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.

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.

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.