subject to a police interrogation, as is the case with an informant or an undercover officer.

Here, although the informant clearly was acting on behalf of the government and interrogating Dillon, Dillon was not entitled to Miranda warnings, and there was no violation of his Fifth Amendment right to counsel. Dillon had not been formally charged, and had no Sixth Amendment right to counsel yet, although he did not challenge the admissibility of his statement on those grounds. Accordingly, Dillon's statements to the informant were admissible and not in violation of Miranda.

ANSWER TO MPT 1

BRIEF IN SUPPORT OF MOTION IN LIMINE

This brief in support of the motion *in limine* addresses the admissible of three proposed pieces of evidence for the trial in *Dobson v. Brooks Real Estate Agency* which is a case based in negligence for a slip and fall accident. As explained below, the proposed testimony of Ms. Doris Gibbs and the previous deposition testimony of Dr. Lena Miller are inadmissible hearsay. However, the proposed introduction of the insurance policy should be admitted because it refutes Brooks Real Estate Agency's Contention that it did not have any responsibility to clear the ice on the sidewalk.

III. Legal Argument

a. The Anticipated Trial Testimony by Doris Gibbs Should be Excluded Because it is Hearsay, was not Adopted by Mr. Dobson by his Silence, and is unfairly prejudicial.

Hearsay is inadmissible at trial. Hearsay is a statement that a declarant does not makes while testifying at the current trial or hearing and is offered by a party into evidence to prove the truth of the matter asserted in the statement. Franklin Rules of Evidence 802(c). A statement is some sort of assertion, whether it is made orally, written, or through conduct. Franklin Rules of Evidence 802(a). A declarant is the person who made the statement. Franklin Rules of Evidence 802(b). Unless a given statement falls under a set of specific exceptions or exemptions from the hearsay rule, the statement is inadmissible. One such exemption is a statement that is offered against an opposing party and is one the party manifested that it adopted or believed to be true. This is includes a statement "admitted by silence." Reed v. Lakeview Advisers LLC (Fr. Ct. App. 2015). However, the exemption for adopted statements by silence require four conditions 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 respond if the statement were not true, and (4) the party must not have responded. */d.*

There are several cases that illustrate the issue of adoption by silence. In the case of State v. Patel (Fr. Ct. App. 2010), the court dealt with a statement that was made at a loud party attended by over 100 people. The court held that it was not clear if the defendant heard the statement or if the defendant would be expected to respond under such circumstances. By contrast, in Hill v. Hill (Fr. Sup. Ct. 2010) the court held there was adoption by silence of a statement by a wife to her husband that the husband was having an affair because they were having a serious conversation in private. Similarly, in Reed v. Lakeview Advisers LLC (Fr. Ct. App. 2015) the court held that there was adoption by silence because a woman in an age discrimination suit was confronted with non-discriminatory reasons for why she was fired and failed to respond while in a serious conversation in an office setting. The court in that case held that it would be expected that she would respond to statements, while she was being terminated, that she was not performing her job competently because her job was on the line. ld.

Here, the proposed testimony by Doris Gibbs is hearsay. It is hearsay because her proposed testimony is about an interaction and conversation that she had with Mr. Dobson outside of this trial or hearing. Her proposed testimony includes statements such as the fact that she stated that Mr. Dobson was merely clumsy at the time he fell and that he must have been on his phone at the time. This is offered to prove the truth of the matter it asserts because it is being offered to show that Mr. Dobson's own negligence is the reason why he was hurt and not because of some action by Brooks Real Estate Agency. Therefore, the statement is hearsay, and absent some applicable exception or exemption, it should be deemed inadmissible.

There are no available exceptions or exemptions to render this hearsay admissible in the upcoming trial. First, this is not a prima facie opposing party statement as deemed admissible under 802(d)(2) because the statements that are being offered were made by Ms. Gibbs, not by Mr. Dobson. In fact, Mr. Dobson was entirely silent during his

interaction with Ms. Gibbs when she made her statements about his accident. Additionally, the adoption by silence exemption is not applicable. While Brooks Real Estate Agency may argue that the first element is met because Mr. Dobson appeared to hear the statement as he was looking at her while she was speaking that may not entirely be the case. Like *Patel,* this conversation took place at a restaurant where there were likely many people present and thus it may have been hard for Mr. Dobson to hear the statements Ms. Gibbs made even though he was looking at her. Additionally, even if he did hear what she said, like *Patel,* this may not have been a situation where he would be expected to respond to such statements. Ms. Gibbs was not making the statements in an accusatory way against Mr. Dobson, she was merely stating as if she understood what was going on. Ms. Gibbs was a tremendous help to Mr. Dobson during his recovery and this dinner was meant as a thank you to her for all her help. So, even if he did hear what she was saying, he may not have felt compelled to challenge her understanding of the event after all she had helped him with.

Additionally, this case is unlike *Hill* and *Reed.* In both those cases, the party was confronted with accusatory statements in a relatively one-on-one interaction. Here, Mr. Dobson was in a public dinner with his wife and Ms. Gibbs was with her spouse as well. Thus, it is way less likely that a person in that position would likely respond even if the statements were untrue.

There is also an argument that these statements should be inadmissible under Franklin Rules of Evidence 403. Rule 403 states that the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needless presenting of cumulative evidence. In *Reed,* the court explained that evidence can be deemed inadmissible under 403 if it has a tendency to suggest decision on an improper basis, which sometimes but not always is an emotional one.

Here, the probative value of Ms. Gibbs's statement is low because she did not have personal knowledge of the accident. Her proposed testimony even explains that she does not know much about Mr. Dobson's fall. Thus, her statement was based on mere speculation. Contrastingly, the statement may be given unfair weight and thus may unfairly prejudice Mr. Dobson because this is a statement by a neighbor who Mr. Dobson had a personal relationship. While Brooks Real Estate Agency may argue that this does not risk a decision based on emotions rather than facts, given the fact that the probative value is so low as is, it should nevertheless be excluded.

Therefore, the testimony of Ms. Gibbs should be excluded.

b. The Deposition Testimony of Dr. Lena Miller Should be Excluded Because Dr. Dobson did not have a Similar Motive in Developing that Testimony at the Previous Deposition and is unfairly prejudicial.

The relevant rule for determining the admissibility of the deposition testimony is also hearsay. Different and limited exceptions to hearsay exists where a witness is no longer available to testify. First, to be considered unavailable, the declarant must fall under one of the categories in Franklin Rules of Evidence 804. Under that rule, a witness is unavailable if she or he cannot be present or testify at trial or hearing because of death or then-existing infirmity, physical illness, or mental illness. Second, an unavailable declarant's statements may be deemed admissible if they fall under the former testimony exception. To qualify as former testimony, the following conditions must be met: (1) the declarant must be currently unavailable (2) the 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- or in a civil case, whose predecessor in interest had- a similar motive and opportunity to develop the challenged testimony at the earlier proceeding -State v. Holmes (Fr. Sup. Ct. 2009). A predecessor in interest does not require an agency relationship, as long as there is a similarity in interests. Jacobs. v. Klein (Fr. Sup. Ct. 2002). To have a similar opportunity and motive, the opportunity and motive need not be identical as long as (1) the questioner was on the same side of the same issue at both proceedings, and (2) the questioner had a substantially similar interest in asserting that side of the issue.

Here, the statement made by Dr. Lena Miller at the deposition in the case between Mr. Dobson and his employer is hearsay. It is hearsay because Dr. Miller made these statements outside of the current trial or proceeding. Additionally, they are offered to prove the truth of the matter they assert because her statements about the extent of Mr. Dobson's injuries are being offered to minimize the extent of Mr. Dobson's injuries. Therefore, it is hearsay and should be inadmissible unless an exception applies.

The former testimony exception does not apply to the deposition testimony of Dr. Miller. First, it is not contested that Dr. Miller is unavailable, as she has passed away falling under the unavailability category under Franklin Rules of Evidence 804(a)(4). Additionally, Brooks Real Estate Agency will be able to prove that the deposition was taken and is being offered against the same party, as Mr. Dobson is a direct party in both suits. However, and crucially, the former testimony exception does not apply because Mr. Dobson did not have the same opportunity and similar motive to develop the testimony against his employer, the City of Bristol as he does against Brooks Real Estate Agency. First, while both cases deal with the same set of injuries they are brought for entirely different purposes. The case against Mr. Dobson's employer is offered to show that he needed additional accommodations while at work. The court in State v. Williams (Fr. Sup Ct. 2013) explains that as long as there was an opportunity to develop the testimony it is irrelevant that the attorney chose not to develop it. Here, Brooks Real Estate Agency may argue that there was an opportunity to question Dr. Miller on cross examination. However, there was not a similar motive. To have a similar motive, as explained in Thomas v. Wellspring Pharmaceutical Co. (Fr. Ct. App. 2017), courts assess whether a prudent attorney would explore such avenues and spent considerable time impeaching the

witness. Here, the prudent attorney in Mr. Dobson's case against the City of Bristol chose acted properly in not asking about the injuries in depth because the issue the attorney was concerned with were the accommodations. So, it made sense to only ask a few questions about Dr. Miller's credibility and in not further asking her about the extent of the injuries.

Moreover, this case is distinguishable from *Thomas*. In Thomas, the court held there was a similar motive to cross examine the doctor in that case because it dealt with the same general issue, the debilitating side effects of a medicine. Also, since the attorney engaged in a robust cross, the former testimony exception was met. Here the same cannot be said. While the case deals with the same general injuries, the testimony was for a different purposes, accommodations at work. Also, the cross examination at the deposition was not robust against Dr. Miller. Therefore, it does not meet the former testimony exception.

Finally, even if it does meet the former testimony exception, it should be deemed inadmissible under 403. Brooks Real Estate Agency may argue that the testimony is highly probative because it discusses the extent of Mr. Dobson's injuries, but the testimony has a substantial risk of unfair prejudice. There was not an ample ability to cross examine Dr. Miller and her credibility may be in question since she has been sued in five separate medical practice cases.

Additionally, a jury may give the testimony undue weight because it is statements from a doctor as opposed to Mr. Dobson's own testimony about the extent of his injuries. Therefore, the testimony should still be inadmissible under 403.

Therefore, the deposition should be excluded.

c. The Insurance Policy is Admissible Because it Illustrates that Brooks Real Estate Agency did have Ownership and Control over the Sidewalk, a Fact it Refutes.

Franklin Rule of evidence 411 provides that evidence that a person was insured against liability is not admissible to prove that the person acted negligently or otherwise wrongfully. However, such evidence is admissible for all other purposes, such as to prove ownership or control. */d.* As explained in the advisory committee notes following Rule 411, what is critical to the exclusionary rule is whether it is admitted for fault or lack of fault. If it is admissible for some other purpose, it is fully permitted.

Here, the insurance policy should be admitted to trial because it does not violate Rule 411. The insurance policy is being offered to prove that Brooks Real Estate Agency had the ability to control the sidewalk and therefore can be liable for negligence for failing to clear the ice on it. This is relevant and does not violate Rule 411 because it is not being offered to prove that Brooks Real Estate is at fault for the ice's presence on the sidewalk. Rather, Brooks Real Estate contests the fact that it controlled the sidewalk and had any responsibility to clear it. The insurance policy directly refutes that because it shows that

Brooks Real Estate Agency is the owner of the building on Elm Street where Mr. Dobson fell and has an insurance policy explicitly covering the sidewalks around the property. Therefore, it is not offered to show fault but to show control, which is expressly permitted by Rule 411.

Additionally, 403 does not warrant this evidence being kept out. The evidence is highly probative because it goes to the heart of the negligence case, whether Brooks Real Estate owed a duty to keep the sidewalk clear of ice. The risk of unfair prejudice is low. The insurance is not offered to show fault but only that Brooks Real Estate owns the sidewalk, which it contests. This is the ordinary type of prejudice expected in a lawsuit, not the unfair prejudice that risks an emotion decision expressed in *Reed.* Therefore, its probative is not substantially outweighed by its prejudicial effect and it is admissible.

Conclusion

Therefore, Ms. Gibbs testimony and the deposition testimony of Dr. Miller should be excluded from trial as inadmissible hearsay, or at least based on Franklin Rules of Evidence 403. However, the insurance policy should be admitted at trial because it is not subject to the limitation of Rule 411.

ANSWER TO MPT 1

TO: Samantha Burton

FROM: Examinee

DATE: July 25, 2023

RE: Dobson v. Brooks Real Estate Agency- Motion *in limine* argument section

I. Captions [omitted]

II. Statements of Facts [omitted]

III. Legal Arguments

A. The anticipated trial testimony by Doris Gibbs describing an interaction she had with Mr. Dobson is inadmissible because Mr. Dobson's silence in response to Ms. Gibbs' comment is not an acquiescence that constitutes the "statement of an opposing party."

Ms. Gibbs seeks to testify to an out-of-court statement she made during dinner with Mr. Dobson. Specifically, she stated 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." She seeks to testify that Mr. Dobson failed to respond to this statement. As stated below, Mr. Dobson's failure to respond to this statement is not an admission of an opposing party under Franklin Rules of Evidence 80l(d)(2), and is thus inadmissible.

1. This evidence is hearsay, which are generally inadmissible.

The Rules of Evidence provide that hearsay is generally inadmissible. Hearsay is a statement that the declarant "does not make while testifying at the current trial or hearing," which a party offers into evidence "to prove the truth of the matter asserted in the statement." Here, Ms. Gibbs' statement and Mr. Dobson's failure to respond occurred out-of-court. Brooks Real Estate Agency (Brooks) is seeking to offer it to show that Mr. Dobson's injury, which was incurred when he slipped on ice on the sidewalk in front of Brooks' building, resulted, at least in part, from his own negligence. Thus, the statement is being offered for the truth of the matter asserted, that Mr. Dobson slipped because he was trying to get to the store quickly, and was on his phone at the time. In fact, Brooks has no other relevant purpose for offering this evidence. Thus, because this evidence is statement made out of court for the truth of the matter asserted, it is inadmissible hearsay.

2. This evidence does not fall under the opposing party statement exclusion to hearsay under Rule 801(d)(2) because evidence does not clearly suggest that Mr. Dobson failed to respond after *hearing* Ms. Gibbs' statement, and more importantly, the circumstances under which Ms. Gibbs made the statement is not one such that a person in Mr. Dobson's position would likely have responded if the statement were not true.

Rule 802(d)(2) excludes the statements of an opposing party from being an inadmissible hearsay. To constitute an opposing party's statement, the statement must be (1) offered against an opposing party and (2) made by the opposing party or its agent or employee, or otherwise adopted by the opposing party. Mr. Dobson does not dispute that factor (1) is satisfied, that the evidence at issue is being offered against him, a party to the case, by Brooks, the opposing party. However, the evidence
at issue is nonetheless inadmissible hearsay, because it is not made or adopted by Mr. Dobson.

In Reed v. Lakeview Advisers LLC (Fr. Ct. App. 2015), the Franklin Court of Appeals addressed the admissibility of an out-of-court statement to which a party to the case failed to respond. In Hill v. Hill (Fr. Sup. Ct. 2010), the Supreme Court held that an opposing party's statement includes statements that were admitted by silence; in other words, if, through silence, a party acquiesced in a statement made by another, that statement may be introduced against the party. Reed enumerated 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. Here, Brooks cannot establish these four preconditions. Notably, the only precondition it can establish is that Mr. Dobson did not respond.

a) Brooks cannot show that Mr. Dobson has heard the statement and has understood it given that the statement occurred at a diner setting with background conversation noises.

Reeds stated that, a statement would not be deemed admitted when it is "unclear whether the defendant had heard and understood the statement." In State v. Patel (Fr. Ct. App. 2010), the court held that a statement is inadmissible as an acquiescence by silence, when the statement was made at a loud party attended by over 100 people. By contrast, Reed held that the trial court abused its discretion in failing to admit such a statement when it was made in an office setting where the facts do not suggest that there was any background noise.

The circumstances under which Ms. Gibbs made her statement is more like those in Patel than Reed. Ms. Patel made the statement during dinner at a restaurant. Although, according to Ms. Gibbs, when she made the statement, Mr. Dobson had set his drink down and looked at her, she also noted that there was the usual background sound of conversation in the restaurant. This is unlike the circumstances in Reed, where it was clear no background noise existed to call into doubt whether the party has actually heard the statement, and thus even had the opportunity to understand it.

b) Brooks cannot show that the circumstances must be such that a person in Mr. Dobson's position would likely have responded if the statement were not true, because the statement was made at a social event rather than during a serious conversation.

More importantly, the circumstances under which Ms. Gibbs made her statement is not one where a person in Mr. Dobson's position would likely have responded. In Reed, the Court of Appeals noted that "context is exceedingly important in determining whether a party acquiesced to a statement by silence." For example, in Patel, the court determined that "at a loud social event with many persons present, someone in the defendant's position would not necessarily be expected to respond." By contrast, when the statement was made during a "serious conversation," like an office setting where serious matters are discussed, and the statement was made in accusation against a party, the party would more likely have responded. Reed. In Reed, the court determined that statements by Reed's supervisor were admissible through silence against Reed, because they were made during serious conversation in an office setting, and contained accusations against Reed, including that she was often late to work and did not complete projects on time.

The circumstances at issue in this case are distinguishable from those in Reed. Here, the setting is a restaurant dinner with the noise of conversations, which is more like the setting in Patel than Reed. Ms. Gibbs made the statement after each person at the dining table, including Ms. Gibbs, her wife, Mr. Dobson, and his wife, all had a beer, further showing its unserious and amicable nature and distinguishing it from an office setting. Finally, the statement in Reed was made in a situation where Reed "could expect that the reason for her termination [from employment] would be discussed;" Reed, the adversarial nature of the conversation made it more likely that she would have responded if the statements made were not true. By contrast, Ms. Gibbs was not Mr. Dobson's work supervisor but his neighbor, and the conversation between Ms. Gibbs and Mr. Dobson were amicable. In fact, Ms. Gibbs said that she did not make her statement in an accusatory way, but only as a statement of fact and of understanding. In light of the amicable circumstances, a person in Mr. Dobson's position likely would not have responded to the statement, even though it were untrue, out of an interest to promote a friendly dinner and neighborly relationships.

B. The deposition testimony of the emergency room physician who examined Mr. Dobson after his fall is inadmissible because Mr. Dobson did not have a similar opportunity and motive to develop that deposition testimony.

Brooks seeks to offer the deposition testimony of the emergency room physician who examined Mr. Dobson after his fall over the ice on the sidewalk in front of Brooks' building. The deposition testimony was not made in connection with this current case. Rather, it was made in connection with a separate case between Mr. Dobson and his employer, the City of Bristol, concerning the City's failure to accommodate him appropriately for the same injuries. Specifically, Brooks wishes to offer the deposition, where the physician stated that Mr. Dobson's injuries were not that serious, to show the truth of the matter asserted, that Mr. Dobson's injuries from the slip and fall was not very serious. Given that the deposition is an out-of-court statement, it is a hearsay that is generally inadmissible.

The deposition testimony does not fall under the hearsay exceptions under Rule 804. Under Rule 804, when a declarant is unavailable, such as when she is dead, the declarant's former testimony given as a witness at a lawful deposition is admissible, if it is now offered against a party who had an opportunity and similar motive to develop it by direct, cross, or redirect examination. 804(b)(1). In Thomas v. WellSpring Pharmaceutical (Fr. Ct. App. 2017), the Court of Appeals summarized the rule into three requirements: (1) the witness must be currently unavailable, (2) the former testimony was given as a witness at a lawful deposition, and (3) the testimony is being offered against a party--or in a civil case, whose predecessor in interest--who had a similar motive and opportunity to develop the challenged testimony at the earlier proceeding. Here, Brooks can only establish the first two factors. The physician has died, making her unavailable to testify at the current trial. And, her former testimony was given at a lawful deposition.

However, it cannot satisfy the third factor. Further, the court need not consider whether the prior deposition testimony was offered against a party who was a predecessor in interest to Mr. Dobson. While the former case was a civil case, in both cases the deposition testimony was/would be offered against Mr. Dobson.

Thomas defined what constitutes similar opportunity and motive to develop testimony. Specifically, the 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. Jacobs v. Klein (Fr. Sup. Ct. 2002).

In assessing similar opportunity, the court asks whether the party in the earlier case had the opportunity to develop the testimony--not whether the party did indeed develop the testimony. For example, in State v. Williams (Fr. Sup. Ct. 2013), the Supreme Court allowed the admission of a deposition testimony of an unavailable witness from a related civil case, where the same counsel represented the defendant in both cases. But this case is distinguishable from Williams. Notably, Mr. Dobson's counsel for the prior proceeding, Attorney Chen, is no longer his counsel in the current case. Thus, the court could find that Mr. Dobson did not have opportunity to develop the physician's deposition testimony in the prior case.

In assessing similar motive, the court applies a two-part test 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. Here, Mr. Dobson was on the same side of the issue as both proceedings; he was the plaintiff, and the deposition testimony by the physician was offered against him. However, Mr. Dobson did not have a similar interest in asserting his side of the issue concerning the extent of his injury in the prior proceeding. In Thomas, the court held that such similar motive existed with respect to a doctor's testimony on the side effects of a drug, which injured the plaintiff. The court noted that the plaintiff in the prior proceeding had the similar motive to cross-examine the doctor because the issue in the prior proceeding was the same as the one in the current proceeding--whether the drug caused debilitating side effects.

Here, by contrast, the prior and current cases did not concern the same question. The prior suit involved a disability discrimination claim, where Mr. Dobson alleged that his employer was not accommodating him appropriately for the injury. Here, however, Mr. Dobson was alleging a negligence claim against Brooks, the party who allegedly caused the injury. Thus, while the extent of his injury was at issue in both cases, the difference in parties and the type of damages sought (more accommodation versus damages) means that Mr. Dobson did not have a substantially similar interest in cross-examining the physician in the prior case.

Notably, this case is further distinguishable from Williams, where the court noted that the primary motive of a discovery deposition in obtaining a preview of a witness's testimony did not exclude the need to understand how the witness's story and credibility might be attacked, and that a prudent attorney would explore such avenues. In Williams, the party's attorney spent considerable time in impeaching the witness whose deposition would be used against the party in the current case. By contrast, Mr. Dobson's previous attorney had focused not on the extent of Mr. Dobson's injuries, but on the level of accommodations given to Mr. Dobson and prior malpractice lawsuits against the physician. Further, while the party in Williams did not explain how he was prevented from fully pursuing lines of questioning or how they would have been pursued any differently at trial, here Mr. Dobson could clearly point out that he would have cross-examined the physician about the extent of his injuries.

Thus, because Mr. Dobson did not have a similar motive and opportunity to develop the deposition testimony of the physician from the previous trial against a different defendant and for a completely different relief, the deposition testimony is hearsay that does not fall under the Rule 804 prior testimony exception, and is inadmissible.

C. The insurance policy on the property of the Brooks Real Estate Agency is admissible because Mr. Dobson is introducing it not to prove Brooks' fault with respect to his injury, but to prove that Brooks does control the sidewalk unlike what Brooks has claimed.

Franklin Rules of Evidence 411 is relevant to the issue whether the insurance policy on the property of the Brooks Real Estate Agency is admissible. Under Rule 411, "[e]vidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully." However, "the court may admit" such evidence for "another purpose, such as proving a witness's ... agency, ownership, or control." In fact, as the Advisory Committee Notes-- which the Franklin Supreme Court has expressly allowed Franklin courts to rely on in Smith v. State (Fr. Sup. Ct. 2000)--states, if evidence as to the insurance policy is relevant, it may be admitted "to prove any fact other than fault or lack of fault."

The evidence concerning the insurance policy on Brooks' property is clearly admissible under Rule 411. Specifically, Mr. Dobson is not introducing the policy to show that Brooks has acted wrongfully with respect to his injury. Rather, Mr. Dobson seeks to admit this policy for the expressly permitted purpose-- to establish Brooks' control of the sidewalk. Specifically, Brooks has claimed that it does not control the sidewalk and therefore was not responsible for clearing it of ice, making it not liable to the injury Mr. Dobson incurred when he slipped on the said ice. Thus, whether Brooks has control of the sidewalk is a question at issue in this case. The insurance policy shows that it explicitly covers sidewalks adjacent to Brooks' property. Thus, it is probative to Brooks' control over the sidewalk; in other words, it makes it more likely that Brooks

controls the sidewalk. Given that this evidence is relevant and used for a purpose not prohibited by Rule 411, it is admissible.

Rule 403 further does not prohibit the admission of the insurance policy. Rule 403 does not demand the exclusion of evidence. Rather the court "may" exclude relevant evidence if its probative value is "substantially outweighed" by a danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Here, the probative value of the insurance policy is high; it goes directly to showing that Brooks had control over the sidewalk. Although a deed also proves this point, the availability of other similar evidence to prove a point was not considered by Reed and Thomas. And based on Reed and Thomas, the Court of Appeals has demonstrated unwillingness to exclude evidence under Rule 403. Accordingly, this court should admit the insurance policy for the reason of proving that Brooks had control of the sidewalk.

IV. Conclusion

For the foregoing reasons, this court should hold that the statement by Ms. Gibbs and the prior deposition testimony by the physician are inadmissible hearsay. It should hold that the insurance policy is admissible because it is not used to assert Brooks' fault.

ANSWER TO MPT 2

Dear Mr. Martin,

Thank you for seeking the advice and assistance of The Law Offices of Bradly Wilson. This letter is in response to your interview with Mr. Wilson on July 24. We have investigated your possible claim and what potential remedies are available to you. If you have any questions or would like to follow up on the below, please contact our offices.

Overview of Den Breeder's Potential Liability

We understand that you are interested in recovering from the Den Breeder (DB) both the cost you paid for your dog, Ash, and the cost of his future medical expenses regarding his liver shunt. Franklin provides two possible statutory avenues for recovery: first from the Franklin Pet Purchaser Protection Act (FPPPA) and the Franklin Uniform Commercial Code (UCC). However, these methods of recovery can possibly be foreclosed if your contract with DB unambiguously disclaimed or waived your right to these methods of recovery.

The first issue, therefore, is whether your contract with DB is ambiguous?

The answer, in short, is yes, the contract is ambiguous, because it omits details that would answer key issues in resolving DB's potential liability to you in the case of a congenital defect.

When dealing with cases involving contract, courts will first examine the written words of the contract. *See Cohen v. Dent* (Fr. Ct. App. 2020). Courts in Franklin have held that if a contract is ambiguous, it is construed favorably in support of the party who did not draft it and ambiguities in the contract are resolved in reliance on the statutes, *id.--in* this case, the FPPPA and the UCC. If the contract with DB is unambiguous, it could constitute a waiver of your statutory right to recovery against DB for a breach of your contract, and therefore, you would not be able to recover for the purchase price of Ash and his future medical expenses. However, if the contract does not unambiguously bar any recovery, then the statutory methods of recovery are still available to you and have not been waived. *See Cohen.* Those are described in the below sections.

The contract with DB, the Dog Purchase Agreement (DPA), provides that if the dog shows signs of illness, the buyer should take the dog to a licensed vet and determine the seriousness of the illness. However, the DPA then goes on to say if the dog has a serious illness that is attributable to DB, the buyer can return the dog within 48 hours of sale. The contract does not instruct of what to do for recovery if the dog becomes ill *after* 48 hours following the sale, as was the case with Ash, who became ill about a month after the sale. Furthermore, the DPA provides that if the dog becomes diagnosed with a congenital defect that prevents the dog from being a companion, the Buyer has to notify the Breeder within 24 hours with a vet's report, but does not provide a remedy if a congenital defect is diagnosed. Therefore, the contract is ambiguous when it comes to analyzing the key questions of who is liable for the dog's injury and when that liability shifts from party to party. The DPA does not establish when the buyer must get the dog inspected, or what to do if the dog shows symptoms of a disease after the dog has been owned by the buyer for some time. Thus, the DPA is ambiguous and certainly does not restrict your possible recovery to its terms.

It is possible that DB will argue that the contract unambiguously imposes a duty on you as the buyer to have had Ash inspected by a vet within 48 hours of the sale, given the 48-hour permitted recovery mentioned in the DBA. *See Tarly v. Paradise* (Fr. Ct. App. 1995). However, this clause is unlikely to be found to unambiguously impose a duty on you. Firstly, the clause is disconnected from the part of the DBA mentioning congenital defects, which is what Ash is suffering from. Secondly, your vet indicated (as well as the article you provided) that liver shunts could possibly not have been caught with earlier testing and the condition could emerge later. The DPA certainly does not provide an unambiguous remedy or disclaimer for what to do when your dog is diagnosed with a congenital defect that arose *after* the 48 hours following the sale.

Because the contract is ambiguous, you can recover for the purchase price and possible future medical expenses for Ash against DB.

The second issue, therefore, is can you recover Ash's future medical expenses associated with his liver shunts. and if so. how do you obtain that recovery?

In short, you can recover the future medical expenses for Ash's liver shunt from DB under the FPPPA because one month after the sale of Ash, he was certified to have a congenital defect (a liver shunt) that adversely affects his health by a licensed vet.

The FPPPA provides a statutory right of recovery for purchasers of animals whose pets contract congenital defects or infectious diseases after sale. The FPPPA governs the sale of dogs. *See Cohen.* §753 of the FPPPA provides that if an animal is certified to have a congenital defect that adversely affects the health of the animal by a licensed vet within 180 calendar days after the sale of the animal, the purchaser is entitled to a remedy. The available remedies for a violation of §753 include: (1) to return the animal and receive a refund of the purchase price and vet costs related to diagnosing the animal, (2) return the animal and receive an exchange animal of equivalent value, or (3) to retain the animal and receive reimbursement for vet services of the buyer's choosing in curing or attempting to cure the animal of the defect.

Here, Ash's liver shunt is a widely recognized congenital defect among his breed according to your vet and the article you provided us. Additionally, you had Ash diagnosed with the liver shunt about a month after the sale, well within the 180-day required timeline under the FPPPA. Although your file does not include a certification of Ash's liver shunt Oust an email from your vet), we can obtain an official certification from your vet with ease. Therefore, you have complied with or are soon to comply with the requirements of the FPPPA and are therefore entitled to one of the above-mentioned remedies. Assuming you still desire to keep Ash, the remedy that would be most appealing to you would be §753(b)(3), which entitles you to retain the animal and obtain reimbursement from DB for the cost of vet services that are necessary to cure Ash of his liver shunt. According to the email from your vet, the surgery and additional medical costs of recuperating Ash will total around $8,000. Dr. Turner specified that the surgery will most likely be successful, but there is always a risk. Because these costs are for the purpose of curing or attempting to cure Ash of his liver shunt, they are recoverable under the FPPPA.

Therefore, you can recover your medical expenses in connection with curing Ash of his liver shunt from DB under the FPPPA.

The third issue, therefore, is whether you can recover the price you paid for Ash from DB, and if so. how?

In short, yes, you can recover the purchase price from DB under the UCC because Ash's congenital defect is a violation of DB's statutory obligations under the UCC.

Article 2 of the UCC covers the sale of animals, including the sale of dogs. *Cohen.* When an animal is sold that is "nonconforming," which in this case means not healthy, then the buyer can recover against the merchant (in this case, the dog breeder) any loss resulting from the poor health of the dog in any manner that is reasonable if the buyer notifies the seller. See UCC §2-104; *Cohen.* Furthermore, in every contract for the sale of goods, including dogs, there is an implied clause called "the implied warranty of merchantability." See UCC §2-314; *Cohen.* The implied warranty of merchantability requires that goods "pass without objection in the trade under the contract description" and "are fit for the ordinary purpose for which such goods are sold." Courts have held that a certification from a vet that a dog is "unfit for purchase" due to a congenital defects indicates that the dog "could not pass without objection." *Cohen.* Moreover, a dog is not fit the for the ordinary purpose that dogs are typically sold for if they cannot function as a companion would. See *Cohen.* Under the UCC, damages are typically measured as the difference at the time of sale between the dog as warranted (meaning, the price of a healthy dog) and the actual dog (meaning, the price of a dog with a congenital defect). UCC 2-714(2). Franklin courts have held that cases involving a breach of warranty, where a buyer would not have agreed to purchase a dog with a congenital defect that might require expensive surgery, the proper measure of damages is to refund the entire purchase price. See *Dalton v. Jackson* (Fr. Ct. App. 1997).

Here, Ash is technically a "nonconforming good" under the UCC because he has the congenital defect of liver shunts. Therefore, because you notified DB of the liver shunts found in Ash, you are permitted to recover from DB any cost reasonably associated with the nonconformity. Moreover, Ash's liver shunts also qualify as a breach of the implied warranty of merchantability because (1) a vet certified (or in your case, will certify) that the liver defects render Ash unfit for purchase, and (2) because the liver shunts have affected Ash's ability to be a good companion. You indicated that Ash is lethargic, weak, disoriented, lacks coordination, and that he spends a lot of time pacing and circling. These types of symptoms would most likely constitute the type of unfitness for ordinary purpose that courts are looking for when looking at a breach of the implied warranty of merchantability. Therefore, DB has breached the implied warranty of merchantability by selling you a dog with a congenital defect that makes him unfit as a companion (the ordinary purpose of a dog). Therefore, because of this breach, you can recover from DB for the full purchase price of Ash ($2500) as Franklin courts have found that to be the proper form of recovery.

It is possible that DB could argue in response that your only method of recovery should fall under the FPPPA and you are not permitted to recover under the UCC additionally. This, however, is misguided. The FPPPA specifically disclaims that other methods of recovery are still available to a purchaser who wishes to recover against a buyer under the

FPPPA. See FPPPA §753(d). Therefore, you are permitted to recover under both the FPPPA and the UCC for the purchase price and possible medical expenses associated with curing Ash of his liver shunts.

Conclusion

As described above, you have a strong case for recovery against DB for both the purchase price and the cost of Ash's liver shunt surgery because (1) your contract with DB is ambiguous, (2) the FPPPA permits you to retain Ash and recover for his medical expenses associated with the congenital defect, and (3) the UCC permits to recover the purchase price because Ash is an unhealthy dog. Going forward, we will need to obtain an official certification from Dr. Turner with Ash's diagnosis and certifying that he was unfit for purchase in order to comply with the requirements of the FPPPA and the UCC. Thank you again for seeking assistance from The Law Offices of Bradley Wilson, we will be in touch.

Best,

The Law Offices of Bradley Wilson

ANSWER TO MPT 2

TO: Anthony Martin

FROM: Law Offices of Bradley Wilson

RE: Litigation Prospects Against The Den Breeder

Dear Mr. Martin,

Please find our thoughts below on your inquiry regarding keeping Ash but recovering the price of his purchase and the cost of corrective surgery. We will be referencing *Cohen v. Dent ("Cohen"),* which is another case heard in Franklin that deals with a similar issue. Such a case gives us insight into how a trial court in Franklin would approach administering the issues in your potential claim.

Question

Can the Den Breeder be found liable under the Franklin Pet Purchaser Protection Act ("FPPPA") or the Uniform Commercial Code ("UCC") to recover the cost of Ash's purchase and the cost of his corrective surgery?

Short Answer

You likely have a strong claim for both recovery under the FPPPA for retaining ash and recovering the costs of his veterinary expenses, as well as for recovering the cost of his purchase under the UCC for Den Breeder breaching the implied warranty of merchantability.

Discussion

1) Ambiguities of the Contract

When Franklin courts review contracts, the look at the language of the document itself first and then if the terms are ambiguous they resolve those ambiguities in part in reliance on state statutes. *Cohen.* If the terms are unambiguous they are acknowledged unless they conflict with relevant statutes. */d.* Establishing the contract does not guide in this situation will help us challenge the Den Breeder's defenses which will likely include you are barred from recovery because of the terms of the contract.

In *Cohen,* the contract made between the pet owner and the breeder was found to contain ambiguities including: when the one-year clock for remedying congenital conditions starts, what the remedy is for such a condition, what the monetary damages were and the lack of clarity around when test results verifying the defect were needed and the time limit in which the claim must be brought. The *Cohen* court conducted the FPPPA and UCC analysis after first finding the contract contained ambiguous terms that did not answer most of the key issues in the case. */d.* The court noted that the ambiguous terms must be construed strongly against the party who prepared it and favorably against a party who had no voice in the selection of its language. */d.* citing 0*'Day.* The finding of ambiguity allowed the court to reject the breeder's claim that the contract barred any recovery by the dog owner and for the court to consider liability under the FPPPA and the UCC. */d.*

In your case, the contract also contains ambiguities that likely do not bar you from recovering because of the contract. The Den Breeder claims that you should have gotten Ash tested as soon as you bought him and that the wait between the testing and the discovery of the defect negated his legal obligation. However, the contract is ambiguous to this claim. The contract only requires testing if the dog is "showing signs of illness" and that a serious disease discovery would require alerting the breeder in 48 hours.

However, a liver shunt does not fall under this umbrella because as Dr. Turner mentioned, it is a congenital defect. While she said many breeders do test for this condition, it can be possible that testing may not uncover a liver shunt as it can emerge later, even when they are older than 12 weeks, so the provision regarding 48 hour discovery does not appear to be applicable. Additionally, you picked out Ash at 8 weeks old, so it is highly likely testing may have been moot anyways. The pamphlet even mentions most experts don't recommend testing until at least 16 years of age and that false positives and negatives are common. The background information provided by Dr. Turner affirms that a liver shunt should be treated as a congenital defect, rather than a disease that can be tested for immediately even if a duty were created under this contract to do so.

The contract from Den Breeder also provides what looks to be an attempted disclaimer regarding genetic or congenital defects. The clause states all canines have the potential for genetic and congenital diseases and the diseases cannot always be eliminated and as such the Breeder tries to minimize not eliminate these conditions in good faith. If this had been developed with more specific language regarding the steps to be taken in the case of discovering a congenital defect it may have more weight, however this general disclaimed is likely not sufficient because the contract has to be resolved against the party who prepared it and favorably for a party who had no voice in the selection of its language, which here is you.

The terms of the contract related to congenital defects are equally as ambiguous, requiring that the breeder be notified within 24 hours and certification is provided. While the breeder can get advice from a vet and the dog must be made available to do so, it does not address what the remedies are for the discovery of such a defect. The lack of discussion in the contract on this point requires looking to statutes in Franklin for figuring out a reasonable remedy.

The provisions in your contract are more ambiguous than even the provisions in the contract at issue in *Cohen,* which the court found still to be ambiguous. For example, in aforementioned contract, the agreement provided specification as to which defects were covered and similarly mentioned that medical certification was needed but did not mention the breeder's duties following the certification. As such, you will likely be successful in arguing the FPPPA and the UCC, not the contract, should guide in this litigation.

2) The Den Breeder's Liability Under the FPPPA

The Franklin Pet Purchase Protection Act, which is codified under the Franklin Animal Welfare Code 763, applies to the sale of household pets including dogs. The FPPPA provides purchasers such as yourself with a remedy if they have the proper certification by a licensed vet about the animal's condition within certain time limits: 14 business days

for illness or symptoms of an infectious disease or 180 calendar days for a congenital defect. Remedies available under the FPPPA if these conditions are met are the right to return the animal and receive a refund, the right to return the animal and receive a replacement animal or the right to retain the animal and be reimbursed for vet costs incurred for curing the animal. *Cohen* citing FPPPA. The FPPPA provides that in addition to the remedies it provides, nothing in the law will limit recovery otherwise available under any other law.

In *Cohen,* a three-month year old bulldog that began limping after 4 months past the owner's purchase was found to have hip dysplasia, with medical costs totaling around $4,000 to cure him. Similar to your case, the owners in Cohen wanted to keep the dog and get reimbursed for the medical expenses because they had grown attached to him and did not want to exchange him for another or return him. The court found the FPPPA applied in light of the contract ambiguities and because there was an ambiguity, found the contract did not waive the remedies under the law.

As discussed above, since a liver shunt is regarded as a congenital defect rather than a contagious illness, you were within the 180 day statutory period to bring the animal to the vet to certify the congenital malformation that was adversely affecting his health. You brought him in on July 16, 2023 after a month and half of owning him and a licensed vet has certified the diagnosis and given recommendations as to the surgical remedies and treatment that is required to make him health. Under 753(b)(3) you are entitled to the remedy of retaining Ash and receiving a refund from Den Breeders for vet services of your choosing for the purpose of curing or attempting to cure the animal. The court in *Cohen* did not rule on whether the purchaser can waive rights to veterinary reimbursement if the contract states otherwise unambiguously, but this undecided issue is not relevant to your case because the contract does not address remedies in the case of a congenital defect. In *Cohen* they were asking for $4,000 which was the cost of the bulldog's surgery for hip dysplasia. While you are asking for more, the $8,000 quoted as the estimated price of Ash's surgery is based on Dr. Turner's expertise and there is nothing in the statute that suggests anything other than a licensed vet's cost to cure or attempt to cure the animal is barred.

In conclusion, you should have a high likelihood of success in recovering the costs of the surgery, as well as getting to keep Ash.

3) The Den Breeder's Liability Under the UCC

The sale of animals is also governed by Art. 2 of the Franklin Uniform Commercial Code ("UCC") as courts have found dogs are goods and breeders are merchants under the statute. Under this statute, a buyer can recover damages if a good is "nonconforming" and recovery can be in any manner which is reasonable. UCC 2-714. In *Cohen,* the court found an unhealthy dog was a nonconforming good so covered under this provision of the

UCC. This can be extended even beyond medical conditions, as in *Jackson v. Mistover Kennels* where a purchase of a teacup dog was found to be nonconforming when a standard Maltese was received.

Here, your transaction is similarly covered because you purchased an unhealthy dog where you thought the benefit of your bargain was receiving a healthy puppy because at the time you attested he looked lively and active.

Under the UCC, there is an implied warrant of merchantability which means goods must pass without objection in the trade under the contract description and are fit for ordinary purposes for which such goods are used. UCC 2-314(2)(a),(c). In *Cohen* a veterinary certification that the dog was unfit for purchase fulfilled this prong and laid the groundwork for a finding of a breach of the warranty of merchantability. Another case, *Dalton v. Jackson,* found a parrot who died two weeks after purchase was unfit for ordinary purpose.

Here, Ash's health issues likely fulfill this. You believed you were purchasing and bargaining for a healthy dog that could serve as a life companion. He was friendly, happy and easygoing upon purchase but began having issues eating, was confused and disoriented and would be depressed for hours without moving. Dr. Turner's affirmation of your observations resulting in a diagnosis of a liver shunt affirms this as well, satisfying UCC 2-314(2)'s requirements of a good being fit for the ordinary purposes in which they are used and Den Breeder being in violation of the implied warranty of merchantability.

Another case on this point is *Tarly v. Paradise,* where a buyer sued for a breach of the warranty of merchantability when his cat was diagnosed with a congenital heart defect. While the contract in Tarly required an exam by a vet within two days of purchase, the heart defect was not discovered until 4 months after the purchase. *Cohen* citing *Tarly.* However, in that case the court was swayed to not find a breach of the implied warranty of merchantability because an exam within 48 hours would have uncovered the heart defect. The contract at issue in *Cohen* did not have an explicit requirement of inspection within a limited time frame.

In your case, the contract does state that the dog should be examined by a licensed vet but it does not provide a time horizon for such an examination. It seems to imply within 48 hours of purchase is the window for return, but this requirement is mentioned after the examination requirement. Additionally, it is likely not even relevant because as Dr. Turner and the information pamphlet on Irish wolfhounds provided, the defect may not have even been discoverable until after 16 weeks. Since you acquired Ash at 8 weeks and the exam would have allegedly had to take place within 48 hours, a court would still highly likely find the contract does not negate a finding of a breach of the implied warranty of merchantability as in *Tarly.* There are also varying signs and symptoms of

liver shunts, further complicating the slim possibility it could have been discovered as the contract may have alluded to.

Under the UCC 2-714(2), if there is found to be a breach of the implied warranty of merchantability, damages are allowed as the different at the time of sale between the dog as warranted and the actual dog. Some courts have refunded the whole of the purchase price for the animal on the assumption that no buyer would agree to purchase an animal it knew to have a defect that might lead to death or might require expensive surgery to correct. *Cohen* citing *Dalton.* Breeders, such as the one in *Cohen,* have tried to argue award of the full purchase price is unreasonable under UCC 2-714(1) which provides a court can award damages for unconformity "in any manner which is reasonable." However, in *Cohen* the court found this was a general rule and the more applicable section was UCC 2-714(2) which applied to cases where there had been a breach of warranty and allows for the difference at the time of acceptance of the goods and the value they would have had if they had been warranted.

In *Cohen,* the plaintiffs were able to recover for $7,000 for the purchase price of their bulldog. This is much more than your claim would be, and the court's openness to evaluating at the time of the transaction what you took away likely bodes well for your claim of recovering the purchase price of Ash.

Conclusion

Your high likelihood of success under the FPPPA should allow you to retain Ash and be reimbursed for the veterinary costs incurred in curing him of his liver shunt. Additionally, your strong claim under the UCC's implied warranty of merchantability should allow recovery for Ash's purchase price.