February 2023
MPT-1
Item

In re Hill

In re Hill

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Foss & Associates LLP
Attorneys at Law
3200 Lakefront Dr., Suite 700
Franklin City, Franklin 33012

MEMORANDUM

To: Examinee
From: Zoe Foss
Date: February 21, 2023
Re: Jasmine Hill matter

We represent Jasmine Hill in connection with her purchase of a boat with serious mechanical issues. Ms. Hill purchased the boat from Reliant Boating, a local boat shop, with the understanding that although the boat was used, it was in perfect working condition. After purchasing the boat, Ms. Hill discovered that the boat's motor had a cracked engine block and needed to be replaced. She has now replaced the motor and would like to know what legal remedies she has against Reliant.

I need you to draft a memorandum to me analyzing whether Ms. Hill has one or more claims against Reliant under the Franklin Deceptive Trade Practices Act (DTPA) (Fr. Bus. Code §§ 200 *et seq.*). Be sure to discuss what specific relief Ms. Hill would be entitled to if she were to succeed in a DTPA action.

Do not include a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis. Focus only on Ms. Hill's potential DTPA claim or claims. Another associate will research other potential claims Ms. Hill may have against Reliant, including any claims based on breach of express or implied warranty.

Transcript of Interview with Jasmine Hill
February 20, 2023

Attorney: Jasmine, it's good to meet you. What can we help you with?

Hill: Thanks for meeting with me. I bought a boat from Reliant Boating, and now I feel like I've been taken advantage of.

Attorney: Why don't you tell me what happened.

Hill: It all started when I decided to buy a boat last year.

Attorney: Have you ever owned a boat before?

Hill: No. This is my first time. My family and I enjoy the outdoors. We like to go camping, hiking, and fishing at Lake Franklin. Over the summer, we rented a boat a few times and had a ball, which got me thinking about getting my own boat.

Attorney: How did you come to buy a boat from Reliant?

Hill: After researching new and used boats, I decided to buy a used boat because I didn't have enough money saved up for a new one. I did an internet search, and Reliant's name popped up. It's one of only a few boat stores in town that sells used boats. I called Reliant in August and spoke with the store's owner, Greg Stevens. I told him I was looking for a good-quality used boat.

Attorney: What did Mr. Stevens say?

Hill: He recommended that I consider buying a pontoon-style boat. You know, the kind that's flat and boxy, with a built-in sunshade over the top and comfortable seating along the sides. He said he had two used pontoon boats in stock: a 2017 18-foot Perth Envoy and a 2019 21-foot Wellington Mariner. He suggested I come down to the shop and take a look at them.

Attorney: And did you do that?

Hill: Yes, I went to the store, and Mr. Stevens showed me both boats. He encouraged me to buy the Envoy. He turned the engine on, and it sounded fine. I told him I needed to think about it and would get back to him. He gave me his email address and cell-phone number and told me to let him know if

I had any questions. That evening, I talked to my family, and we all agreed that the Envoy was our best option because it was significantly less expensive than the Mariner but still roomy enough to comfortably seat six to eight people. I was really excited about the Envoy but had some concerns, so I emailed Mr. Stevens. Here's a copy of my email exchange with him.

Attorney: Thanks! When did you buy the boat, and what did you pay for it?

Hill: I returned to the shop a few days after my initial visit. I paid $7,500 for the boat, which is less than half of what a new 18-foot pontoon boat typically costs. The price included the boat, motor, and trailer. At the time, I thought I was getting a great deal. Mr. Stevens told me that the boat was a real gem and that it was in great condition. The bill of sale said that there were no defects. Here's a copy of it.

Attorney: Thank you. What happened after you bought the Envoy? Were you able to use it?

Hill: We trailered the boat to Lake Franklin, intending to stay the weekend and spend most of our time boating. About 15 minutes after we got out on the water, the motor died. I called Reliant immediately and told Mr. Stevens about the problem with the motor.

Attorney: What did he say?

Hill: He said there was no warranty on the boat, so I was responsible for any repairs. He started asking me questions about how I had operated the boat and suggested that I had done something wrong that caused the motor to die, which was infuriating. I was disappointed—our weekend getaway was ruined! The whole point of the trip was to spend as much time as possible on the lake enjoying our new boat. We didn't bring our hiking boots or our trail bikes. When the boat stopped working, there was no point in staying for the weekend, so we packed up our camping equipment and left.

Attorney: Were you able to find out what was wrong with the motor?

Hill: A boat mechanic inspected it and found that the engine block was cracked. The mechanic said that the motor couldn't be repaired and would have to

be replaced. I told him that before I bought the boat, Mr. Stevens ran the motor briefly and it seemed to work fine. The mechanic said that it's not uncommon for a motor with a cracked engine block to run for a few minutes under test conditions. But then when you try to use it in the water for an extended period, the motor starts leaking oil, overheats, and seizes up. He said he found epoxy glue in the cracks on the engine block, and he could tell that the glue had been recently applied. This told him that the engine block was damaged when I bought it.

Attorney: Did you have the motor replaced?

Hill: Yes, I did. And it cost me an arm and a leg! I brought a copy of the receipt. Having to replace the motor was stressful because it set me back financially. I think Reliant took advantage of me. The boat runs fine now, but I never would have bought it if I'd known it would need a new motor. I want to keep the boat now that it works, but I think Reliant should reimburse me for the replacement motor and all the hassle I've been put through.

Attorney: That's very understandable. I think you have some legal options against Reliant. I'll review the documents you provided and research a few issues and then get back to you early next week.

Hill: That sounds great. Thanks for helping me with this!

Jasmine Hill/Greg Stevens Email Correspondence [in chronological order]
August 10, 2022

From: Jasmine Hill<jhill@cmail.com>
To: Greg Stevens<gStevens@reliant-boat.com>
Subject: Pontoon Boat

Hi, Greg. Thanks so much for taking the time to show me the Perth Envoy and Wellington Mariner pontoon boats. I'm leaning toward the Envoy because it's the one you recommended and it's in my price range.

From: Greg Stevens<gStevens@reliant-boat.com>
To: Jasmine Hill<jhill@cmail.com>
Subject: Pontoon Boat

Jasmine, I think the Envoy is a real gem and would be a perfect fit for you because it has plenty of room for you and your family!

From: Jasmine Hill<jhill@cmail.com>
To: Greg Stevens<gStevens@reliant-boat.com>
Subject: Pontoon Boat

You mentioned that the Envoy is five years old. I'm a little concerned about its age. This is a big purchase for me. I don't want to buy a boat that's going to need repairs.

From: Greg Stevens<gStevens@reliant-boat.com>
To: Jasmine Hill<jhill@cmail.com>
Subject: Pontoon Boat

The Envoy is a few years old, but it's in excellent condition and runs just like new.

From: Jasmine Hill<jhill@cmail.com>
To: Greg Stevens<gStevens@reliant-boat.com>
Subject: Pontoon Boat

OK, let's do this! Can I come by the shop this weekend to complete the paperwork?

From: Greg Stevens<gStevens@reliant-boat.com>
To: Jasmine Hill<jhill@cmail.com>
Subject: Pontoon Boat

Sure! See you then!

Boat Bill of Sale

BE IT KNOWN that for payment in the sum of $7,500, the full receipt of which is acknowledged, the undersigned Greg Stevens d/b/a Reliant Boating (Seller) hereby sells and transfers to Jasmine Hill (Buyer) the following boat, motor, and trailer (Boat):

Make: Perth

Model or series: Envoy

Year: 2017

Color: White

Hull ID No.: SSR 77070 173 06

Style: 18-foot pontoon

Odometer Reading (# hours): 275 hours

Title #: [omitted]

Motor: 9.9-horsepower Jupiter

Trailer: 20-foot standard boat trailer

The sale is subject to the following conditions and representations:
Seller acknowledges receipt of $7,500 as full payment for the Boat, with title transfer to take place immediately.

* * *

Seller has no knowledge of any defects in and to the Boat.

Seller: Greg Stevens **Date:** August 13, 2022

Buyer: Jasmine Hill **Date:** August 13, 2022

In the presence of (Witness): Graham Tailor **Date:** August 13, 2022

INVOICE NO. 3017
DATE: September 20, 2022

JB Boat Repairs
Proudly Serving Franklin Boaters Since 2012
1200 Marina Blvd.
Franklin City, FR 33015

TO:
Jasmine Hill
9361 Castle Lane
Franklin City, FR 33015

Diagnosis:

Examined broken Jupiter 9.9-horsepower motor in 2017 Perth Envoy pontoon boat and found that engine block was cracked. Found remnants of epoxy glue in cracked engine block, indicating engine block had been previously damaged.

Motor is not fixable and needs complete replacement.

Work Performed	**Cost**
Remove broken motor and install refurbished 9.9-horsepower Jupiter replacement motor. Fill oil tank. Test motor. Test propeller.	$3,000

Total Cost $3,000

THANK YOU FOR YOUR BUSINESS!

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Excerpts from Franklin Business Code, Chapter 200

§ 201. Short Title

This chapter may be cited as the Deceptive Trade Practices Act.

§ 202. Construction and Application

This chapter shall be liberally construed and applied to promote its underlying purpose, which is to protect consumers against false, misleading, and deceptive business practices.

§ 203. Definitions

As used in this chapter:

(a) "Goods" means tangible items or real property purchased or leased for use.

(b) "Services" means work, labor, or service purchased or leased for use . . . .

(c) "Person" means an individual, partnership, corporation, association, or other group, however organized.

(d) "Consumer" means an individual . . . who seeks or acquires any goods or services . . . .

(e) "Trade" and "commerce" mean the . . . sale . . . of any good or service . . . .

(f) "Economic damages" means compensatory damages for actual pecuniary loss, including costs of repair and replacement. The term does not include exemplary damages or damages for physical pain and mental anguish.

. . .

(k) "Knowingly" means actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

§ 204. Deceptive Trade Practices Unlawful

False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful, including but not limited to the following acts:

. . .

(d) representing that goods or services

i. have characteristics or uses they do not have, or

ii. are of a particular standard, quality, or grade if they are of another;

. . .

(f) representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced;

(g) failing to disclose information concerning goods or services that was known at the time of the transaction if such failure was intended to induce the consumer to enter into a transaction into which the consumer would not have entered had the information been disclosed; . . . .

§ 205. Relief

(a) A consumer may maintain an action against any person who engages in any one or more of the false, misleading, or deceptive acts or practices enumerated in Section 204 of this chapter, if such act or practice is a producing cause of the consumer's damages and the consumer relied upon such act or practice to the consumer's detriment.

(b) In a suit filed under this section, a consumer who prevails may obtain

(1) the amount of economic damages found by the trier of fact; or

(2) if the trier of fact finds that the conduct of the defendant was committed knowingly:

(i) exemplary damages of three times (treble) the amount of economic damages, and

(ii) damages for mental anguish.

(c) Each consumer who prevails shall be awarded court costs and reasonable and necessary attorney's fees.

Gordon v. Valley Auto Repair, Inc.
Franklin Court of Appeal (2009)

Jack Gordon sued Valley Auto Repair (Valley) alleging Deceptive Trade Practices Act (DTPA) violations arising from repairs made to his truck by Valley. A jury awarded Gordon economic damages, exemplary damages, and attorney fees under the DTPA, Fr. Bus. Code § 201 *et seq.* Valley appeals. We affirm in part and reverse in part.

FACTS

Gordon purchased a used diesel pickup truck in Franklin in April 2007. Gordon bought the truck to use for his business hauling goods to locations in three states, including Franklin. The truck had few problems until October 2007, when Gordon noticed that the truck was using too much oil. He took the truck to Valley for repair. A Valley mechanic took two weeks to repair the engine, but the truck continued to leak oil. Gordon returned to Valley once more in November. Again, it took Valley two weeks to perform repairs; and after the second repair, the truck continued to leak oil and run poorly. Gordon had to pay Valley a total of $4,000—$2,000 for each of the two unsuccessful repairs. At that point, Gordon was "fed up" with Valley and had the truck repaired by another mechanic at a cost of $2,000.

DTPA ANALYSIS

The DTPA prohibits "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce." Fr. Bus. Code § 204. Section 204 contains a list of prohibited acts, including the specific acts alleged in Gordon's complaint (i.e., §§ 204(d) and (f)). Actionable representations may be oral or written. *Diaz v. Ellis* (Fr. Sup. Ct. 1998).

The elements of a DTPA claim are (1) the plaintiff is a consumer; (2) the defendant engaged in one or more of the false, misleading, or deceptive acts enumerated in § 204; (3) the act(s) constituted a producing cause of the plaintiff's damage; and (4) the plaintiff relied on the defendant's conduct to his or her detriment. *Diaz;* Fr. Bus. Code § 205(a). A "producing cause" is a substantial factor that brings about the injury, without which the injury would not have occurred. *Diaz*. The plaintiff consumer has the burden of proof as to each element. *Id.* If a violation is committed "knowingly," the plaintiff is entitled to receive three times his or her actual economic damages (treble damages), as well as damages for mental anguish. Fr. Bus. Code § 205(b)(2).

Gordon asked Valley's service department to perform repairs on his truck. This qualifies him as a "consumer" under the DTPA. His allegations focus on Valley's failure to

repair the truck on a timely basis and on misrepresentations by Valley employees about that work. Specifically, Gordon alleged that Valley's conduct violated the DTPA by (1) representing that goods and services are of a particular standard, quality, or grade when they are of another, Fr. Bus. Code § 204(d)(ii)); and (2) representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced, Fr. Bus. Code § 204(f).

A. DTPA Violations

Valley contends that there is no evidence that it committed the alleged DTPA violations. We review each alleged violation in turn.

(1) representations about standard, quality, or grade of services—§ 204(d)(ii)

Gordon testified that when he first took the truck to Valley, he stressed the need for quick repairs to ensure the success of his business. In response, Valley employees made several representations to him. Specifically, a mechanic assured Gordon personally, "We'll get it done, we'll get it fixed, we'll get it right back out on the road." When Gordon asked how long repairs usually took, he was told, "It depends on the problem, but normally one to three days" but that "you might have some problems that would take a little longer." Gordon testified that, based on these representations, he was led to believe that "Valley would get it in and get it out." Gordon contends that these were actionable misrepresentations because each repair effort took one to two weeks.

Valley contends that these representations were merely puffing and thus not actionable under the DTPA. Valley is correct that "mere puffing," that is, exaggerated "sales-speak" for promotional purposes, is not actionable under the DTPA. *Diaz.* Three factors determine whether a representation is "mere puffing":

(1) the specificity of the alleged misrepresentation: vague or indefinite representations, statements that compare one product to another and claim superiority, and mere opinions are not actionable misrepresentations under the DTPA;

(2) the comparative knowledge of the consumer and the seller or service provider: representations made by a service provider with greater knowledge and experience than the consumer are more likely to be actionable; and

(3) whether the representation relates to a past or current condition as opposed to a future event or condition: statements about past or current conditions are more likely to be actionable than statements about the future. *Id*.

Valley's representations about repair time were too general and indefinite to be actionable. None of the statements guaranteed a precise time frame for completion of repairs. Indeed, the last statement acknowledged that some repairs would take longer

than the "one to three days" "normally" required. This rendered the statements too indefinite to be actionable. *See Salas v. Carworld* (Fr. Ct. App. 2003) (dealership's description of vehicle as "luxurious" and "rugged" was mere opinion or puffery). *But cf. Chapman v. Acme Construction* (Fr. Ct. App. 2006) (affirming DTPA recovery where defendant "guaranteed" he would finish a construction project "no matter what" for a set price within a certain time period and the quality of the construction would be "great").

(2) representations that services were performed—§ 204(f)

Gordon contends that Valley completed alleged repairs twice but failed to repair the leak each time. The evidence shows that Valley's manager stated after the second unsuccessful repair, "We've got it fixed now." The evidence also shows that the truck leaked oil after each attempted repair. This evidence is sufficient to support a finding that Valley's representations about the performance of the repairs violated the DTPA.

B. Damages

A plaintiff may recover "economic damages" where the defendant's misconduct was a producing cause. Fr. Bus. Code § 205. The term "economic damages" has been construed to include "the total loss sustained by the consumer as a result of the deceptive trade practice," which includes related and reasonably necessary expenses. *Diaz.* The trial court found that Gordon's economic damages included (1) the repair costs he incurred ($4,000 to Valley) and (2) lost net profits resulting from interruption in his business due to the truck's being in the shop for extended periods of time ($1,500). Section 203(f) expressly includes "repair or replacement" costs in the definition of "economic damages." Gordon's evidence at trial supports the award of these amounts as economic damages.

C. Knowing Conduct as a Basis for Exemplary Damages

Valley contends that there is no evidence that it acted knowingly in its representations about its repairs. The DTPA defines "knowingly" to include "actual awareness" of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim. Fr. Bus. Code § 203(k). Knowledge may be inferred where objective manifestations indicate that a person acted with actual awareness. *Id.* As the court explained in Diaz, "actual awareness" does not mean merely that a person knows what he is doing. Rather, it means that a person knows that what he is doing is false, deceptive, or unfair. The person must think at some point, "Yes, I know this is false, deceptive, or unfair, but I'm going to do it anyway." *Diaz.*

Gordon claims that Valley acted knowingly because Valley "did not even attempt to fix the oil leak" on two separate occasions. But the record does not support this

characterization. Valley offered proof that its service department believed that the oil leak had been fixed each time it worked on the truck. Gordon offered no direct evidence to rebut this proof.

Accordingly, we conclude that the evidence supports only a finding that Valley represented that it had repaired the oil leak when in fact it had not. The evidence does not support a finding that Valley made a "knowing" misrepresentation. *Compare Berg v. RMS Roofing* (Fr. Ct. App. 2001) (knowing conduct found where contractor admitted work was not done properly but did not fix it despite continuing to bill plaintiff for balance owed). For this reason, we reverse the award of treble damages with instructions to the trial court to enter judgment in the amount of the actual economic damages without the multiplier.

D. Attorney's Fees

Valley also contests the award of Gordon's attorney's fees. "Each consumer who prevails *shall* be awarded court costs and reasonable and necessary attorney's fees." Fr. Bus. Code § 205(c) (emphasis added). The award of reasonable and necessary attorney's fees is mandatory for a prevailing DTPA plaintiff.

We have determined that Gordon is entitled to prevail on one of his DTPA allegations against Valley. His attorney testified to the amount of reasonable and necessary attorney's fees incurred. Accordingly, we affirm the attorney fee award.

Affirmed in part, reversed in part, and remanded for further proceedings.

Abrams v. Chesapeake Business College
Franklin Court of Appeal (2012)

Danielle Abrams brought this action against Chesapeake Business College (CBC) under the Deceptive Trade Practices Act (DTPA), Fr. Bus. Code §§ 201 *et seq.* The trial court entered judgment for Abrams and awarded $22,000 in exemplary damages and damages for mental anguish, plus attorney's fees. We affirm.

Abrams enrolled in CBC seeking a business administration degree after seeing a newspaper ad and several television commercials and visiting CBC's campus. In August 2010, Abrams visited CBC's campus, signed an enrollment agreement, and made a deposit of $1,000 toward the $12,000 tuition. That evening she read the school catalogue aloud to her mother and became enthusiastic about her decision to pursue a business degree from CBC. Two weeks later, she started classes and paid an additional $4,000 toward her outstanding tuition balance. However, she soon became disappointed in CBC and concluded that she had been misled by the catalogue. She eventually stopped attending CBC, did not pay the remainder of her tuition, and filed this action.

Abrams's claims under the DTPA focus on statements contained in CBC's catalogue and on information that CBC failed to disclose to her before she enrolled. The catalogue promised qualified teachers ("Our teachers are thoroughly trained subject-matter experts in their field"), modern equipment ("state of the art"), and a low student-teacher ratio ("No more than 10 students per teacher/classroom"). At trial, Abrams and several other witnesses testified that CBC in fact provided one unqualified teacher in a room with 42 students, all taking different courses, with only two 10-key adding machines. The evidence established the poor training of CBC's teachers, a high student-teacher ratio, outdated computers, and antiquated office equipment that frequently broke down. The jury found that CBC had violated DTPA §§ 204(d) (misrepresenting the characteristics, standard, or quality of services) and 204(g) (failing to disclose information). It awarded $15,000, or three times the economic damages of $5,000, in exemplary damages plus $7,000 as damages for mental anguish. CBC appealed.

On appeal, CBC makes three arguments. First, it argues that the statements in its catalogue could not have been a producing cause of Abrams's damages because Abrams read the catalogue after she signed the contract. We disagree. The unrebutted proof shows that the catalogue contained representations that substantially contributed to Abrams's decision to enroll. Even though she read the catalogue after she signed the agreement, that agreement gave her a 72-hour period to cancel the agreement for a full

refund. Abrams proved that CBC's representations in its catalogue were false and misleading and that she relied upon these representations in deciding not to cancel the agreement and instead to pay additional tuition. The evidence is sufficient to support a finding that the representations in the catalogue were a producing cause of Abrams's loss.

Second, CBC argues that it cannot be held liable for a failure to disclose information when Abrams had actual notice of the same information. We disagree. Under the DTPA, the plaintiff must show that (1) the defendant failed to disclose information about goods or services (2) known by the defendant at the time of the transaction and (3) intended to induce the consumer to enter into a transaction (4) into which the consumer would not have entered had the information been disclosed. Fr. Bus. Code § 204(g). To be sure, a seller cannot be held liable for failing to disclose information about which the buyer has actual notice; such information could not be a producing cause of the buyer's loss. *Ling v. Thompson* (Fr. Ct. App. 2008). In this case, however, ample evidence shows that CBC knew that its catalogue contained misrepresentations and that Abrams relied on those statements when she enrolled and paid tuition. This is not a situation where statements were made without knowledge of their falsity or where information was withheld innocently. The evidence supports a finding of liability for a failure to disclose under § 204(g).

Finally, CBC also challenges the award of treble damages and damages for mental anguish. To justify an award of these categories of damages, the plaintiff must prove that the defendant's actions were taken "knowingly." Fr. Bus. Code § 205(b)(2). We note that the Act provides that it is to be liberally construed so as to promote the purpose of protecting consumers against false, misleading, or deceptive business practices. *Id.* § 202. Here the record establishes that CBC knew that its representations in the catalogue were false.

In particular, CBC claims that no evidence supported the award of damages for mental anguish. Again, we disagree. An award of damages for mental anguish "implies a relatively high degree of pain and distress beyond mere worry or anxiety, . . . and includes pain resulting from grief, severe disappointment, indignation, wounded pride" and similar emotions. *Oliver v. Elite Systems* (Fr. Sup. Ct. 1997). The proof at trial met this high standard. Abrams testified that she felt severe disappointment with CBC's academic program, indignation at its poor instruction, wounded pride at being "had," and such severe despair that she dropped out of CBC. This evidence is sufficient to support the award of damages for mental anguish under the Act.

Affirmed.

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B&B Inc. v. Happy Frocks Inc.

B & B Inc. v. Happy Frocks Inc.

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AZIZ & SHAPIRO LLP
Attorneys-at-Law
100 Austin Street
Franklin City, Franklin 33705

MEMORANDUM

To: Examinee
From: Hamid Aziz
Date: February 21, 2023
Re: B&B Inc. v. Happy Frocks Inc.

Our client, Happy Frocks Inc., was sued in the United States District Court by B&B Inc. for trademark infringement. At a post-trial hearing after a bench trial, the court announced its conclusion that our client was liable for trademark infringement in that it sold goods with an infringing mark, asked each party to brief its position on the remedies to be awarded, and stated that a full written opinion on both liability and remedies would be forthcoming after briefing.

Plaintiff B&B is seeking, among other things, actual damages, an injunction, and an award of that portion of the profits earned by our client from the sale of the infringing goods that was attributable to the infringement of the trademark. We believe that, whatever its liability for other remedies, our client is not liable for an award of profits.

Please draft the portion of our brief arguing that our client is not liable for an award of profits. (I have asked others in the firm to draft those portions of the brief dealing with other remedies or measures of damages, including their computation.) I am attaching the following materials:

- excerpts from the trial transcript, which provides the relevant factual record
- the transcript of the post-trial hearing, in which the court announced its conclusion as to liability only and requested briefs on remedies
- brief excerpts from the Supreme Court's decision in *Romag Fasteners, Inc. v. Fossil Group, Inc.,* on liability for profits in cases of trademark infringement
- the Franklin federal District Court's decision in *Spindrift Automotive v. Holt Enterprises,* setting forth the factors to consider in awarding profits in such cases

I am also attaching our firm's memorandum on the proper structure and content of a persuasive brief. Do not prepare a statement of facts, but be sure to incorporate relevant facts into your argument.

AZIZ & SHAPIRO LLP

MEMORANDUM

To: All Attorneys
Re: Guidelines for Persuasive Briefs in Trial Courts
Date: September 5, 2021

The following guidelines apply to persuasive briefs filed in trial courts.

I. Caption [omitted]

II. Statement of Facts (if applicable) [omitted]

III. Legal Argument

The body of each argument should analyze applicable legal authority and persuasively argue that both the facts and the law support our position. Supporting authority and facts should be emphasized, but contrary authority and facts should also be cited, addressed in the argument, and explained or distinguished. Courts are not persuaded by exaggerated, unsupported arguments.

We follow the practice of breaking the argument into its major components and writing carefully crafted subject headings that summarize the arguments they cover. A brief should not contain broad argument headings. Rather, the argument headings should be complete sentences that succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. Examples:

Improper: Setback requirements and removal of non-complying property

Proper: Because Defendant's garage sits only 15 feet from the curb, it fails to comply with the setback requirements of the homeowners' association and should be removed.

You need not prepare a table of contents, a table of cases, a summary of argument, or an index; these will be prepared, as required, after the draft is approved.

B&B Inc. v. Happy Frocks Inc.
United States District Court for the District of Franklin
EXCERPTS FROM THE TRIAL TRANSCRIPT, DECEMBER 16, 2022

Direct Examination of Vera Garcia, CEO of Plaintiff B&B Inc.

Plaintiff's Att'y Diane Berg: Please state your name and position for the record.

Garcia: Vera Garcia. I am Chief Executive Officer of B&B, Incorporated.

Berg: What is your firm's business?

Garcia: B&B makes buttons and other accessories for the fashion industry. Our buttons are well known in the trade, because they are uniquely styled and unlike any others in appearance. They are also made from high-quality materials, not just cheap plastic. Each button is stamped with our trademarked logo.

Berg: What was your firm's relationship with Happy Frocks?

Garcia: About nine years ago, we entered into a contract with Happy Frocks to supply them with our buttons, for their use in their high-end children's clothing. The contract provided that Happy Frocks would use our buttons exclusively and required that they instruct their authorized clothing manufacturers to purchase buttons directly from us.

Berg: How many manufacturers did Happy Frocks have that used your buttons?

Garcia: Four—they're all located overseas.

Berg: And how many buttons did Happy Frocks buy from you?

Garcia: On an annual basis, each manufacturer bought tens of thousands of our buttons. Our relationship with Happy Frocks was mutually beneficial for many years.

Berg: Then what happened?

Garcia: About two years ago, one of our employees was in a store and found some Happy Frocks children's clothes with buttons that looked like ours, contained our trademarked logo, but were made of cheap plastic and were clearly infringing. We knew that Quality Clothes, one of the overseas manufacturers they used, manufactured this line of clothing for Happy Frocks. We checked our records and found that, for the prior year, Quality Clothes had purchased only a few hundred of our buttons. We concluded that, for at least one year prior,

virtually all the clothing made by Quality Clothes that Happy Frocks was selling contained infringing buttons that looked exactly like ours, including our B&B logo, but were of inferior quality.

Berg: What did you do?

Garcia: We contacted you as our lawyer, and you sent Happy Frocks a letter telling them to cease and desist using the infringing buttons and demanding compensation.

Berg: What was the response from Happy Frocks?

Garcia: One of their managers called us and said they would look into it, but we didn't hear anything further from them, so we instructed you to bring this lawsuit.

Berg: What are you seeking by bringing this action?

Garcia: We want to be made whole for what we've lost, we want Happy Frocks to stop using the infringing buttons, and we want whatever profits they made that resulted from their use.

[Further direct testimony omitted.]

Cross-Examination of Vera Garcia, CEO of Plaintiff B&B Inc.

Defendant's Att'y Hamid Aziz: Ms. Garcia, are the allegedly infringing buttons dangerous?

Garcia: I'm not sure what you mean.

Aziz: Are they poisonous, for example?

Garcia: No, they're just cheap plastic.

Aziz: As these clothes are made for children, is it more likely that a child could swallow one of those buttons if it came loose than would be the case for one of your buttons if it came loose?

Garcia: No.

Aziz: Did any other clothing manufacturers besides Quality Clothes stop using your buttons because Happy Frocks sold the clothes manufactured by Quality Clothes?

Garcia: Not that I know of.

Aziz: To your knowledge, is Happy Frocks still selling clothes with the non-B&B buttons?

Garcia: No, they apparently made Quality Clothes stop doing so, but we want to make sure they don't start using them again.

Aziz: Did your overall sales decline during the period these buttons were used?

Garcia: No, our overall sales increased, but of course we lost the revenue from the sales of our buttons to Quality Clothes for the time that they used the infringing buttons until they stopped.

Aziz: To your knowledge, do customers who buy Happy Frocks clothing know who makes the buttons on the clothes?

Garcia: I hope they do from seeing B&B's logo on the buttons. I do think that customers know the difference between our high-quality buttons and the inferior-quality ones that were used.

Aziz: How long was it between the time you discovered the use of the non-B&B buttons and when you asked your lawyer to send the cease-and-desist letter?

Garcia: We did it almost immediately—maybe a week or two.

Aziz: And you say you got no response from Happy Frocks. The record will show that you did not file the complaint in this action, seeking an immediate injunction, until some nine months later, about a week before the so-called "Black Friday" sales in November. To your knowledge, is that the day with the largest sales of most retail goods like clothing?

Garcia: Yes, I believe it is.

Aziz: So would it be fair to say that you waited nine months to bring this lawsuit, until you could do so at a time when Happy Frocks would suffer the most damage from an injunction, and you could then put the most pressure on Happy Frocks to settle the case on your terms?

Garcia: I wouldn't put it that way.

Aziz: But with the belief that your trademark was being infringed, you still waited nine months from the date you learned of the allegedly infringing use until you brought suit to stop it, correct?

Garcia: That was the timeline, yes.

[Further cross-examination omitted.]

Direct Examination of Samuel Harris, CEO of Defendant Happy Frocks Inc.

Defendant's Att'y Aziz: Would you state your name and position for the record?

Harris: Samuel Harris. I am Chief Executive Officer of Happy Frocks Inc.

Aziz: Did you receive a so-called cease-and-desist letter from B&B's attorney about 22 months ago?

Harris: Yes, it said that some of our children's clothes contained infringing buttons, rather than buttons made by B&B. They demanded that we immediately stop the manufacture and sale of these clothes and said that we owed them a considerable amount of money.

Aziz: What did you do?

Harris: Well, their letter didn't specify which clothes from which of our overseas manufacturers contained these allegedly infringing buttons, so we had to investigate. It took us several weeks to get current samples from all our overseas manufacturers. When we finally did, we learned that Quality Clothes was indeed using buttons that didn't come from B&B. So we contacted Quality Clothes, told them to stop immediately, and, pursuant to the terms of our contract with them, terminated the relationship with them. We stopped selling our inventory of clothing that Quality Clothes had manufactured.

Aziz: Did you inform B&B of that fact?

Harris: No, we figured that stopping it was enough.

Aziz: Did Happy Frocks suffer any monetary loss as a result of all this?

Harris: Yes. You see, Quality Clothes, like all our manufacturers, was supposed to purchase the buttons directly from B&B and then bill us for the cost of the buttons. We found that, although they were using cheaper buttons, they were still billing us and we were still paying them for the cost of buttons from B&B. And we lost the value of our on-hand inventory. That all cost us a lot of money—I don't know if we'll be able to recover it from them, given their overseas location.

[Further direct testimony omitted.]

Cross-Examination of Samuel Harris, CEO of Defendant Happy Frocks Inc.

Plaintiff's Att'y Berg: Mr. Harris, what quality controls does Happy Frocks have over its overseas manufacturers regarding the clothing that they make for you?

Harris: We specify the quality levels of all the aspects of our clothing in our contracts with our manufacturers.

Berg: And what do you do to make sure that those levels of quality are adhered to?

Harris: We sample the goods that are manufactured to see if they are up to the quality standards we require.

Berg: How often are those samples examined?

Harris: Every time we get a new shipment from a manufacturer.

Berg: Referring to the time period beginning one year before you terminated your relationship with them, how many shipments of clothes did you receive from Quality Clothes?

Harris: Four.

Berg: And given your prior testimony, is it correct to say that you didn't notice the use of non-B&B buttons until the last—that is, the fourth—of those shipments?

Harris: Yes.

Berg: Have you since gone back and checked to see if the previous three shipments also contained buttons that were not made by B&B?

Harris: Yes, and they did.

Berg: So, despite your alleged application of quality controls for each shipment of clothing from each manufacturer, you didn't notice that the quality of at least those three previous shipments did not meet your standards, in that they contained these non-B&B buttons?

Harris: Yes. Simply put, we missed it.

Berg: You were negligent in maintaining that quality control, weren't you?

Aziz (Defendant's att'y): Objection—the question calls for a legal conclusion by the witness.

The Court: Sustained.

Berg: Let me put it another way—don't you think that you were lax, to say the least, in maintaining that quality control in this case?

Harris: In hindsight, of course I wish we had noticed the problem sooner, but we did our best.

Berg: Now let's address the question of why you missed it, as you put it. During the year when the non-B&B buttons were used, did you see an increase in the demand for the line of clothes made by Quality Clothes?

Harris: Yes, the retailers were clamoring for these designs—they were flying off the shelves.

Berg: And what did you do to meet that demand?

Harris: We accelerated our processing of the shipments we received from Quality Clothes so we could get them out the door faster.

Berg: How did that "acceleration" come about?

Harris: We instructed our employees to get their jobs done as quickly as possible to meet the demand.

Berg: And did that instruction extend to your quality control officer?

Harris: The instruction went to all our employees.

Berg: Wouldn't that have put pressure on the quality control officer to cut corners, and so lead to missing the use of the infringing buttons?

Harris: We would never do anything to cut corners on quality control. Your speculation is flatly wrong.

Berg: You say you stopped selling the inventory you had of goods manufactured by Quality Clothes. Did you recall any of those clothes that were out in the marketplace?

Harris: No, that would have been an impossible task, as we sell to over 900 retailers.

Berg: Have you ever recalled clothing from your retailers?

Harris: Yes, a few years ago we had a problem with some children's pajamas that had been made by one of our manufacturers with defective fabric.

Berg: How did that recall work?

Harris: We contacted the retailers and had them return the shipments with the defective fabric.

Berg: So you could have recalled the clothing with the infringing buttons, couldn't you?

Harris: That was a very different situation—the pajamas with the defective fabric had been shipped to about 600 of our retailers, and so the recall was manageable, unlike the situation with the buttons, where they had been shipped to over 900 retailers.

Berg: A recall from 900 retailers as opposed to 600 is actually quite possible, isn't it?

Harris: Well . . . I don't think it is.

Berg: Let's move on. What is your total cost per piece for the infringing clothing manufactured by Quality Clothes, and how many did you sell to your retailers?

Harris: Including everything, about $50 per piece. We sold about 18,000.

Berg: And how much did you charge your retailers per piece?

Harris: $75.

Berg: So you made a profit of $25 on each piece sold, or a total profit of $450,000 on the clothes with the non-B&B buttons?

Harris: Yes.

[Further cross-examination omitted.]

Direct Examination of Tiffany Chen, Defendant Happy Frocks's Expert Witness

Defendant's Att'y Aziz: Please state your name and position.

Chen: I am Tiffany Chen, Chief Executive Officer of TM Surveys, Ltd.

Aziz: I note for the record that Ms. Chen has previously been qualified as an expert witness on the construction and conduct of trademark surveys. Ms. Chen, were you commissioned by Happy Frocks to conduct a consumer survey of customers in relation to the use of B&B Inc.'s buttons on Happy Frocks clothing?

Chen: Yes. We conducted such a survey using standard scientific survey procedures.

Aziz: Please summarize the findings of your survey.

Chen: We conducted a survey of 839 consumers of Happy Frocks clothes manufactured by Quality Clothes. We found that the use of B&B's logo on the buttons played a minimal role in the clothing purchase: 3% of the respondents said that they noticed the logo and thought it added to the desirability of the clothes. We conducted another survey of 997 consumers of children's clothes

generally. We found that only 6% stated that whether there was a brand name printed on the buttons of clothes was one reason, among others, for purchasing one item of clothing instead of another, and less than 1% said that the appearance of a brand name on a button was the only reason for purchasing a particular item of clothing over another.

[Further direct examination and cross-examination omitted.]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF FRANKLIN

B&B, INC.	)	
Plaintiff,	)	
v.	)	Post-Trial Hearing Transcript
HAPPY FROCKS, INC.	)	Case No. 22 CV 1658
Defendant.	)	

February 17, 2023

Post-Trial Hearing Before Hon. Patricia James, U.S.D.J.

Present: Diane Berg, attorney for Plaintiff B&B, Inc., and Hamid Aziz, attorney for Defendant Happy Frocks, Inc.

The Court: Good afternoon. As you know, after the bench trial in this matter I asked both sides for post-trial briefs on the question of liability only. I did so because, if I found no liability, there would be no point in wasting the court's and the parties' time in addressing remedies. I have now read those briefs on liability and reviewed the trial transcript. As is my practice in cases of this sort, I am having this hearing to let counsel know my conclusion as to defendant's liability. I have concluded that defendant is liable for trademark infringement, as defendant sold goods that infringed plaintiff's trademark. I realize that defendant did not initiate the infringement, but the fact is that it sold infringing goods, and that is enough to establish liability.

I now require briefing from both sides on the question of remedies. Specifically, plaintiff has demanded a permanent injunction against sale of goods that infringed its mark, damages caused by defendant's sale of such goods, and an accounting of that portion of the defendant's profits attributable to the sale of such goods. Please submit your briefs two weeks from today. I will in due course render my decision on those points and issue a written opinion. Are there any questions? No? Then thank you, and this hearing is adjourned.

LIBRARY

Excerpts from Romag Fasteners, Inc. v. Fossil Group, Inc.,

140 S.Ct. 1492 (2020)

JUSTICE GORSUCH delivered the opinion of the Court [joined by four other Justices].

When it comes to remedies for trademark infringement, the Lanham Act [the federal trademark statute] authorizes many. A district court may award a winning plaintiff injunctive relief, damages, or the defendant's ill-gotten profits. Without question, a defendant's state of mind may have a bearing on what relief a plaintiff should receive. An innocent trademark violator often stands in very different shoes than an intentional one. But some circuits have gone further. These courts hold a plaintiff can win a profits remedy, in particular, only after showing the defendant *willfully* infringed its trademark. The question before us is whether that categorical rule can be reconciled with the statute's plain language [regarding the false or misleading use of trademarks].

[The Court reviewed the specific statutory language and structure, the argument that "principles of equity" include a willfulness requirement, and the history of trademark case law regarding the award of profits.]

. . . [W]e do not doubt that a trademark defendant's mental state is a highly important consideration in determining whether an award of profits is appropriate. But acknowledging that much is a far cry from insisting on the inflexible precondition to recovery Fossil advances. . . . The judgment of the court of appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE ALITO [joined by two other Justices] concurring.

We took this case to decide whether willful infringement is a prerequisite to an award of profits under [the Lanham Act]. The decision below held that willfulness is such a prerequisite. [Citation omitted.] That is incorrect. The relevant authorities, particularly pre-Lanham Act case law, show that willfulness is a highly important consideration in awarding profits under [the Lanham Act], but not an absolute precondition. I would so hold and concur on that ground.

[JUSTICE SOTOMAYOR issued a separate concurrence, omitted.]

Spindrift Automotive Accessories, Inc. v. Holt Enterprises, Ltd.

United States District Court for the District of Franklin (2021)

In this trademark infringement action, defendant Holt Enterprises has been found liable to plaintiff Spindrift Automotive Accessories. The question before the court is the determination of damages for that infringement. There are generally three remedies for trademark infringement: (1) the actual damages suffered by the plaintiff (for example, due to lost sales); (2) injunctive relief, barring future infringements; and (3) that portion of the defendant's profits that are attributable to the infringement. As to the latter, the court must determine, as best it can, what portion of the defendant's profits are attributable to the infringement, and what portion are attributable to non-infringing aspects.

One of Spindrift's demands here is that Holt disgorge its profits gained from the infringement. Spindrift argues that the Lanham Act allows for an award of profits based on the facts of the case. Holt counters that, based on those very facts, no award of profits is merited because it has been proven that the infringement was not "willful."

Willfulness Need Not Be Found to Justify an Award of Profits

Before reviewing the legal standard for making an award of profits in cases such as this, the court must consider the effect of the Supreme Court's recent decision in *Romag Fasteners, Inc. v. Fossil Group, Inc.,*140 S.Ct. 1492 (2020). There, the Supreme Court concluded that, in cases brought under the relevant provisions of the Lanham Act at issue here, proving willfulness was *not* a prerequisite to an award of profits. Rather, the Supreme Court explained that willfulness is not "an inflexible precondition to recovery" of a defendant’s profits under the Act. Instead, "a defendant’s mental state is a highly important *consideration* in determining whether an award of profits is appropriate." *Id.* (emphasis added). Hence, in light of the Supreme Court's holding, in this case Holt cannot avoid an award of profits solely because its actions were not willful. Accordingly, the court will now proceed to a discussion of the factors that justify an award of profits to determine whether an award of profits is justified here.

Analysis of Factors That Determine Whether an Award of Profits Is Justified

As a general matter, an award of profits is justified by three rationales: (1) to deter a wrongdoer from doing so again, (2) to prevent the defendant's unjust enrichment, and

(3) to compensate the plaintiff for harms caused by the infringement. In determining whether to award an infringer's profits as part of a recovery, a court must balance many factors. Certainly the defendant infringer's mental state—whether willful or otherwise—must be considered in this analysis. It is important to note that these various factors are not assigned equal weight, as the district court's discretion lies in assessing the relative importance of these factors in a particular factual situation and determining whether, on the whole, the equities weigh in favor of an accounting for profits. Thus, the court should consider the following:

1. The infringer's mental state. The court must consider the infringer's mental state in light of the harm to the trademark owner and to consumers, for particularly culpable defendants should be more likely to be subjected to an award of profits. On the one hand, in addition to willfulness, factors such as recklessness, callous disregard for the plaintiff 's rights, willful blindness, and a specific intent to deceive should be taken into account; on the other, mere negligence, or an innocent nature to the infringement, would argue against an award of profits. Here, defendant Holt knowingly and deliberately sold automotive parts not made by Spindrift but containing Spindrift's trademark, and it continued to do so when Spindrift so notified it. This conduct by Holt was hardly innocent. This factor justifies an award of profits.

2. The connection between the infringer's profits and the infringement. Was the trademark owner harmed by lost or diverted sales due to the infringement (beyond those sales lost by the infringement itself, which would be accounted for by actual damages)? Do the infringer's profits flow directly from, or were they caused by, the infringement? If so, an award of profits would be justified. Were consumers confused by the infringement, in thinking that the trademark owner authorized the infringing acts? Again, this would argue for an award of profits. What is the certainty that the infringer benefited from the infringement? A certain benefit would also argue for an award of profits. Here, Holt sold infringing parts that cost it but 25% of the cost it would have paid for the genuine Spindrift parts. Holt then charged the public the full amount that the genuine parts would have cost. Holt obviously benefited economically from the infringement. Hence, this factor favors an award of profits.

3. The adequacy of other remedies. Will the trademark owner be made whole by other available remedies, such as actual damages and injunctive relief? If so, there would be no basis for an award of profits. Spindrift alleges that the infringing parts are inferior to its genuine parts, and that consumers buying the infringing parts will lose confidence in its products. There is nothing in the factual record to support plaintiff's claim, and so this factor does not justify an award of profits.

4. Equitable defenses. Does the defendant have a claim of equitable defenses such as laches (i.e., unreasonable delay in pursuing a legal remedy) or failure to timely act on the part of the plaintiff, acquiescence by the plaintiff in the infringement, or unclean hands? Such defenses would argue against an award of profits. Here, as soon as Spindrift learned of the sale of the infringing parts, it took action to stop their sale, including filing this lawsuit and seeking and obtaining a preliminary injunction. The defendant has no claim of an equitable defense. Accordingly, this factor justifies an award of profits.

5. The public interest. Is there a public interest in making an award of profits, such as preserving public safety or deterring other infringements? For example, an infringing medicine containing an ingredient that would cause harm to the consumer would raise significant concerns for the public interest. Such a compelling public interest would argue for an award of profits. Such is not the case here. Given the existence of the injunction (which the attached order will make permanent) and the lack of evidence that the infringing parts cause a danger to the public, an award of profits cannot be justified based on this factor.

Having considered all five factors, the court concludes that, while some would not justify an award of profits, on balance, those factors that do justify an award of profits are more significant in this case, and so an award of that portion of the defendant's profits attributable to the infringement of Spindrift's trademark will be made.

[Court's determination of the amount of damages and profits to be awarded omitted.]

February 2023
MEE
Questions

MEE Question 1

One year ago, Joan executed a will in which she left her entire estate to her only daughter. At that time, Joan's daughter, Joan's granddaughter (the only child of Joan's daughter), Joan's only son, and Joan's three grandsons (children of her son) were living. Joan's son and her three grandsons had extensive criminal records for theft and burglary.

Joan was not close to her children and grandchildren. She rarely saw any of them, even on holidays, although she regularly sent them birthday cards and inexpensive presents.

Three years ago, Joan's doctor had prescribed her a drug that was known to produce hallucinations in some patients. Joan had difficulties with the drug and began to experience frequent hallucinations leading to her delusion that the male line of her family was "cursed" by Martians. Nonetheless, she continued taking the drug because it was the only medication available to control her medical condition.

When she went to her lawyer to draft her will, she told her lawyer that she wanted to leave all her property to her daughter and nothing to her male line. She explained, "Leaving the males in my family anything valuable would be a complete waste on burglars and thieves."

For the last five years, Joan had regularly had lunch with several friends. All of them were much wealthier than Joan. At these lunches, she often told her friends that she was a "multimillionaire" and owned both a "luxurious" home and a "very expensive" car. They had no reason to doubt Joan's claims because she had never invited them to her home and she took cabs to their lunches. In fact, Joan was never a millionaire, and she never owned either a luxurious home or an expensive automobile. She lived in a modest apartment, and her primary source of income was her Social Security benefits. She monitored her bank account regularly and reconciled her bank statement every month.

One month ago, Joan died, survived by her daughter, her granddaughter, her son, and her three grandsons. At her death, Joan owned no significant assets other than her bank account containing $100,000.

1. Under the insane-delusion rule, is Joan's will invalid? Explain.

2. Do these facts establish that Joan's will is invalid because she lacked the general mental capacity to execute a will? Explain.

3. Which, if any, of Joan's surviving relatives has standing to contest Joan's will? Explain.

MEE Question 2

Homeowner ordered a pizza to be delivered to his house for lunch. When the pizza delivery driver (Driver) arrived, Homeowner invited him to step inside while Homeowner retrieved his wallet.

A minute later, two police officers arrived at Homeowner's house to execute a valid warrant to search the house for counterfeit $100 bills. Although the warrant did not explicitly authorize a "no-knock" entry, the officers kicked open Homeowner's front door and entered the house without knocking and without announcing their identity and purpose.

One officer detained Homeowner and Driver in the hall near the front door while the second officer began to search the house. The first officer saw a lump in the back pocket of Driver's pants, which she thought could be a handgun. Concerned that Driver might harm her if he had access to a handgun, the officer decided to pat him down. While patting him down, the officer discovered that the lump was not a weapon but a soft object. She could not determine what the object was by patting the outside of Driver's pants, so she reached into his pants pocket and retrieved a plastic bag containing marijuana. Possession of marijuana is a crime in the state. The officer seized the bag of marijuana.

Meanwhile, the second officer, who was searching the house, noticed a desktop computer sitting on Homeowner's kitchen counter. The officer saw a serial number visible on the top of the computer, and she discovered, through a quick search using a law-enforcement app on her cell phone, that the serial number appeared on a list of serial numbers of recently stolen computer equipment. She seized the computer.

In Homeowner's bedroom, on a nightstand next to the bed, the second officer found a two-inch-tall, unlabeled, transparent medicine bottle that contained several pills with no markings on them. She seized the bottle and the pills. Later testing by the police crime lab showed that the pills were illegal narcotics. The second officer completed her search of the house without finding any counterfeit money.

The officers arrested Homeowner and Driver, and the state prosecuted them based upon the items seized in the search. Homeowner and Driver challenged the admission of evidence based only on rights protected by the United States Constitution. Neither Homeowner nor Driver has raised any constitutional objections to their brief detention during the search.

1. Should the officers' entry into the house result in the exclusion of evidence? Explain.

2. Assuming that the officers' entry into the house does not result in the exclusion of evidence, should the following conduct result in the exclusion of evidence?

   (a) the officer's seizure of the marijuana from Driver

   (b) the officer's seizure of the computer from Homeowner

   (c) the officer's seizure of the narcotics from Homeowner

   Explain.

MEE Question 3

Big City, in State A, and Small Town, in State B, are located 10 miles apart.

A woman and a man were driving in State B when their cars collided with each other. The collision seriously injured the man. Shortly after the collision, the man sued the woman in the federal district court for the District of State B, properly invoking the court's diversity jurisdiction. The woman is a citizen of State A; the man is a citizen of State B. The man's complaint sought damages of $250,000 and alleged that the woman's negligent driving had caused the accident and his injuries.

The woman immediately contacted her automobile insurance company to notify it about the lawsuit and to ask the company to provide an attorney to represent her in the action and to indemnify her against any liability, as required by the terms of the insurance policy. The insurance company, however, refused to provide an attorney. The insurance company also told the woman that because she had not paid her premiums for several months before the accident, her policy had lapsed and therefore did not cover the accident. The woman insisted that she was current on her payments and that the policy should still be in effect.

The woman then went to the clerk's office for the federal district court for the District of State B, which is located in Small Town. She timely filed an answer to the man's complaint. She simultaneously timely filed a complaint against the insurance company, naming it as a "third-party defendant" in the action pending against her in that court and alleging that the insurance company was obligated under the insurance policy to defend her in the man's suit and to indemnify her if she was found liable to the man. She also obtained from the clerk of court a summons to the insurance company requiring the company to file an answer to the woman's complaint or be subject to a default judgment. She then returned to State A, where she hired a process server. Ten days later, the process server personally delivered the summons and complaint to the president of the insurance company at its headquarters in Big City, State A.

The insurance company does no business in State B and has no facilities in State B.

The insurance company moved to dismiss the complaint against it. The district court granted the motion, ruling that (a) the insurance company "cannot be joined to the suit as a third-party defendant because its presence is unnecessary to resolve the dispute" between the man and the woman and (b) "the court lacks personal jurisdiction over the insurance company because the company lacks sufficient contacts with State B."

1. Do the Federal Rules of Civil Procedure permit the woman to bring the company into the action as a third-party defendant? Explain.

2. Assuming that the Federal Rules of Civil Procedure permit the woman to bring the company into the action, does the court have personal jurisdiction over the company, despite the company's lack of contacts with State B? Explain.

3. Under the Federal Rules of Civil Procedure, what actions, if any, could be taken by the district court to allow the woman to immediately appeal the court's dismissal of her complaint against the insurance company? Should the court take those actions? Explain.

MEE Question 4

Shortly after passing the State X bar examination and being admitted to the bar, a lawyer decided to open her own practice as a sole proprietorship in State X, which is her principal residence. The lawyer wanted a couch for her new office's waiting room and went to a furniture store in State X where she found a couch that she liked. She asked if she could buy the couch on credit, saying, "This is for the waiting room of my new law office." The salesperson responded that the store would sell the couch to her on credit if her obligation to pay was secured by the couch. The lawyer agreed and bought the couch on those terms.

As part of the sale, both the lawyer and the salesperson (who had authority to sign on behalf of the store) signed a "Credit Sales Agreement" that stated that the lawyer granted the store a security interest in the couch (described in the agreement by manufacturer and model number) to secure the lawyer's obligation to pay the purchase price.

On her way out of the store, the lawyer saw a table that she thought would be ideal for her home. She asked the salesperson if she could buy the table on credit, saying, "This would look great in my dining room." This time, the salesperson said, "This is a popular model, so we have a special financing deal. You can get the table on credit and have it delivered tomorrow, but we retain title to the table until you finish paying for it. Does that work for you?" The lawyer said that it worked for her and bought the table on the terms outlined by the salesperson. She signed an agreement that described the table by manufacturer and model number and that stated that the store would retain title to the table until she finished paying for it.

The next day, the store delivered the couch to the lawyer's office and delivered the table to the lawyer's home.

The furniture store in State X did not file a financing statement with respect to either the couch transaction or the table transaction.

Six months later, the lawyer passed the bar examination in State Y, where her parents had a home at which she stayed for a few weeks each year. After being admitted to the State Y bar, the lawyer decided that she wanted to be able to represent clients in State Y while she was staying at her parents' home. The lawyer decided to furnish a room in her parents' home as an office and to buy a desk for the office.

She went to a furniture store in State Y and agreed to buy a desk on credit, with her payment obligation secured by a security interest in the desk. She signed an agreement granting the store a security interest in the desk (described in the agreement by manufacturer and model number). The store immediately filed a financing statement in the State Y central filing office for financing statements. The financing statement listed the lawyer as the debtor, named the furniture store as the secured party, and indicated the desk (described by manufacturer and model number) as the collateral.

The store delivered the desk to the lawyer's State Y office the next day. The desk was used by the lawyer only in conjunction with her law practice.

At all relevant times, the lawyer's principal residence was in State X.

1. Does the State X furniture store have an enforceable and perfected security interest in the couch used by the lawyer in her office waiting room in State X? Explain.

2. Does the State X furniture store have an enforceable and perfected security interest in the table used by the lawyer in her dining room in State X? Explain.

3. Does the State Y furniture store have an enforceable and perfected security interest in the desk used by the lawyer in her office in State Y? Explain.

MEE Question 5

In 1901, Smith owned a three-acre undeveloped parcel of land in State A. He validly subdivided the parcel into two lots. Both undeveloped lots remained in the Smith family until 2005, when John purchased the lot that comprised the western two acres and Beth purchased the lot that comprised the eastern one acre. Both John and Beth promptly recorded their valid deeds.

In 2009, one of Smith's descendants purported to convey to Wendy by quitclaim deed the entire three-acre parcel that had originally belonged to Smith. The quitclaim deed accurately described the three-acre parcel.

On January 1, 2010, Wendy began to occupy one acre of the three-acre parcel purportedly conveyed to her in 2009, specifically, one acre of John's two-acre lot.

In 2016, John died, survived by Mary, his 12-year-old daughter and sole heir.

On March 1, 2022, Wendy brought a quiet-title action against Mary and Beth, alleging ownership of all three acres by adverse possession.

For the purpose of the action, and to avoid confusion, the trial court labeled each acre of the original three-acre parcel as follows:

> the "Western Acre" (which is the western half of the land described in John's deed);
> the "Central Acre" (which is the other half of the land described in John's deed and which Wendy occupied); and
> the "Eastern Acre" (which is the land described in Beth's deed).

The facts at trial established that (1) the quitclaim deed from Smith's descendant gave Wendy colorable title to the three-acre parcel described in that deed; (2) from 2010 until the end of 2021, Wendy possessed the Central Acre in a manner that was actual, open and notorious, continuous, exclusive, and hostile and under claim of right; (3) Wendy ceased her actual possession of the Central Acre on January 1, 2022; and (4) neither the Western Acre nor the Eastern Acre had ever been possessed by any of its owners or by Wendy.

The state's adverse-possession law provides:

> An action to recover title to or possession of real property shall be brought within 10 years after the cause of action accrues. However, if at the time the cause of action accrues, the person entitled to bring that action is under 18 years of age, such person, after the expiration of 10 years from the time the cause of action accrues, may bring the action to recover title or possession within five years after reaching the age of 18.

1. In 2020, did Wendy acquire title by adverse possession to the Central Acre? Explain.

2. Assuming that Wendy acquired title by adverse possession to the Central Acre in 2020,

   (a) did she also acquire title to the Western Acre in that year? Explain.

   (b) did she also acquire title to the Eastern Acre in that year? Explain.

MEE Question 6

A woman (Plaintiff) has filed a civil action in the federal district court for State A against her former landlord (Defendant) seeking damages under State A law for invasion of privacy, which in State A requires a finding of intent. The federal court has diversity jurisdiction over the suit and personal jurisdiction over Defendant.

Plaintiff's complaint alleges the following facts:

> 1. While Plaintiff was a college student, she rented an apartment in a building owned and managed by Defendant.
>
> 2. One day, as Plaintiff dressed after showering, she saw a gleam of light through a small hole in a wall of her bathroom. Then she saw an eye looking through the small hole from the other side. She put on her bathrobe and ran from her apartment into the hall of her apartment building, where she saw Defendant leaving a utility closet that shared a wall with her bathroom. Plaintiff accused Defendant of peeking at her from inside the closet.
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> 3. Defendant first told Plaintiff that he had been in the closet "just to put things away" and then said that he would evict her from her apartment if she told anyone "what happened."

Defendant's answer admits the allegations in paragraph 1 but denies the allegations in paragraphs 2 and 3. Defendant's answer alleges that he was inside the closet inspecting a water heater and that, at the time of the incident, he had not known that the hole in the wall existed or looked through it.

The parties have filed pretrial motions to exclude evidence.

Defendant seeks to exclude from evidence statements that he made in court when pleading guilty to a criminal voyeurism charge that was based on the same facts alleged in Plaintiff's complaint. Under questioning by the judge, Defendant admitted that he knew about the hole in the closet and that he had repeatedly used it to spy on Plaintiff while she was dressing. Although Defendant initially pled guilty to the criminal voyeurism charges, he later withdrew his guilty plea. The criminal case against Defendant is still pending.

Defendant also seeks to exclude from evidence deposition testimony of a man who previously rented the same apartment as Plaintiff. The man stated in a deposition taken by Plaintiff that he once confronted Defendant "about the utility closet and his perversion" when he caught Defendant watching him under circumstances nearly identical to those described in Plaintiff's complaint. Defendant and his attorney were present at the man's deposition and had an opportunity to examine him. The man currently lives and works in a jurisdiction hundreds of miles from State A, and he has refused to attend the trial and testify in person despite extensive efforts by Plaintiff to convince him to do so.

Plaintiff plans to testify at the trial. She is now in graduate school. She seeks to exclude any evidence, including testimony, that she plagiarized her college senior thesis and lied about the plagiarism on her recent graduate school application.

How should the court rule on the motion to exclude each of the following?

1. The admissions of Defendant made in connection with the guilty plea he later withdrew. Explain.

2. The deposition testimony of the man who stated that Defendant watched him under similar circumstances to those alleged by Plaintiff. Explain.

3. Evidence that Plaintiff plagiarized her senior thesis in college and lied about it on her graduate school application. Explain.