July 2023

Ohio Bar Examination

Multistate Essay Examination
Questions & Selected Answers

Multistate Performance Test
Summaries & Selected Answers

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THE SUPREME COURT OF THE STATE OF OHIO

OHIO BAR EXAMINATION

The July 2023 Ohio Bar Examination contained 6 Multistate Essay Examination (MEE) questions. Applicants were given three hours to answer a set of 6 essay questions. These essays were prepared by the National Conference of Bar Examiners (NCBE).

The exam also contained two Multistate Performance Test (MPT) items. These items were prepared by the NCBE. Applicants were given three hours to answer both MPT items.

The following pages contain the NCBE's summary of the MEE questions given during the July 2023 bar exam, along with the NCBE's summary of the MPT items given on the exam. This booklet also contains actual applicant answers to the essay and MPT questions.

The essay and MPT answers published in this booklet merely illustrate above average performance by their authors and, therefore, are not necessarily complete or correct in every respect. They were written by applicants who passed the exam and have consented to the publication of their answers. See Gov. Bar R. I, Sec. 5(C). The answers selected for publication have been transcribed as written by the applicants. To facilitate review of the answers, the bar examiners may have made minor changes in spelling, punctuation, and grammar to some of the answers.

Copies of the complete July 2023 MPT and its corresponding point sheet are available from the NCBE. Please check the NCBE's web site at www.ncbex.org for information about ordering.


THE SUPREME COURT OF THE STATE OF OHIO

Question 1

QUESTION

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.

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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

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ANSWER

1. Under tort law, for negligence to be proven by the wife, she must establish that the farmer owed her a duty, that duty owed was breached, that the claimed negligent party (the farmer) was the actual and proximate cause of her injury, and that damages resulted. The wife would have to show that the GS gas used by the farmer is not only capable of causing harm in humans, but she must also be able to prove that the farmer acted negligent in his handling, administration, or in his duties in applying the pesticide. Here, the farmer owes the wife a duty to plant his crops and use the GS gas in a manner that is reasonable and consistent with other famers. The farmer has attended the department's safety seminars and has been applying the GS gas to his fields in accordance with the application safety and recommendations presented in that seminar for the past two years. There is no indication that he has breached his duty of care owed to the wife in the current use or application of the pesticide.

If the court should find that the duty was breached or that the farmer was using a dangerous chemical and thus a higher standard was owed, the wife would still not be able to show that that the farmer was the actual or proximate cause of her cancer diagnosis. Here, although the wife believes that GS caused her cancer diagnosis, no study has definitively linked GS gas exposure to cancer in humans. While studies have shown a link in mice, this is not a similarity that would likely be able to establish causation. Actual cause must be shown as: "but for" the use of the GS gas then the woman would not have cancer. In the town, cancer rates are consistent with the states rates, where GS gas is not used. Therefore, as there is no evidence that the farmer was negligent and no causation linking the wife's cancer to the farmer, she will not likely prevail.

2. Trespass claims are proven by showing that a party entered or caused something else to enter onto the land of another voluntarily. For trespass, the entry does not need to be physical and particles entering onto the land of another would constitute a trespass. For the husband to prove his trespass claim, he must show that the particles, or "drift" of the GS gas that rose above the soil after application into the ground, entered his land. Further, he must show that the drift, as it is so highly toxic from even minimal exposure, is the "but for" and proximate cause of his serious respiratory problems. In the county where the husband lives, reports of severe respiratory problems have increased by 50% since the department lifted the ban on GS gas. The rate is now higher during the planting season- well above the rate of other counties in the state at the same time of year. The husband's house is less than one mile from several points where the GS gas has been applied, and the facts have shown that after two weeks more than 90% of the gas will have risen from the soil into the air. The gas in the air will likely drift onto other properties via wind, especially those that are less than one mile away. Therefore, there is a greater likelihood that the husband will be able to establish his trespass claim.

3. An award of a permanent injunction to prevent the farmer from being able to continue the use of GS gas will require a balancing test between the provided utility of what the famer is able to produce and the harm that is resulting. The courts will usually look at many factors, such as the availability of alternatives; the value of the production by the farmer; the potential risk of the harm; the cost to move operations; or the possibility of reducing/lessening

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the harmful act via other means. Essentially, the farmer will likely be able to continue if he can show the benefit created by the farmer is not outweighed by the harm it creates. Here, the health department specifically lifted the ban as the crops were difficult to grow without effective pesticides and other alternatives were no longer available. There was also a lack of viable substitute crops, a lack of other pesticides on the market, and the estimated crop loss if GS gas was not allowed would be over $500 million annually. The alternative here is the risk to the health and safety of those in the county. However, this was already weighed when the ban was lifted, and it was deemed permissible due to the low population density in the county. Thus, it is unlikely that the court will issue an injunction and enjoin the farmer from using GS gas.


THE SUPREME COURT OF THE STATE OF OHIO

Question 2

QUESTION

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.

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ANSWER

1. Parent is not liable to VanCo as a partner of Sub. The issue is whether Parent and Sub are partners because partners are personally liable for the debts of the partnership. A partnership is two or more persons carrying on as co-owners of a business for profit. A person need not be a natural person, that is, a joint venture between businesses can be a partnership. There are limited-liability forms of partnership, but in cases like this, in which the alleged partnership is unregistered, that is not at issue. Whether a venture is a partnership depends on a consideration of various factors, most significantly being the sharing of profits and losses, but also the level of involvement in the business, the manner in which the business' property is held, and also whether the business holds itself out as a partnership. In this case, there are factors that pull each way. In favor of partnership: the businesses work closely together, sharing personnel and coordinating production. However, the balance of the factors counsels against finding a partnership. Although the businesses work closely together, that does not make a partnership. There is no sharing of profits or the costs associated with the staff that contribute to Sub. Rather, all profits accrue to Parent, which is the expected arrangement in a parent subsidiary relationship. Furthermore, Parent exercises managerial control over Sub in selecting its manager rather than the collaborative dynamic suggested by partnership.

2. Parent is not bound by the agreement between Sub and VanCo signed by Greta, Parent's manager. The issue is whether Greta had authority as an agent of Parent to bind Parent in that transaction. Agency is the agreement between parties that one will act on behalf of and subject to the control of another. When agents contract on behalf of a principal, they can bind the principal when they act with authority. That authority can be actual or apparent. In this case, Greta was purporting to act as an agent of Sub, that is how she signed her name. She had actual express authority to do that from Sub's manager. As such, Sub is bound, but that does not resolve Parent's involvement. Greta did not purport to bind Parent, nor did she have authority, express or implied, to do so. Apparent authority, in contrast with actual authority, is based on the representations of the principal to the third party; whereas actual authority is about the representations of the principal to the agent. Here, there is no evidence that VanCo knew that Greta had any connection to Parent. She was at Sub's office and signed "as agent of Sub." This would perhaps be different if VanCo were aware of Greta's employment by Parent and relied on that. There are also avenues for liability under inherent agency power, e.g., respondent superior. Greta is an employee of Parent and this was arguably in the scope of her employment, but given that she was explicitly acting on behalf of Sub and represented herself as such, there should be no respondent superior liability.

3. Parent and Sub's corporate structure should not be disregarded to find liability for Sub's obligations. The issue is whether the "corporate veil," or in this case, the LLC veil, should be pierced. LLCs are limited liability companies, which means that their members are not personally liable for their debts. As such, Parent is not liable, as member, for Sub's debts. Piercing the LLC veil would disregard that corporate form and hold the members directly liable. This is proper only in cases where the corporate or LLC form is being abused. That includes cases in which the LLC is really an alter ego of another business, or the LLC is being used to avoid previously accrued liabilities.

Courts often consider whether corporate formalities are being satisfied, e.g., board meetings and minutes, though that is less appliable to a member managed LLC. Here, the course of conduct does not suggest that Sub is merely an alter ego of Parent. Sub has a distinct line of business, manufacturing shoes from the plastic it buys from Parent. Sub has its own management team, and though chosen by Parent, that is not unusual for the sole member of an LLC. Sub also did cease distributing profits to Parent when it experienced financial difficulties, which is consistent with its responsible management as an independent entity rather than a mere instrumentality of Parent. There is also less of a tendency to pierce the corporate veil in cases involving contract as opposed to tort.

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Question 3

QUESTION

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.

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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.

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ANSWER

1. Termination with consent.

The first issue is whether termination of the trust would be a material purpose of the trust.

Under State A Trust Code, a trust may be terminated upon the consent of all beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. If agreed upon, the trustee will distribute the trust property as agreed by the beneficiaries. Additionally, a spendthrift provision in the trust is not presumed to constitute a material purpose for the trust.

Here, the beneficiaries to the trust are Tom's wife, Betty, and Tom's estranged daughter. In his trust he states that Betty gave him a wonderful marriage, that she is the love of his life, and that the primary purpose of the trust is to ensure her care and support for the remainder of her life. He additionally leaves the remainder of the trust assets to his daughter after Betty's death, but that is done so the trust will not escheat to the state. Tom does not seem to want to grant the remainder of the trust to his daughter, but it is his only relative, so he chose that over giving it to the state. Because the spendthrift provision in section (4) of the trust is not a material purpose of the trust and because both the daughter and Betty, the sole beneficiaries to the trust, consent to its termination, the only question is whether a material purpose of the trust will be violated by selecting annuity A. Considering the main purpose of the trust is to provide for his wife Betty, and that his daughter is seemingly an afterthought to prevent escheatment to the state, it is likely that no material purpose is violated. Betty now has health problems, is in a nursing home, and the fees have dramatically increased in ways Tom would not have anticipated. Betty can no longer afford the current or likely future nursing home fees, and the purpose of the Trust was to provide for her care and support for the rest of her life.

Therefore, terminating the trust and investing in Annuity A would not violate a material purpose of the trust because it will continue the material purpose of the trust- to provide for Betty during her life, which the trust no longer accomplishes, and will prevent escheatment because the rest of the funds will have gone to the annuity and not the state.

2. Termination without consent by court.

The next issue is whether the interests of a beneficiary who has not consented would be appropriately protected in accordance with the testator's probable intention.

Under State A Trust Code, if not all the beneficiaries of the trust consent, the court may still approve of the termination of the trust if the trust could have been terminated if all beneficiaries consented, and the interests of a beneficiary who does not consent can be appropriately protected in accordance with the testator's probable intention.

Here, the daughter does not consent to the termination of the trust. As discussed previously, if all beneficiaries had consented, the trust could be terminated under Section 1 of State A Trust Code. However, we must now determine if the Court could grant the termination of the trust and the purchase of Annuity B without the consent of the daughter. It is clear that the

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purchase of Annuity B would protect the interests of Betty in accordance with the testator's intent to provide for Betty for life. However, it is not entirely clear that it would protect the daughter's interest in accordance with the testator's intent. Here, daughter has an interest in the remainder of the trust property so that the trust property does not escheat to the state. Under Annuity B, the daughter would still be provided a cash payment at Betty's death, but that payment would be substantially less than the amount the daughter would receive under the trust. However, the testator's probable intention of granting the remainder to his daughter was so that the remaining trust property did not escheat to the state. Given that the termination of the trust for Annuity B would provide for the testator's intent of providing for his wife, and that it would also provide his intent of preventing the estate from escheating to the state while also giving his estranged daughter some money, it is likely that the court would approve of the trust termination.

Therefore, the court may authorize the trustee to terminate the trust and purchase Annuity B.

3. Modification of the trust by court.

The third issue is whether this modification would be in accordance with the testator's probable intention.

Under State A Trust Code, Section 5, a court may modify the terms of a trust due to circumstances not anticipated by the testator if it would further the primary purpose of the trust. This modification must be made in accordance with the testator's probable intention.

Here, the testator did not have the ability to anticipate the circumstances. Tom did not know that Betty would develop a health problem and be required to go into a nursing facility. Additionally, Tom did not anticipate that nursing home fees would dramatically increase and that Betty would no longer be able to afford the current and future nursing home fees. Additionally, a modification allowing the trustee to pay 100% of the trust income would further the primary purpose of the trust. The primary purpose of the trust is to care for Betty and the trust is no longer providing the care and support she needs to continue living in the nursing home. Additionally, the modification would be made in accordance with the testator's probable intention because it would provide for his wife Betty as he wished and would still leave money to his daughter and prevent the trust residuary from escheating to the state.

Therefore, the court may authorize the trustee to pay 100% of the trust income to Betty.


THE SUPREME COURT OF THE STATE OF OHIO

Question 4

QUESTION

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.

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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.

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ANSWER

1. Whether Tech properly raised the statute of limitations defense

Under Federal Rule of Civil Procedure (FRCP) 12(b), a party can move to have the case dismissed based on the fact that the claim was not asserted within the applicable statute of limitations. This defense must be asserted in either a pre-answer motion or in the answer, otherwise it is waived. Here, the contract is governed by State A law. State A's statute of limitations for a breach of contract is four years. Diner filed its complaint on January 4, 2023, claiming that Tech breached the contract on December 1, 2018. Even if the breach occurred on December 1, 2018 – the latest possible date asserted by either of the parties–the statute of limitations had expired by January 4, 2023. However, Tech waived this defense when it failed to raise it in its answer and did not file a pre-answer motion. Therefore, Tech did not properly raise the statute of limitations defense.

2. How the court should resolve the motions for summary judgment on the issue of breach of contract

Under the FRCP, a motion for summary judgment can be granted only if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. A party is entitled to judgment as a matter of law when no reasonable minds could find in the alternative. The court must weigh the evidence in the light most favorable to the non-moving party but cannot weigh the credibility of the evidence.

Here, there are two main issues raised regarding the breach of contract. The first issue is how the court should rule on the date of the breach. When a defendant admits an allegation in a complaint, the admission is binding on the defendant and is treated as if the defendant adopted that statement as its own. Here, the parties disagree on the date of the breach. Tech admitted Paragraph 5 of the complaint, which states that Tech delivered the software that did not enable Diner's computers to recognize all the items on the menu on November 30, 2018. However, whether the breach occurred at this time or later on December 1 is immaterial. If the court reaches the issue of breach, it means it will have resolved the issue of statute of limitations in favor of Diner. Thus, even though Tech and Diner genuinely dispute the date, the date of breach is insignificant. Even if it were material, reasonable minds could disagree about whether the breach occurred on the date of delivery or on the date when Tech refused to cure. Because the court must weigh the evidence in the light most favorable to Diner, it should deny Tech's motion for summary judgment and grant Diner's cross-motion for summary judgment on the issue of the date of breach.

The second issue raised in the motion for summary judgment is whether the contract itself included a requirement to provide voice recognition software for all of Diner's menu or just combination meals identified by number. Tech provides a sworn affidavit of its president in support of its position of the latter argument; meanwhile, Diner offers sworn testimony of eight witnesses, including two Tech employees, who support its position of the former argument. Despite the fact that Diner offers more witnesses and potentially more credible witnesses given that it offers the testimony of two Tech employees who are testifying against their interests, the court cannot decide the issue based on the credibility of the evidence. Both parties provided some

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evidence to support their positions, and the essential terms of the contract are material to the issue of whether Tech breached the contract. Therefore, the court must deny Tech's motion for summary judgment on the terms of the contract and also deny Diner's cross-motion because there is a genuine dispute of material fact that must be decided by a jury.

3. What action(s), if any, the court should take sua sponte

The court should dismiss the case for lack of subject matter jurisdiction. A court cannot hear a case without subject matter jurisdiction and can act on its own initiative to dismiss a case if there is no valid basis for it. A federal court has subject matter jurisdiction in two ways: federal question and diversity.

A court has federal question jurisdiction if the case raises issues of federal law. Here, the claim raises issues of contract law, which is a matter of state law. Because there are no federal claims, there is no federal question jurisdiction.

A court has diversity jurisdiction if the plaintiff is completely diverse from all defendants. A corporation is a citizen of every state in which it is incorporated and the one state of its principal place of business. Here, Diner is a citizen of State C, where it is incorporated, and State A, its principal place of business. Tech is a citizen of State D, where it is incorporated, and State A, its principal place of business. Because Diner and Tech are both citizens of State A, there is not complete diversity. Therefore, with lack of diversity and lack of federal question jurisdiction, the federal court in State A does not have subject matter jurisdiction and should dismiss the case for Diner to pursue in state court.


THE SUPREME COURT OF THE STATE OF OHIO

Question 5

QUESTION

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.

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ANSWER

1. (a) Does Supplier have an enforceable security interest?

In order for a security interest to become enforceable (attach), three things must occur: (1) the debtor has rights in the collateral; (2) the secured party gives value to the debtor (extends credit, etc.); and (3) either the secured party has possession of the collateral or there is an authenticated (signed) security agreement with a sufficient description of the collateral. The security interest attaches once all three of these requirements are met. A sale of goods including a retention of title merely creates a purchase-money security interest in those goods.

Here, on February 1st, Supplier sold the machine to Company on credit, along with a retention of title. The retention of title created a purchase money security interest in the machine. Company, at that time, obtained rights in the collateral in the form of possession. Supplier extended credit to Company, which constitutes giving value. In addition, the parties both signed a writing that noted the retention of title to the machine, which constitutes an authenticated security agreement. Thus, all three requirements were met, and Supplier had an attached security interest as of February 1.

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

For there to be a sufficient description of collateral in a security agreement, the collateral must be described to sufficiently identify it. While this can be done by listing a category of collateral (i.e. "inventory" or "equipment"), a supergeneric description such as "all personal property" is insufficient identification to support a valid security agreement even though it is a sufficient description for a financing statement.

Here, Lender gave value to Company by lending it $1,000,000. Company, still with possession of the machine, had rights in the collateral. However, while the security agreement was signed by both parties, it listed the collateral as "all of Company's personal property." This is an insufficient description of collateral to create a valid security agreement. As a result, Lender failed to create an enforceable security interest in the goods, and will thus be treated as a general unsecured creditor with no specific enforceable interest in the machine or any other collateral.

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

A description of collateral in a security agreement is valid if it describes collateral by a category, like equipment. Equipment is a catch-all for tangible goods that are not consumer goods (used for personal, non-business use), inventory (goods held for sale or works in process/raw materials) or farm products. A description of collateral may specify that it includes after-acquired property.

Here, BigBank loaned Company $750,000 on April 3, thereby giving value. Company still had possession of the machine, meaning it had rights in the collateral. In addition, the parties signed a security agreement listing collateral as "all of Company's present and future-acquired equipment." This was a valid description, as it used a category of collateral and validly included after-acquired property. The machine, since it was used for business purposes, rather than for sale or personal use, constituted equipment. Thus, BigBank had an enforceable security interest in the machine as of April 3.

2. Who has priority?

To determine priority, we must determine whether the interests were perfected or not.

A. Perfection of Supplier's purchase-money security interest

A purchase money security interest (PMSI) exists when the secured party's extension of credit/lending of money allows the debtor to acquire rights in the collateral. A PMSI in equipment has priority over even prior-perfected security interests; however, the PMSI must be perfected (typically by filing a financing statement in the appropriate state office) within 21 days of attachment. If this does not occur, the PMSI becomes unperfected and is deemed never to have been perfected.

Here, Supplier's lending of money allowed Company to obtain possession of the collateral, meaning it had a PMSI in the machine. However, Supplier did not then file a financing statement regarding its interest in the machine. As a result, after 21 days passed, Supplier's interest became unperfected. Thus, Supplier has only an unperfected security interest.

B. Perfection of Lender's interest

Lender does not have a security interest to perfect. The fact that it filed a financing statement regarding its claimed interest is irrelevant. Thus, Lender remains an unsecured creditor.

C. Perfection of BigBank's Interest

BigBank filed a proper financing statement regarding its interest in current and after-acquired equipment on May 4 in the proper office. Thus, BigBank's interest became perfected as of May 4.

D. Order of Priority

In general, a perfected security interest has priority over an unperfected security interest, even if it is a PMSI. Also, an unperfected security interest has priority over general unsecured creditors.

Here, as BigBank has a perfected security interest, its interest will take first priority over Supplier's unperfected security interest. In addition, Supplier's unperfected security interest will take second priority, with Lender, as an unsecured creditor, taking whatever is left over, if anything.

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Question 6

QUESTION

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."

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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.

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ANSWER

1. The court should reject Adam's motion to suppress his incriminating statement; it was not obtained in violation of *Miranda* because he was not in custody.

For there to be a *Miranda* violation, a defendant must be (1) in custody and (2) subject to interrogation. Custody arises in situations like that of a station-house arrest (e.g., when there is no freedom to leave); custody does not arise when a person is pulled over for a traffic violation. Interrogation includes questioning by police as well as any statements likely to (or reasonably expected to) elicit an incriminating statement from the defendant.

Here, the four men were pulled over for driving illegally without headlights. The fact that this was a mere pretext and that the officers intended to investigate the recent burglary does not matter– it was a valid stop. Likewise, the pat down of Adam (because the officer saw a bulge) was valid because it likely constitutes a reasonable articulable suspicion that he was armed. The fourth amendment, however, is not the basis for Adam's claims; nevertheless, the statement is not subject to the exclusionary rule as fruit of a poisonous tree.

During the stop, Officer One asked Adam to exit the vehicle, which is constitutionally permitted. Officer One also said: "You're not free to leave now, but you will be as soon as I finish ticketing you . . . and verify that your license is valid." While perhaps Adam was not free to leave, this does not rise to the level of a station-house stop, so it does not rise to the level of custody. Adam expected to be released soon (if he complied with Officer One's directives), so he was not in custody, despite Officer One's intent to arrest him later.

If Adam was in custody, "We'll release you in a few minutes whether or not you answer questions. I'm just curious where you guys were tonight" would be likely to elicit an incriminating response. It would be reasonable for Adam to think he was not the subject of an investigation and would be free to say something, even if it harmed his interest, which would qualify as an interrogation. However, because he was not in custody, this is irrelevant to the conclusion the court should reach: that the statement is admissible and was not obtained in violation of *Miranda*.

2. The court should reject Ben's motion to suppress his incriminating statement because he was not subject to an interrogation, although the phrasing of his *Miranda* rights would likely constitute a violation.

Under *Miranda*, a person who is arrested must be notified of four rights: (1) the right to remain silent; (2) notice that anything said can be used against them; (3) the right to an attorney; and (4) if they cannot afford an attorney, one will be provided for them. There is no strict linguistic requirement, but these four must be communicated to the defendant in such a way that they can understand the rights. For there to be a valid waiver, a defendant must do so knowingly, voluntarily, and intelligently.

Here, Ben was in custody (he was arrested and at the station house, see Part 1 above). It is less clear that he was subject to an interrogation–it appears that Officer Two had not asked any questions yet besides, "Do you understand?" regarding the *Miranda* rights. All Officer Two said was: "I need to tell you that you have all the rights the Constitution gives you, along with any *Miranda*

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rights you might have. Do you understand?" From this statement alone, Ben could not have understood either (1) what his rights were or (2) that his *Miranda* rights are in fact guaranteed by the constitution. Ben, however, also could not have reasonably believed that Officer Two was actually interrogating him about his activity (because the question was not directed at understanding his activity); likewise Officer Two could not reasonably expect, "Do you understand?" to elicit an incriminating response because it was solely about *Miranda*. Because Ben was not subject to interrogation, his *Miranda* rights were not violated.

However, if, "Do you understand?" could be construed as interrogatory, Ben's subsequent statement ("to avoid prison, I'll admit that me and my buddies broke into the pharmacy a few weeks ago") could not be admitted because his *Miranda* rights were not clearly listed or enumerated, as required by *Miranda*. This would constitute a *Miranda* violation, but this result is unlikely. Therefore, because Ben was interrogated, Ben's incriminating statement should be admitted.

3. The court should reject Carl's motion to suppress his incriminating statement- it was not obtained in violation of *Miranda* because he waived his right.

Invoking the right to silence must be unambiguous under *Miranda*. It must also be done in a knowing, voluntary, and intelligent way.

Here, Carl was in custody (he was arrested and at the station house, see Part 1 above) and he was subject to interrogation for two hours (during which the police questioned him). Before such questioning, however, Officer Three read Carl all four of his *Miranda* rights ("You have the right to remain silent. Anything you can say 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."), and gave him a written copy. Even if Carl was illiterate– and no facts indicate this is so or that the officer had reason to believe so– he was sufficiently read his rights and so could voluntarily, knowingly, and intelligently waive his rights because they were clearly communicated to him in a way that he could reasonably understand.

Officer Three then interrogated Carl for two hours, during which Carl remained silent. Asserting the right to silence, however, must be unambiguously done, and merely staying silent (even for two hours) is insufficient to invoke the right. Moreover, Officer Three said he was not assuming that Carl was asserting his right, thereby putting Carl on notice that his silence was insufficient to assert his *Miranda* right. On the one hand, this may indicate that Carl thought he was no longer entitled to assert such a right, but this is an unlikely conclusion because there were no intervening events that would cause Carl to forget that he had those rights, which were recently read to him. Carl's subsequent statement ("OK. I was there two weeks ago, but I was only sort of a lookout") was a valid waiver of the right to silence. Carl had not asserted the right, which would require that his right be scrupulously honored, and so he was still capable of waiving it when he spoke two hours later. Because he effectively waived his right, Carl's statement should be admitted.

4. The court should reject Dillon's motion to suppress his incriminating statement because it was not obtained in violation of *Miranda*; *Miranda* permits interrogations by unidentified cellmate informants.

Miranda permits the use of cellmate informants. This is different from the sixth amendment right to counsel, which attaches once a person is charged and is not at issue here, because the sixth amendment does not permit the use of unidentified police agents to interrogate an accused. If cellmates had to identify themselves as working for the police, their usefulness would be completely undermined.

Here, Dillon was in custody (he was arrested and at the county jail, see Part 1 above) and he was subject to interrogation by Cellmate during the three hours they were together (although it is unclear that the interrogation actually lasted that long). Cellmate induced Dillon to "brag that he broke into the pharmacy two weeks ago and tried again last night" at the direction of Officer Four, who induced this action by offering Cellmate $50 and his own efforts to convince the prosecutor to offer Cellmate an early release deal. Cellmate was a police agent, but this does not constitute a *Miranda* violation. It does not matter that Officer Four believed (sincerely or not) that Dillon had been *Mirandized* because *Miranda* and the fifth amendment do not come into play with undercover informants. Likewise, it does not matter that Officer Four got Cellmate to comply through such offers because that has no bearing on Dillon's fourth amendment rights. Because *Miranda* is not violated through the use of undercover informants, Dillon's incriminating statement should be admitted.

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MPT 1

DOBSON V. BROOKS REAL ESTATE AGENCY (JULY 2023, MPT-1)

In this performance test, the client, Peter Dobson, has sued the Brooks Real Estate Agency alleging negligence in connection with injuries that Dobson suffered when he slipped and fell on the ice-covered sidewalk adjacent to the defendant's building. The examinee's task is to prepare the argument section of the brief in support of a motion in limine. The purpose of the motion is to persuade the court to bar admission at trial of two pieces of evidence: Dobson's conversation with a neighbor and the deposition testimony of a physician who is now deceased. In addition, the motion seeks to permit the introduction of the insurance policy on the defendant's building. The File contains the task memorandum, the firm's guidelines for writing persuasive trial briefs, a transcript of the client interview, a file memorandum summarizing a related action against Dobson's employer, an investigator's memorandum, and excerpts from the deceased physician's deposition testimony. The Library contains selected provisions from the Franklin Rules of Evidence, which are identical to the Federal Rules of Evidence, and two Franklin cases: *Reed v. Lakeview Advisers LLC* (discussing the "admission by silence" hearsay exclusion), and *Thomas v. WellSpring Pharmaceutical Co.* (discussing the use of former testimony).

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ANSWER

To: Samantha Burton

From: Examinee

Date: July 26, 2023

Re: Dobson v. Brooks Real Estate Agency — Motion in Limine Argument Section

I. Captions [OMITTED]

II. Statements of Facts [OMITTED]

III. Legal Arguments

A. The anticipated trial testimony by Doris Gibbs is inadmissible because it is hearsay and does not qualify as a non-hearsay opposing party's statement adopted by Mr. Dobson.

The anticipated trial testimony by Doris Gibbs as to a statement made out of court while with Mr. Dobson at dinner should be excluded as hearsay, as it is not a non-hearsay party opponent statement. It should be ruled inadmissible at trial.

1. The statement by Ms. Gibbs is hearsay because it is an out of court statement offered for the truth of the matter asserted.

Hearsay is an out of court statement that is offered to prove the truth of the matter asserted. FRE 801(c). Hearsay is excluded unless an exception allows its admissibility.

The prosecution intends to call Ms. Gibbs, Mr. Dobson's neighbor to describe an interaction where Mr. Dobson did not respond to a statement that Mr. Dobson made, asserting that Mr. Dobson was clumsy, walking fast, and on his phone at the time of the slip and fall. Because this statement was made by the declarant at a place out of court and is being offered by the prosecution to refute Brooks' negligence, or the truth of the statement, it is hearsay within Rule 801. As such, it would need to meet a hearsay exception to be admissible, and as shown below, the statement does not meet any exceptions and does not qualify as non-hearsay.

2. The statement by Ms. Gibbs was not "adopted" or "acquiesced by silence" by Mr. Dobson such that it qualifies as a non-hearsay opposing party statement under Rule 801(d)(2)(B).

Rule 801(d)(2)(B) provides that an opposing party statement that is "offered against an opposing party and is one the party manifested that it adopted or believed to be true," is considered non-hearsay, and is thus admissible. This includes statements admitted by silence. *Reed v. Lakeview Advisers LLC* (Fr. Ct. App. 2014). In order 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. *Id.* In this case, while it is true that Mr. Dobson did not respond, Brooks cannot show the other required elements, importantly that a person in Mr. Dobson's position would have responded if it were not a true statement.

The statement made by Ms. Gibbs, "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," is not something an ordinary person would respond to, let alone in the context of a dinner, while having a beer with your family and neighbors. Context is "exceedingly" important in this analysis and a court should carefully consider the circumstances surrounding the statement. *Id.* Further, this court has held that for a statement made at a loud social event with many persons present, someone in the defendant's position would not necessarily be expected to respond, and *Reed* citing *State v. Patel* (Fr. Ct. App. 2010). Mr. Dobson was having dinner at a restaurant with his wife and Ms. Gibbs, with others around, engaging various topics of conversations. The court held in *Reed* that for statements made in a serious and accusatory manner from the plaintiff's employer, in an office setting where serious matters were discussed, one in the employee's situation would have responded by defending themselves. *Reed.* This is a stark contrast from the facts of the case at hand. In this case, Ms. Gibbs stated that she did not say this statement in an accusatory way, but only as a statement of understanding-likely to make Mr. Dobson feel better, as she later expressed that she is clumsy often. The context of this case is also unlike in *Hill v. Hill* (Fr. Sup. Ct. 2010), when a wife asked her husband if he was having an affair, and he failed to respond, thus acquiescing by silence. Mr. Dobson and the other social guests moved on from the conversation and started chatting about other things amicably. Mr. Dobson, or a reasonable person in his position, would likely not feel the need to defend themselves or prove otherwise, as it was a casual comment made to express understanding of a friend.

Additionally, much like the party in *Patel*, it is unclear whether Mr. Dobson heard and understood the statement. In *Patel*, the court held that due to the context of the statement being made at a party attended by many persons, it was unclear whether the defendant had heard and understood the statement. *Patel.* In this case, Mr. Dobson was at a restaurant with usual sounds of conversation going on in the background. Ms. Gibbs stated that she "thought" Mr. Dobson was listening, but he was actively drinking when she made the statement and had just put his drink down when she finished. Since the wife made no response to the statement either, it could be argued that Mr. Dobson did not hear or that neither of the other individuals at the table understood what Ms. Gibbs had said. Thus, the statement cannot be shown to have been adopted by Mr. Dobson as a party opponent statement, or non-hearsay.

3. Even if the statement was adopted by Mr. Dobson, it will not survive a Rule 403 balancing test.

Rule 403 allows a judge to exclude evidence if the danger of unfair prejudice substantially outweighs the probative value of the evidence. FRE 403. It also applies to evidence that will confuse the issues, mislead the jury, result in an undue delay, waste of time, or needlessly presents cumulative evidence. *Id.* Evidence should be excluded if it allows or encourages the jury to reach a verdict based on an impermissible ground or to make an impermissible inference. *Reed.*

Allowing Ms. Gibbs to testify as to her statement on what she thought Mr. Dobson was doing at the time of the fall, equates to allowing her thoughts on the matter to speak for the defendant without personal knowledge. Its probative value is weak as Ms. Gibbs has stated that she has no personal knowledge on the accident as she was not there when it occurred,

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and otherwise has no knowledge "about anything related to it." Thus, it is likely that even if Mr. Dobson is deemed to have adopted the statement and it is considered non-hearsay, there is a substantial likelihood that a jury will give too much weight to this evidence. It should be excluded under Rule 403 as unfairly prejudicial.

B. Deposition testimony of Dr. Lena Miller should be deemed inadmissible at trial because Brooks cannot show that there was a similar opportunity and motive to develop testimony, as required by the prior testimony hearsay exception.

1. The prior testimony by emergency room physician Dr. Lena Miller, is hearsay.

Hearsay is an out of court statement that is offered to prove the truth of the matter asserted. FRE 801(c). Hearsay is excluded unless an exception allows its admissibility.

The statements made by Dr. Miller in the emergency room are being offered to prove the truth of the matter asserted, specifically the injuries of Mr. Dobson and his condition. As the declarant, she made the statements out of court, and they are thus considered hearsay that will need an exception to be admissible at trial.

2. The prior testimony by Dr. Miller does not qualify for the former testimony hearsay exception under Rule 804.

Rule 804 provides hearsay exceptions for when the declarant is unavailable to testify in the current trial because of death or illness. One is for former testimony of the declarant, provided that the former testimony meets the requirements laid out in Rule 804(b)(1)(A) and (B). To admit former testimony under Rule 804(b)(1), the proponent must satisfy three requirements: (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 to develop the challenged testimony at the earlier proceeding. *Thomas v. WellSpring Pharmaceutical Co.* (Fr. Ct. App. 2017), citing *State v. Holmes* (Fr. Sup. Ct. 2009).

In this case, there is no dispute that Dr. Miller is unavailable due to her death from a heart attack in November of 2022 as evidenced by her death certificate in the County Office of Vital Records. Additionally, there is no dispute that her testimony was given at a trial, hearing, or deposition, as it was given in a deposition on September 22, 2022. However, Brooks cannot show that the predecessor in interest of Mr. Dobson, here the City of Bristol, had a similar motive to develop testimony at the earlier proceeding.

Because Mr. Dobson is the party against whom the testimony is being introduced and he was a party to the previous action (*Dobson v. City of Bristol*), we do not need to discuss a predecessor in interest. However, this court has made it clear that the party against whom the testimony is now being introduced, 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. *Thomas citing Jacobs v. Klein* (Fr. Sup. Ct. 2002). This is determined by 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.* What matters is the opportunity, not whether they did develop the testimony. *Id.*

In this case, the testimony offered was developed through a deposition, and not a trial, unlike in *Thomas*. However, as indicated by the deposition testimony, the interests were not similar because Mr. Dobson's prior attorney, Robert Chen, did not have an opportunity or motive to develop testimony as to his injuries because the case was a disability discrimination case that focused solely on the City's poor accommodations under the Franklin Disability Act. The source and causation of those injuries were not at issue in that case. Chen even made the decision not to examine Dr. Miller on the opinion about the extent of his injuries because the focus of the deposition was on the level of accommodations by the city. As such, while Chen had a chance to cross examine Dr. Miller, he impeached her with malpractice claims and omitted any questions as to the injuries as they were not relevant. This indicates that Chen did not have a substantially similar interest in asserting Mr. Dobson's injuries and the extent of such injuries from the fall as they related to Dr. Miller's examination.

Accordingly, the former testimony does not qualify for the hearsay exception within Rule 804 and should be excluded from this trial. Even if it were to meet this, Rule 403 would not exclude evidence of this type. See *Thomas*.

C. Brooks Real Estate Agency's insurance policy is admissible because it is not being offered to prove negligence, but instead to show ownership or control, which is a permissible purpose under Rule 411. The evidence can subsequently survive a Rule 403 balancing test.

1. Evidence of liability insurance is admissible to prove ownership or control, and in this case, defendant Brooks Real Estate Agency disputes ownership of the sidewalk.

Rule 411 provides that evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. FRE 411. But the court may admit this evidence for another purpose, such as providing a witness's bias or prejudice or proving agency, ownership, or control. *Id.* Advisory committee notes indicate that this exclusion exists for public policy reasons, to avoid juries inferring fault or the lack of fault based on insurance coverage. However, it remains that if offered for a permissible purpose that is not barred from the rule, its admissibility remains governed by Rule 403.

In this case, in discovery, Brooks has claimed that it does not control the sidewalk and therefore was not responsible for clearing the ice off. Thus, Brooks put the issue of ownership or controversy in dispute. The liability insurance for the building owned by Brooks explicitly covers sidewalks adjacent to the property. Accordingly, this evidence is being offered for a permissible purpose within the meaning of Rule 411 and not to show negligence, and thus its admissibility would not violate Rule 411.

2. Admitting Brooks Real Estate Agency's liability insurance does not result in unfair prejudice within the balancing of Rule 403.

As indicated above, evidence that is proper within the meaning of Rule 411 is still subject to Rule 403. Rule 403 allows a judge to exclude evidence if the danger of unfair prejudice substantially outweighs the probative value of the evidence. FRE 403. It also applies to evidence that will confuse the issues,

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mislead the jury, result in an undue delay, waste of time, or needlessly presents cumulative evidence.

It is unlikely that evidence of the liability insurance showing ownership is control will result in an unfair prejudice to Brooks, as it has disputed ownership of the sidewalk covered by the insurance agreement. Further, the evidence has a high probative value based on the fact that Mr. Dobson's negligence claim turns on the ownership of the sidewalk and the subsequent conduct or lack thereof, that occurred on the sidewalk that led to his injuries. As such, neither Rule 403 or 411 should exclude this evidence. As a result, it should be deemed admissible.

D. Conclusion

In sum, this court should rule: (1) that the testimony by Doris Gibbs was not acquiesced by silence by Mr. Dobson and is thus not an opposing party statement. As such, it is inadmissible hearsay that should be excluded from trial. (2) The testimony by Dr. Miller is inadmissible hearsay because it does not meet the requirements for the former testimony hearsay exception and is inadmissible hearsay. (3) Evidence of Brooks' liability to prove ownership or control of the sidewalk is a permissible purpose and should be deemed admissible evidence.


THE SUPREME COURT OF THE STATE OF OHIO

MPT 2

MARTIN V. THE DEN BREEDER (JULY 2023, MPT-2)

This performance test requires the examinee to write an advice letter to the client, Anthony Martin, assessing his potential claims against Simon Shafer, who raises purebred Irish wolfhounds under a sole proprietorship called "The Den Breeder." About six weeks ago, Martin purchased an Irish wolfhound puppy from Shafer. Martin became concerned when the puppy, which he had named Ash, began appearing listless, especially after eating. Testing by Martin's veterinarian revealed that Ash had a congenital defect of the liver that impaired the liver's ability to filter toxins from his blood. This condition can be treated with surgery, but at a cost of at least $8,000. Martin wants to know what legal recourse he has against Shafer. He wants to keep Ash, but he also wants Shafer to pay for treating Ash's condition and refund the full purchase price. To properly advise Martin, the examinee must analyze the parties' contract as well as the impact of Franklin's "Pet Lemon Law" and its version of the Uniform Commercial Code. The File contains the task memorandum, the firm's guidelines for preparing advice letters to clients, a transcript of the client interview, the contract of sale, an email from Ash's veterinarian, and an article describing Ash's condition. The Library includes selections from the Franklin Uniform Commercial Code and from the Franklin Pet Purchaser Protection Act, and an appellate case, *Cohen v. Dent* (Fr. Ct. App. 2020).

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ANSWER

Law Officers of Bradly Wilson

2405 Main Street

Creedence, Franklin 33805

To: Anthony Martin

From: Examinee

Date: July 25, 2023

RE: The Den Breeder Issue

Dear Mr. Martin:

Please find below my analysis of your potential claim against Simon Shafer regarding the issues with the purchase of Ash. When interpreting the terms of written contract, the courts will first examine the language in the document itself to determine where any terms or ambiguous. *Cohen*. Once a court discerns which terms to apply, they will look to the impact of relevant laws to determine what remedies are available to an individual. In this case, the court will specifically examine the Franklin Pet Purchase Protection Act (FPPPA) and the Uniform Commercial Code (UCC). Though a plaintiff may seek remedies under the FPPPA, nothing in the law limits the rights or remedies that are otherwise available to a purchaser under any other law. FPPPA ss753(d).

1. Is the contract between Anthony Martin and the Den Breeder ambiguous?

When examining a contract, if the terms of the contract are unambiguous, the court will apply those terms to the dispute at hand, unless they conflict with relevant statutes. *Cohen*. If the terms of the contract are ambiguous, it will resolve those ambiguities in part in reliance on statutes. *Cohen*. When a contract contains ambiguous terms, a court must construe it most strongly against the party who prepared it, and most favorably to a party that had no voice in the selection of its language. *O'Day*.

In *Cohen*, the court held that the contract between the parties was ambiguous and that it did not bar any recovery for the plaintiff because while it listed a one-year remedy when a pet has a congenital condition, it did not specify a start date for that year. The contract required the buyer to provide test results verifying a congenital condition, but only required them "if needed" and stated no time limit within which a party had to make a claim. Additionally, the contract required the buyer to make a choice between several remedies but does not address refunds or other money damages.

Here, the contract that you signed appears to be ambiguous as to its terms. The contract states that a purchaser should take a sick dog to the vet for treatment, however there is no language stating a time frame for when the visit can or needs to take place. Agreement. The contract could be construed to read that purchaser is permitted to return the dog due to illness within 48 hours of purchase, thus limiting the initial remedy to what is in the contract. Agreement. The true ambiguity lies in the latter half of the contract where

no remedy is outlined due to a congenital defect. Agreement. A liver shunt is a congenital defect, and thus would qualify under the second portion of the contract. Turner email. Just as the contract in *Cohen* that did not specifically limit the remedies of the purchaser, the contract here requires the purchaser to notify the breeder of any congenital defects found within the first year but does not state what may be done about it. Agreement. The contract was presumably written by Shafer and thus will be construed against him, in your favor. Therefore, as the contract does not specify which remedies are specifically available when a congenital defect is at play, you may seek other remedies outlined below.

2. Does Ash's liver shunt condition fall under the protections of the FPPPA, and if so, what remedies are available?

a. Does Ash's condition fall under the FPPPA?

The FPPPA governs the sale of household pets, including dogs. *Cohen*. Under the FPPPA, a purchaser has a remedy if: (1) within 14 days following the sale, a licensed vet certifies such an animal to be unfit for purchase due to illness or the presence of symptoms of a contagious or infections disease; or (2) within 190 calendar days following the sale, a licensed veterinarian certifies such an animal to be unfit for purchase due to a congenital malformation that adversely affects the health of the animal. FPPPA ss753 (a)(1-2).

In *Cohen*, the court found that the purchaser had remedies under the FPPPA because the dog at issue had a congenital disease known as hip dysplasia, which neither party contested. Additionally, the disease was noted by a veterinarian within the 180-day limit outlined by the statute.

Here, you will be able to recover under the FPPPA because Ash's liver shunt condition is a congenital disease suffered by Wolfhounds. It was additionally diagnosed within the 180 days required, as you signed the purchase agreement on June 12, 2023, and received the diagnosis from Dr. Turner on July 18th, 2023. Turner email. While Dr. Turner has yet to sign the form certifying her opinion, she is prepared to do so, which would likely not cause any issue in recovery under the FPPPA. Turner email. Just as the court found that the purchaser could recover in *Cohen*, you will likely be able to recover as well.

b. What remedies are available?

Under the FPPPA, three remedies are available to a purchaser: (1) the right to return an animal and receive a refund; (2) the right to return the animal and receive a replacement animal; or (3) the right to retain the animal and be reimbursed veterinary costs incurred for the purpose of curing or attempting to cure the animal. *Cohen*.

Here, as Ash's condition falls within the requirements of the FPPPA, you are entitled to any of the remedies within it. You could: (1) return Ash and received a full refund; (2) return Ash and receive a different Wolfhound; or (3) keep Ash and be reimbursed for the $8,000 cost of the surgery. It seems like the third option would be the best remedy for you. You and Ash seem to "have a connection" and you believe that he is the "right dog for you". Martin interview.

Thus, while all of the FPPPA remedies are available, the last seems to be the best option for you and Ash.

The answers printed in this booklet were selected because they were among the better answers written at the exam. They are not model answers and are not necessarily complete or correct in every respect.

3. Does the purchase of Ash fall under the protections of the UCC, and if so, what remedies are available?

a. Does the purchase fall under the UCC?

Article 2 of the UCC governs the sale of animals. *Cohen.* Under the Franklin Uniform Commercial Code ss 2-314, unless excluded or modified, 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 the goods of that kind. UCC 2-314(1). Goods to be merchantable must: (1) pass without objection in the trade under the contract description, and (2) be fit for the ordinary purposes for which such goods are used. UCC 2-314(2)(a/c). Courts have found that dogs are "goods," and that pet stores and breeders are "merchants" under the UCC. *Cohen.*

In *Cohen* , the court found that the purchase of a dog falls within the UCC definition of goods, and that the buyer ultimately received a nonconforming dog because she did not get what she bargained for, which was a healthy dog. *Cohen.*

Here, you purchased a dog, which is considered a good, from a breeder, considered to be a merchant, therefore the UCC applies. When you purchased Ash, you paid for a healthy dog. In fact, at the time you purchased the dogs they all seemed happy and healthy. There is no person that would purposefully purchase a sick dog unless they intended to. Just as the purchaser in *Cohen*, you did not receive what you bargained for and thus Ash was a "non-conforming good".

Shafer may argue, just as the seller in *Tarly*, that you should have had the dog tested immediately upon purchase to check for any defects, which would render him not liable. While the contract did not specifically require it after purchase, it did require an immediate observation by a vet, if sick, and to report that within 48 hours, however this argument is without merit. While the defect in the dog at issue in *Tarley* could have been detected with a search shortly after purchase, there is no evidence to suggest that the liver shunt could have been. Doctors are split on when a test can even successfully be completed, let alone whether results would have bene conclusive. Miller email.

Therefore, you can likely recover under the UCC.

b. What remedies are available?

Under UCC ss 2-714(2), the measure of damages is the difference at the time of sale between the dog as warranted and the actual dog. Courts may refund the whole of the purchase price for the animal on the assumption that no buyer would agree to purchase an animal it knew to have a defect that might lead to death or require expensive surgery. *Dalton.* The sale of an animal creates an implied warranty of merchantability. *Cohen.* For a case involving a breach of warranty, the damages under ss 2-714(2) may be awarded. *Cohen.*

Here, as the remedies under the UCC are available, you can likely recover the price difference between the $2,500 you paid and what a dog with the liver shunt is worth. This may be the whole purchase price, but it would have to be investigated further to know for sure. Shafer has an implied warranty to deliver what you expected, which was a dog with no diseases or issues of any kind. He failed to do that as a merchant, and instead delivered a good which did not tender to your expectations.

In short, you can recover under the FPPPA, and the UCC if you so choose.

Thank you for allowing me to assist you in this matter. If I can be of any further assistance, please do not hesitate to reach out.

Best,

/s/ Examinee

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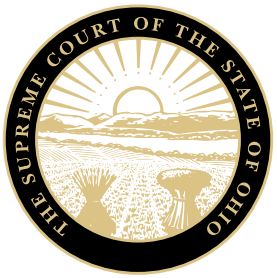

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