February 2021 Georgia Bar Examination Sample Answers

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Essay 1 – Sample Answer 1

The Trial Court indeed erred in three ways. First, it should not have excluded Dr. Apple's testimony in its entirety. It merely should have abided by the policy against disclosure of confidential communications between physician and patient. Second, the Trial Court erred in allowing Plaintiff's statement that she went to her family doctor instead of the emergency room based on advice by Big Box's insurance adjuster. Third, the Trial Court erred in refusing to instruct the jury to disregard the inflammatory remark about Big Box's financial status made by Plaintiff's counsel during closing arguments.

However, the court did not err in allowing Plaintiff's memory to be refreshed, in allowing Plaintiff's counsel to use past recollection recorded, or by refusing to declare a mistrial for the inflammatory remark made by Plaintiff's counsel in closing. In order to win on a motion for new trial, there must be a showing of substantial unfair prejudice such that the absence of such errors would have resulted in a different outcome to the trial. These are known as reversible errors. The above points are analyzed as follows:

1. The Trial Court did err in excluding Dr. Apple's testimony in its entirety. Under Georgia evidence rules, there is no recognized, codified physician-patient privilege. Rather, there are policies in place that prohibit doctors from disclosing confidential communications made by their patients to third parties. However, it is an overbroad and, arguably, an abuse of discretion for the Trial Court to have excluded Dr. Apple's testimony in its entirety. Rather, the appropriate resolution under Georgia evidence rules would be to exclude testimony by Dr. Apple that was about confidential communications made by the Plaintiff regarding her treatment. It would not have been a violation of the policy against disclosure of physician-patient communications for Dr. Apple to testify to simple facts unrelated to testimony - i.e., Dr. Apple could have testified to how long he or she has treated the Plaintiff (10 years). A jury could then decide for themselves based on the non-confidential information presented to them, in combination with the other evidence presented, whether it believed Plaintiff's contention of having PTSD as a result of her fall. This would be dually functional and efficient in that it would allow the defense a chance to exercise its constitutional right to confront the witnesses against it, while still honoring the policy against disclosure of physician-patient communications.

2. The Trial Court did not err in allowing Plaintiff to testify about the location of her fall after she reviewed the eye witnesses. This is known as refreshing recollection. Under Georgia evidence rules, refreshing recollection is the practice by which a questioning attorney gives their witness a chance to refresh their memory using virtually anything while testifying. The practice allows the witness to read or review the document or other refreshing item silently and then testify as to what their memory of the

question is now that they have had a chance to refresh that memory. The key in refreshing recollection to be permissible is that the witness is not permitted to read the refreshing tool out loud to the jury. The refreshing tool may, however, be entered into evidence by the opposing party if it wishes to do so.

Here, Plaintiff was on direct examination and unable to recall a detail as questioned by her own attorney. Plaintiff's counsel then showed a written statement to Plaintiff from an eyewitness, whereby Plaintiff read the eye witness statement and then testified to her memory now that it has been refreshed. She did not read the document aloud. This was a proper execution of refreshing recollection, and therefore, the Trial Court did not err in allowing it.

3. The Trial Court did not err in allowing Plaintiff to read to the jury the written statement she gave previously regarding the wet floor signs. This is known as past recollection recorded and is an exception to the hearsay rule. Hearsay is an out of court statement offered to prove the truth of the matter asserted. Certain exceptions and exemptions apply, which allow for out of court statements to be entered into evidence despite otherwise fitting the definition of hearsay. Under the past recollection recorded exception, the Georgia evidence rules allow for a witness to read aloud to the jury a written instrument that was recorded shortly after an event in question in an effort to substitute for the declarant's now lapsed memory. The theory behind allowing such a reading is that the instrument was recorded contemporaneously with or shortly after the event took place when the event was fresh in the declarant's mind, so it is presumed to be a reliable source of information. For these reasons, the Trial Court did not err in allowing the practice of past recollection recorded.

4. The Trial Court did err in overruling Big Box Store's objection to Plaintiff's statement explaining that she followed the advice of Big Box Store's insurance adjuster and visited her family doctor following her fall instead of going straight to the emergency room. There are three reasons this is in error. First, the statement that Plaintiff was merely following what the insurance adjuster advised her to do is arguably hearsay. As stated, hearsay is an out of court statement offered to prove the truth of the matter asserted. Here, this is an out of court statement (an insurance adjuster allegedly advised Plaintiff to go to the family doctor instead of the emergency room at some point before court proceedings) that is being offered to prove the truth of the matter asserted - that Plaintiff went to the family doctor instead of the emergency room based on advice by Big Box's insurance adjuster. It is arguable, however, that this statement is not being offered to prove the truth of the matter asserted, however. Rather, the statement may be offered to explain why she chose one medical treatment over another. In that case, the statement would not be hearsay and would be admissible.

Nonetheless, this statement still may not be admissible under a second Georgia evidence rule. This statement may also be a roundabout way of introducing evidence that Big Box has liability insurance, and is therefore indirectly admitting fault, which is prohibited under Georgia evidence rules. This is a policy concern that theorizes the notion that companies will not continue to obtain insurance to cover their liabilities if this action may be used against them in a court of law as proof of an admission of guilt.

Third, this goes also to the balancing test, which determines the admissibility of evidence based on whether the probative value substantially outweighs the danger of unfair prejudice. Here, it is arguable that Plaintiff blurting out that Big Box has sought the help of a liability insurance carrier is more prejudicial than probative, and should therefore be excluded under this reasoning.

5. The Trial Court did not err in declaring a mistrial, but it did err in refusing to instruct the jury to disregard the comment of Plaintiff's counsel regarding Big Box's financial status. First, a mistrial under Georgia evidence rules is appropriate when there is such a prejudicial error during the trial that the defendant no longer has a chance at a fair trial, because the error was so grave such that no jury could continue to fact-find in an unbiased and impartial manner. Here, that statement, albeit inappropriate, does not likely arise to the level of such severe prejudice that a fair trial is no longer possible for Big Box.

However, the Trial Court likely erred by refusing to instruct the jury to disregard the statement by Plaintiff's counsel regarding Big Box's hefty financial status. Georgia evidence rules allow judges to provide limiting instructions under their discretion to disregard a statement made when said statement is prejudicial and has a tendency to influence a jury, but does not rise to the level of declaring a mistrial.

The facts do not indicate whether a limiting instruction was provided by the judge to inform the jury that statements made by attorneys during opening and closing statements are not to be considered evidence. However, such an instruction would have been appropriate. Nevertheless, the Trial Court still erred by not instructing the jurors to disregard the inflammatory remark about Big Box's finances.

Essay 1 – Sample Answer 2

(1) Did the trial court err in excluding Dr. Apple's testimony in its entirety?

The Trial Court likely did err in excluding Dr. Apple's testimony in its entirety. In order for evidence to be admissible, it must first be relevant. Evidence is defined as relevant if it has any ability to make a fact of consequence either more or less likely. The threshold for a court to find something "relevant" is very low and therefore almost all evidence having to do with the facts of the claim can be admitted, so long as they pass a 403 balancing test, that is, their probative value is not substantially outweighed by the prejudicial value. Additionally, such evidence cannot be admitted if it falls within any of the exclusions, including hearsay and character evidence. These are not at issue here.

It is likely that the testimony of the psychologist will be deemed relevant because it has to do with the causation element of the injury. Of course, a plaintiff must prove both legal cause (proximate cause) and cause in fact (factual cause) and cannot make a prima facie personal injury suit without showing causation. The defense seeks to introduce testimony by the psychologist in order to dispute the plaintiff's claim that our client, the defendant, caused her PTSD.

This psychologist should be allowed to testify because Georgia does not recognize a psychiatrist-patient privileges. Because the evidence is relevant, the defense team had the psychologist on their witness list, and intended to have her testify, there is no basis for excluding her as a witness. The psychologist would not be allowed to testify regarding the Plaintiff's medical records, as there are statutory privileges that apply to medical records, but such an issue could be dealt with while the psychologist was on the stand. To exclude the psychologist completely from testifying was a mistake by the Trial Court.

(2) Did the Trial Court err in allowing Plaintiff to testify about the location of her fall after she reviewed the eyewitness statement?

The Trial Court did not err in allowing Plaintiff to testify about the location of her fall after she reviewed the eyewitness statement because such form of testimony is allowable under the doctrine of refreshing one's recollection.

Generally, witnesses must testify from their memory and are not able to testify from previous notes, reports, etc. A witness must have personal knowledge about what they are testifying to and must not merely read papers placed in front of them by counsel. The exception to this general rule, which is applicable both under Georgia law and Federal rules of evidence, is that when a witness is asked a question by counsel and responds stating that they cannot remember the answer to that question, counsel is able to "refresh the witnesses recollection" by using anything. The thing used to refresh the witness's recollection need not be admissible and could literally be anything. Once the witness is shown the item and given a chance to read the item and either gives it back to counsel or turns it over, if the witness now can recall the answer to the question asked, she is able to respond. It is important to note that when this takes place, opposing counsel is given the opportunity to cross-examine the witness through use of the refreshing document and is even able to introduce the document into evidence if they see fit.

In the present case, Plaintiff stated that she was unable to recall the area in which she fell. Her counsel showed her a written statement to refresh her recollection. Assuming that once she reviewed the statement, she gave it back/turned it over/etc. and did not testify that she remembered she was in the frozen food section while she was still looking at the written statement, the court's admission of such testimonial evidence was not in error.

(3) Did the Trial Court err in allowing Plaintiff to read to the jury the written statement she gave previously regarding wet floor signs?

The trial court did err in allowing the Plaintiff to read to the jury the written statement she gave previously regarding wet floor signs because it is hearsay and does not fit in any exception.

The general rule, as stated in response to answer 1, is that evidence can be admitted so long as it is relevant, passes the 403 balancing test, and is not excluded because it is hearsay, character evidence, etc. Hearsay is defined as an out of court statement used for the purpose of proving the truth of the matter asserted. The use of an out-of-court statement to prove the truth of the matter asserted is barred, and will not be admitted into trial absent an applicable exclusion to the rule against hearsay. An out of court statement is one that can either be a spoken statement, recorded on film, in a writing, etc., so long as such statement was used to convey a message and was made by a human declarant (that is, not by an animal or a machine). The previous statement made by the Plaintiff is hearsay because it is a statement that she made out-of-court (she made it immediately following the fall) and being used to prove at trial that the sign was where she said it was in the statement.

In the present case, Plaintiff's counsel attempted to have Plaintiff testify as to where the wet floor sign was. The plaintiff responded by saying that she did not remember. In that case, counsel could have shown Plaintiff her written statement and asked if that helped the plaintiff recall the answer to the question. If so, counsel could have removed the statement and asked Plaintiff to testify and that would have been allowable as explained in the answer to section 2. If Plaintiff instead maintained that she still did not know the answer to the question, counsel could have asked the Plaintiff to read the statement under the recorded recollection exception to hearsay. The recorded recollection exception to hearsay allows counsel to, after attempting to refresh a witness's recollection and failing, ask the witness to read the document being used to refresh their recollection. The witness may then do so, but the document itself is not admitted into evidence, only the testimony is. Additionally, the witness must have had personal knowledge at a former time, the document was either made by witness or adopted by the witness, the making or adoption occurred when the event was fresh in the witness's memory, and the witness can vouch for the accuracy of the document when made or adopted.

The court did not follow the steps needed to admit a past recollection recorded, because it did not give the witness a chance to refresh her recollection with the document and did not check to see whether the document actually refreshed her recollection. Because of this, the reading of the document was inadmissible and not properly admitted.

The Plaintiff's counsel may attempt to argue that her witness is not hearsay and therefore was properly admitted because it is an inconsistent prior statement by testifying a witness who is subject to cross-examination. In Federal Court, such exception would not apply because the prior inconsistent statement (the statement saying where the sign was) was not made under the penalty of perjury at a prior proceeding and therefore is still hearsay. But in Georgia, under Georgia law an out of court statement of

a testifying witness, is admissible if it is a prior inconsistent statement regardless of whether the statement was made under oath. The issue here then comes down to whether or not there was actually a prior inconsistent statement - i.e. whether the witness stating that she does not remember is inconsistent with her prior statement. This is not an inconsistent statement and instead is simply a lack of memory, so the evidence should not have been admitted as a prior inconsistent statement.

(4) Did the Trial Court err in overruling Big Box Store's objection to Plaintiff's statement explaining that she followed the advice of Big Box Store's insurance adjuster and visited her family doctor following her fall instead of going straight to the emergency room?

The Trial Court likely did not err by overruling Big Box Store's objection to Plaintiff's statement regarding the advice of the defendant's insurance agent. Generally, evidence that a person has, or does not have, liability insurance is inadmissible to prove that the person's fault or absence of fault. The reasoning behind this is to avoid the risk that the jury will make a decision based on the fact that the insurance is available rather than the merits of the case, and also, to not punish defendant's for carrying insurance. Insurance is admissible to prove other things though, such as proof of ownership or control if controverted, or impeachment of a witness.

In the present case, Plaintiff was asked a question about why she did something and she responded that she did because she was told by the defendant's insurance agent. This statement, though it references an insurance agent and allows the jury to make an inference regarding Big Box Store's decision to get insurance, is not being used to prove the Big Box Store's fault or liability. It is instead just being used to explain why the Plaintiff acted in a certain manner. Therefore it admissible and was properly admitted at trial.

(5) Did Trial Court err in failing to declare a mistrial and refusing to instruct the jury to disregard the comment of Plaintiff's counsel regarding Big Box Store's financial status?

This statement was probably inadmissible and should not have been admitted unless the Plaintiff was seeking punitive damages. Generally, the statement that Plaintiff's counsel made regarding Big Box Store's financial status is admissible so long as it is relevant and passes a 403 balancing test. A court would likely find that this statement is not relevant and more prejudicial than probative and therefore should be excluded. The fact that the defendant is a big corporation and has a lot of money has no ability to make a fact of consequence in the suit more or less likely. The statement therefore should have been inadmissible and the jury should have been instructed to disregard the comment made by Plaintiff's counsel.

But, if the Plaintiff was seeking punitive damages, the statement would likely be admissible. Punitive damages are, by definition, meant to punish a defendant. The amount of wealth a defendant has is relevant for the determination of punitive damages because such evidence is probative of how much money will be required to actually deter the defendant. It is important to note though that if the Plaintiff was pleading punitive damages, the punitive damage portion will include a "bifurcated" trial in which the jury first decides whether punitive damages are awarded and then decides how much (so in practice, such admission of the statement regarding Big Box Store's wealth would only be relevant and admissible to the second portion of the trial in which the amount of damages is decided, not liability). But, punitive damages must be plead in the complaint and will only be awarded when it is proved that the defendant's actions demonstrate such willful misconduct, fraud, wantonness or oppression to raise a presumption of

conscious indifference to the consequences of his actions. That is not present here so this information likely should have been excluded.

Essay 1 – Sample Answer 3

1. The trial court did err in excluding Apple's testimony in its entirety.

Under Georgia law evidence must be relevant to be admissible. Generally, evidence is relevant if it has any tendancy to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. All relevant evidence is admissible unless a statute or rule says otherwise, or the 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. A witness must have first hand personal knowledge of the matter she testifies about. Hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted Hearsay is not admissible unless it comes within an exception. A statement for the purpose of medical diagnosis is an exception to hearsay that makes statements made for and reasonably to medical diagnosis or treatment and describe medical history, past or present symptoms or sensations admissible as a hearsay exception. Note: a statement made an opposing party offered against that party is not hearsay. Also Note: statements made to a doctor employed to testify are admissible under Federal rules.

Here, Dr. Apple's testimony as to the fact the victim's communcations of PTSD prior to the incident should be admitted as a statement made for the purposes of medical diagnosis or treatment since the statements were made for the purpose of medical diagnosis and describe a medical condition or medical history. Further, the statement was made to a doctor employed to testify. The plaintiff may argue that these statements are covered by the physician client privileged. However, this privilege does not apply when the patient puts his physical condition in issue - for example in a personal injury case. Since Plaintiff is alleging she received PTSDD from this fall she has placed her medical condition at issue therefore this information is admissible

Additionally, the statement may be admitted for impeachment as well as substantive purposes since the statement was made during a discovery deposition. If the Plainitff takes the stand she may be impeached by her prior testimony. Generally, any party may impeach a witness even the party calling the witness with a prior inconsistent statement. Here, the plainitff would be making a contradicting statement. However the witness must be given an opportunity to explain or deny the statement. Therefore, the trial court did err in excluding the doctor's testimony in its entirety

2. The trial court did not err in allowing Plaintiff to testify about the location of her fall after she reviewed the eyewitness statement

Generally witness must have personal first hand knowledge of the matter she testifies about. Her opinion must be rationally based off of her perception, helpful, and not based on scientific, technical, or specialized knowledge. On the other hand an expert does not need personal knowledge but may use facts he has been made aware of at trial as a means to form his opinion. However, if a witness's memory fails him or her, they may be shown a document or record to jog their memory. Generally, an attorney may use any document to refresh a witnesses recollection. This document may be showed to the opposing party at their request.

Here, the plaintiff was unable to recall the area where she fell. She notified the attorney on direct examination and he showed her a written statement to recall her memory. The fact that this document

was written by someone else is irrelevant and is still a proper way to refresh the witnesses testimony. Therefore, the trial court did not err in allowing the Plaintiff to testify about the location of her fall after she reviewed the statement.

3. The trial court did err in allowing Plaintiff to read to the jury the written statement she gave previously regarding wet floor signs

This evidence is relevant on the point of whether the store was negligent since this evidence could refute that fact by showing the store took proper precautions. Additionally this evidence's value is not substantially outweighed by a danger of unfair prejudice or misleading the jury etc. However, this evidence is hearsay since it is a statement other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted. Hearsay is not admissible unless it comes within an exception. Recollection recorded is a hearsay exception that states that on a matter that the witness once knew about but now cannot recall well enough to testify fully and accurately, may be read into evidence. However, the proponent may not offer the document as an exhibit. The statement must have been made or adopted at a time when the memory was still fresh.

Here the plaintiff made a statement shortly after falling that there was no wet floor sign following the fall. The statement was made when the matter was fresh in the plaintiff's head. This was a matter she once knew well enough to testify accurately but because of the passed time she has forgotten. The evidence may be read into evidence but not offered as an exhibit. Therefore, the court did not err in admitting the evidence.

4. The trial court did err in overruling Big Sox Store's objection to Plaintiff's statement explaining that she followed the advice of Big Sox Store's insurance adjuster and visited her family doctor following the fall instead of going to the emergency room

The statement is not hearsay since it is a statement not being offered into evidence to prove the truth of the matter asserted. The Plaintiff is not trying to prove that the Big Sox insurance adjuster told her to go to the family doctor. The statement was made to show why she went to the family doctor as opposed to the emergency room. Therefore the statement is not hearsay. Therefore, the trial court erred in overruling the plaintiff's explanation as to why she went to the family doctor as opposed to the emergency room.

5. The trial court did err in failing to declare a mistrial and refusing to instruct the jury to disregard the comment of Plaintiff's counsel regarding Big Sox’s financial status. Generally insurance coverage is inadmissible to prove negligence, but may be used for other purposes such as to show agency, ownership, control, or bias. Here, the plaintiff's counsel has stated that the corporation is a multimillion dollar company and therefore the jury should find them negligent because they can afford to pay the verdict with their insurance policy. However, as a matter of public policy this information should be inadmissible since it has no bearing on liability. Therefore, the trial court did err in failing to declare a mistrial and refusing to instruct the jury to disregard the comment of Plaintiff's counsel regarding Big Sox’s financial status.

Essay 2 – Sample Answer 1

1a. Darlene's pre-Miranda statement that she had not "been in the office in weeks."

Darlene's statement that she had not been in the office in weeks should be admitted because it was a voluntary statement made when she was not in custody and when there was no interrogation underway. Any argument that this statement should be excluded because the officer had not given Darlene a Miranda warning should fail. The Fifth Amendment protects a defendant from compelled self-incrimination. Pursuant to the 5th Amendment, Police are required to give Miranda warnings to criminal suspects only when the suspect is in custody and under interrogation.

To constitute custody, there must be a significant deprivation of a person's freedom of movement so they cannot leave the area. This is judged from an objective stand point, not subjective. Here, Darlene agreed to go to the police station; she was not put in handcuffs or told she had to come in or else she would be arrested. Her decision to come to the station was completely voluntary. While the detective did escort her into "an interrogation room" that had bright lights and no windows, this did not mean Darlene was actually in custody. When asked if she was a suspect, the detective told Darlene that she was not and that she was free to leave at any time. He then offered her a drink. From an objective standpoint, Darlene was still free to leave at any time, and was not in custody despite being at the police station.

Further, Darlene was not under interrogation when she made the statement about not being at the office. Being in an "interrogation room" is not the determinative factor for whether interrogation is occurring. Interrogation occurs when the police know or should know that their actions are reasonably likely to elicit an incriminating response from the suspect. Here, the detective had not asked Darlene a single question other than whether she wanted a drink. Darlene's excited utterance about not going to the office was not made in response to a question or other conduct by the detective that was reasonably likely to elicit such a response. If, on the other hand, the police had asked Darlene, "Where were you?" or "When was the last time you saw the victim," then it would have been reasonable to expect an incriminating response. However, asking a person if they want a drink is not reasonably likely to lead to an incriminating statement. Therefore, Darlene was not under interrogation, and not in custody. Therefore, she was not entitled to a Miranda warning, and the statement is admissible.

1b. Darlene's post-Miranda statement that she went to the office to "confront Veronica about funds that were missing from some of [their] accounts."

This statement is admissible because Darlene did not adequately invoke the right to remain silent or the right to an attorney. Such an invocation must express, clear, and unambiguous; it is not sufficient for a suspect to merely hypothesize about whether they should be quiet or speak to a lawyer. Here, Darlene's statement that "maybe" she should get an attorney and that "only a fool" would speak to the police without a lawyer was not a clear, unambiguous statement of her intent to invoke her 5th Amendment right to silence and 6th Amendment right to counsel. By using "maybe" it was not affirmative. Maybe can mean maybe yes, or maybe not. It is not a clear indication of intent or desire. Darlene's statement that only a fool would talk to the police without a lawyer is simple a statement of opinion and does not clearly indicate that she did not want to speak without a lawyer present. Because it was not an unambiguous invocation of her rights, the detective was within his rights to continue to question Darlene. Therefore, the statement about going to confront Veronica should be admitted.

1c. Darlene's statement to the second detective as she was being booked.

Darlene's statement to the second detective should be admitted because she gave a knowing waiver of her Miranda rights. Resuming questioning after a suspect invokes Miranda rights requires a significant amount of time to elapse and a refreshing of the Miranda warnings, or a knowing and voluntary waiver of those rights. The statements from the first detective about her fingerprints being on the gun and the fact that she was under arrest for murder does not constitute a resuming of the interrogative questioning. There were no questions posed to Darlene. The detective relayed a fact and placed the suspect under arrest. This is allowed even after Miranda has been invoked.

Further, the second detective did not ask any questions of Darlene until after Darlene signed a standard waiver-of-rights form. As the prosecution, we bear the burden of proving the waiver was knowing and intelligent. Georgia courts have held that the standard waiver-of-rights form can serve as a basis for a knowing and intelligent waiver of the Miranda rights. The form is standard and was given to Darlene to review so she could understand she was giving up certain rights by agreeing to talk. Further, she was not pressured to waive her rights. Merely booking a defendant when evidence supports their guilt, such as their fingerprints being on the gun, is not evidence of undue pressure or influence on Darlene to waive her rights. She "spontaneously "stated she was willing to talk--again, not the result of police pressure, but voluntarily and of her own accord. Only about an hour had passed since her initial conversation with the first detective, so she had not been held for an unreasonable amount of time to force her into waiving her rights. Because no facts suggest her waiver was coerced in any way, and because she was given the standard waiver form, Darlene's statement to the second statement did not violate any constitutional rights and is therefore admissible.

2. Darlene is not entitled to a jury charge on voluntary manslaughter.

Malice murder is a killing of another human with malice aforethought. Such a killing is done intentionally or with a reckless disregard for the obvious or known risks associated with one's conduct. Voluntary manslaughter is an intentional killing done in response to adequate provocation or other circumstances that negate the malice aforethought. The adequate provocation is judged objectively, and there must not be any "cooling off" period whereby a reasonable person would have cooled down and not acted in response to the provoking conduct. Felony murder is a statutorily created crime that covers killings that occur during the commission of an underlying inherently dangerous felony, including burglary, arson, robbery, rape, kidnapping, or other crimes delineated by statute, such as aggravated assault in Georgia. For there to be a felony murder conviction, the defendant (or a defendant's accomplice under Georgia's agency theory of felony murder), must intentionally engage in inherently dangerous conduct (the underlying felony) that results in a killing. However, simply engaging in an intentional killing is not sufficient for a finding of felony murder, as there must also be the commission (or attempted commission) of another inherently dangerous felony.

Voluntary manslaughter is not a lesser included offense to felony murder. Felony murder only requires proof of the underlying felony and a resulting death that results from defendant's actions. Voluntary manslaughter is considered a lesser included offense to malice murder. To prove malice murder, the prosecution must prove an unlawful intentional killing with malice aforethought. To prove voluntary manslaughter, the prosecution must also prove an unlawful intentional killing, but there was adequate provocation that negates the malice aforethought required to be proved for malice murder. It

would be impossible for a defendant to be found guilty of both voluntary manslaughter and malice murder based on the same facts.

Darlene is not entitled to a charge for voluntary manslaughter because there was not adequate provocation here. A reasonable person would not respond to a co-worker taking a computer by pulling out a handgun and shooting. Nor would a reasonable person essentially take someone's dare of "you don't have the guts to shoot me," by pulling the trigger. Darlene's subjective mental state about not handling stress well and being treated poorly by Veronica would not be considered from the reasonable person objective standpoint. By going into the glove box, Darlene showed that she knew what she was doing and had time to think about whether or not she should go get the gun. She did not come armed and pull it out and fire automatically. Further, she contemplated whether or not to fire long enough for a conversation to ensure between her and Veronica. She could have put the gun down; she could have called the police; she could have requested someone go with her to the parking lot. She chose not to, and she intentionally killed the victim. Therefore, there was not adequate provocation and the she not receive a jury charge for voluntary manslaughter.

Essay 2 – Sample Answer 2

1. (a) Darlene's pre-Miranda statement that she had not "been to the office in weeks."

Darlene's statement that she had not "been to the office in weeks" is an admissible statement. The main issue here is whether the detective's conversation is classified as a custodial interrogation. Information obtained as a result of a custodial interrogation may not be used against the suspect at a subsequent trial unless the police provide procedural safeguards to secure the privilege against self-incrimination. A custodial interrogation is questioning initiated by a known law-enforcement officer after a person is in custody. "Custodial" is a substantial seizure and is defined as either a formal arrest or restraint on freedom of movement to the degree associated with a formal arrest. If there is no formal arrest, the question is whether a reasonable person would have believed he could leave, given the totality of the circumstances. Just because an individual is at a police station does not make an encounter custodial. In this case, Darlene was clearly not in custody. Although there were no windows in the room, the detective clearly stated that she was not in custody and free to leave at any time. Looking at the totality of the circumstances, it is obvious that at the time of her statement that she had not "been to the office in weeks", she was not under custody and therefore her statement is admissible.

1. (b) Darlene's post-Miranda statement that she went to the office to "confront Veronica about funds that were missing from some of [their] accounts."

Darlene's statement to "confront Veronica about funds that were missing from some of [their] accounts" is admissible. Once a person is placed into custody and the custodial interrogation begins, anything the defendant says is inadmissible until the defendant is informed of the Miranda rights and the defendant waives those rights. Part of the procedural safeguards the Fifth Amendment affords is the right to counsel. In order for this right to be invoked, the suspect must make a specific, unambiguous statement asserting his desire to have counsel present. If a counsel makes an ambiguous statement regarding the right to counsel, the police are not required to end the interrogation or to ask questions or clarify whether the suspect wants to invoke the right. However, once the right to counsel is invoked, all interrogation must stop until counsel is present. In this case, although Darlene stated she maybe need an attorney, this was not a clear specific statement stating her desire to have one. The detective was not required to clarify. Since her statement that she went to the office to "confront Veronica about funds that were missing from some of [their] accounts" happened before her demand for an attorney, it is admissible.

1. (c) Darlene's statement to the second detective as she was being booked into jail.

An interrogation refers not only to express questioning, but also to any words or actions that the police know or should know are reasonably likely to elicit an incriminating response. Volunteered statements are not protected by Miranda since they are not the product of an interrogation. A confession is involuntary only if the police coerced the defendant into making the confession. Whether a statement is voluntary or coerced is determined by the totality of the circumstances. In this case, Darlene volunteered her statements. She went as far as to sign a standard waiver-of-rights form. There is nothing in the facts to indicate that there are characteristics of Darlene that would make her easily coerced into a confession. Instead, it is clear that she volunteered her confession which is not protected by Miranda therefore admissible even though her attorney was not present.

2. Voluntary manslaughter is a lesser offense than malice murder and felony murder. Malice murder is the unlawful killing of another living human being with malice aforethought. Malice can be shown by an intent to kill, intent to do serious bodily injury, reckless indifference to human life, and intent to commit a felony.

Felony murder is unintended and foreseeable killing proximately caused by and during the commission or attempted commission of an inherently dangerous felony. In Georgia, any felony that is inherently dangerous or creates a foreseeable risk of death will support a conviction for felony murder.

Voluntary manslaughter, often called "heat of passion" murder, is a lesser offense because although the homicide was committed with malice aforethought, there are some mitigating circumstances. The murder committed is a response to a situation that could inflame a reasonable person. A common example being a husband walks in on his wife cheating and in a moment of rage, kills the wife. The main issue here is to look at the time between the provocation and the killing and determine if a reasonable person had time to cool down. In this case, although stealing funds is a provocation, it does not rise to the level of justifying a reduction in the crime from murder to voluntary manslaughter. Plus, she had to drive to the office which provided her with adequate time to cool down.

Essay 3 – Sample Answer 1

1. The main cause of action that Joe has is a tort based upon an invasion of his privacy. The exact tort would be appropriation of plaintiff's picture. Because he has had his picture taken and used, without his permission, by BetterBeer in its advertisements, he has a cause of action against BetterBeer. He does not have a cause of action against Smith because Smith has not appropriate his image for commercial gain in advertisements. Yes, it is true that he sold the rights to this picture to BetterBeer, but he did not himself publish the photo in a commercial context, BetterBeer did.

2. Because Georgia has enacted a survival statute for tort claims, a deceased's personal representative is substituted in the cause of action for the deceased, as such, the cause of action for invasion of privacy should survive Joe's death. It will make a difference in the survival as the cause of action whether or not the claim was pending in a suit filed before the plaintiff's death. Because the deceased's personal representative is substituted for the deceased in this type of cause of action, the cause of action needs to be pending.

3. In order to proceed without filing a new suit on Joe's behalf, one must file a motion to substitute in Joe's personal representative for Joe. Once one files this motion, the court should grant the substitution and allow the court to proceed on Joe's behalf.

4. The answer to this question depends on whether, during Joe's life, one, Joe signed a sworn statement attesting to Harry being his son, two, there has been a court order declaring Joe to be Harry's father, three, Joe signed Harry's birth certificate, or four, there is other clear and convincing evidence that Joe is Harry's biological father. In addition, if Joe had a paternity test done that proved that Joe was Harry's biological father during Joe's lifetime, then Harry can claim under Joe's will. If not, then Harry will not share in Joe's estate with Joe's legitimate descendants. If Harry did share under the will, because Joe willed that his children would take per stirpes, or "by the roots," each of Joe's three sons would be entitled to a one-third share, or one million dollars each. However, because Tom is dead, is share would have lapsed in the common law, but, thanks to Georgia's anti-lapse statute, Tom's share would go to his descendants, namely his twins, who will each take $500,000. Because Dick is still alive, he would take $1,000,000, and Harry would take $1,000,000. However, if Harry does not share, then Tom's children will take one-half of Tom's $1,500,000 each, or $750,000 each, and Dick will take $1,500,000.

Essay 3 – Sample Answer 2

1. Causes of Action available to Joe

Joe may be able to pursue a commercial appropriation of likeness claim against Smith and BetterBeer. Such a claim requires Joe to prove the defendants are using his likeness for commercial advantage without his permission or authorization. However, such a claim cannot stand if the use is for newsworthy purposes. Smith took Joe's picture without his authorization and sold it for commercial gain to BetterBeer. This meets the initial required elements for the cause of action. Smith will likely argue that it was a newsworthy event to catch a record breaking home run, and it was also newsworthy when a fan is able to catch a home run hit by the most famous slugger without spilling his beer. Smith likely had the right to sell the image to news sites or television channels because of the newsworthy nature of the catch. Therefore, such an action may not be successful against Joe.

Joe can bring the same claim against BetterBeer, as they are using his image in nationwide commercials, and received a "big boost" in sales as a result. While the initial catch may have been newsworthy, repeated distribution of an image of the catch across the entire country, not just where the team plays, likely exceeds the allowance for publishing newsworthy events. Further, the fact that BetterBeer has received increase in revenue establishes that it has benefits commercially from using Joe's likeness. It has gone beyond the scope of publicizing Joe's image for newsworthy purposes and is making economical gains through the use of Joe's likeness. Therefore, a claim of this nature against BetterBerr has a better chance of success.

Joe may also want to pursue an inclusion into seclusion against Smith and BetterBeer, but this is not likely to be successful. Smith taking a picture of Joe catching the ball at a public baseball event likely does not unreasonably intrude into Joe's zone of privacy in a way that is highly objectionable to a reasonable person. However, BetterBeer redistributing that image repeatedly across the country may be more objectionable to a reasonable person. BetterBeer may argue Joe consented to the use of his image by putting on the shirt, getting the cup, and agreeing to go to a public game. However, Joe likely did not know that his image would now be used in a national advertising campaign. By making him the public figure of their company without his express consent, BetterBeer may have crossed the line into unreasonable intrusion into Joe's zone of privacy.

2. The causes of action will survive Joe's death if filed before his death

Georgia's survival statute will allow for Joe's claims to survive Joe's death if filed before he dies. The survival statute preserves all of the decedent's tort causes of action. Both causes of action involve the use of Joe's likeness and are based in privacy torts. Such privacy rights are personal to Joe, and therefore Joe is likely the only person who initially has standing to bring the claims against Smith and BetterBeer. Therefore, if they are not initated during his lifetime, his estate likely cannot bring them later on his behalf. However, if the claims are filed before Joe's death, Joe's estate can be substituted in as plaintiff to continue the causes of action against the defendants. The survival statute in Georgia allows tort claims to be continued by spouses, heirs, and/or personal representatives for the decedent. Here, since Joe's wife pre-deceased him, the claims can be carried on by his personal representative.

3. Procedures to ensure lawsuits continue after Joe's death

Joe's heirs should see that a personal representative is appointed. A personal representative should be appointed by the probate court. This requires that the representative appear in person in the probate court and take an oath that they will serve as a fiduciary to Joe's estate, and expeditiously pursue the estate's interests, including litigating the pending lawsuits.

This personal representative should then be substituted as plaintiff in the pending litigation after a notice of plaintiff's death is filed with the court. This should be done within 6 months of Joe's death.

4. Harry's right to inherit.

If Harry can prove that he is Joe's child born out of wedlock, he will share in Joe's bequest to his children, even though he was not a known heir of Joe's at the time of Joe's death. The intent of the testator governs in Georgia, and Georgia courts offer a more flexible approach of will construction than in other states, attempting to give intent to the testator's intent rather than the plain meaning of the text. The issue here is how to interpret the term "my children" and whether Joe's discussions with Ed about his intent to provide for Tom and Dick will destroy Harry's right to inherit under the will as one of Joe's children.

If a term is not ambiguous, no parole evidence is allowed to explain or contradict the terms. Only if there is an ambiguity on the face of the will, will the court look to the surrounding circumstances surrounding the testator at the time of will execution to explain the ambiguities. Here, there is no ambiguity on the face of the will. The term "children" is not ambiguous. One is either someone's child, or they are not. Georgia courts do not distinguish between children born out of wedlock and those born within the confines of a valid marriage. Because there is no ambiguity, a court will likely not allow parole evidence in the form of Joe's conversations with others, including Ed, about his intentions to assure Tom and Dick specifically where provided for.

Children born out of wedlock claiming an inheritance from the father requires proof of paternity by clear and convincing evidence. Assuming Harry can meet this standard and prove he is in fact Joe's child, he will be able to inherit under the will.

If Harry can take under the will, the $3 million dollars from the estate will be distributed in 1/3 to Harry, 1/3 to Dick, and 1/3 to Tom's two daughters (with that 1/3 split evenly between the two women). Tom's widow and Dick's wife do not take. Typically, a gift will lapse if the beneficiary dies before the testator, as Tom did here. However, Georgia's anti-lapse statute allows for a deceased beneficiary's interest to pass to his descendants (but not to a spouse or other relatives.) Here, Tom had daughters at the time of Tom's death, so they may take Tom's share per stripes.

If the court determines that Harry cannot take under the will, the $3 million dollars from the estate will be distributed 1/2 to Dick, and 1/2 to Tom's two daughters (with that 1/2 split evenly between the two women).

Essay 4 – Sample Answer 1

Memo

To: Partner

From: Examinee

Re: Tortious interference and Security issues

Date: 2/23/2021

1. A Motion for summary judgment can only be granted if there is no genuine issue of material fact in dispute and the movant is entitled to judgment as a matter of law. The court must determine what facts are necessary to decide the outcome of the case, if there is genuine dispute over those facts that should be decided by a fact-finder, and if there is no dispute, if movant is not entitled to judgment as a matter of law, and if they are, summary judgment must be denied. The court's job is not to make credibility determinations and view disputed evidence except to find whether no reasonable juror could believe the evidence provided for the fact at issue. If that is the case, it does not need to go to a fact-finder. If the court finds a reasonable juror could go either way, the court should send the issue to a fact-finder.

Examples of an issue that should go to a fact finder that are fact-determinable issue is whether Client had knowledge of the relationship, and specifically the right of first refusal, of Globex. If Client did not, summary judgment on the tortious interference claim should be granted since Globex can not prove every element of the tort. Malice in interfering with the relation would require intent and knowledge of the relationship. Here, the only fact supporting knowledge by Client is disputed evidence from a credible witness suggesting Client CEO informed AcmeFuel that Globex' rights of first refusal is invalid. If a judge found no reasonable juror could believe this testimony, he should grant the MSJ.

2. Tortious interference with a business relation requires the defendant act improperly and without privilege, the defendant acted purposefully and with malice with the intent to injure, induced a third party not to contintue a business relationship, such action caused some financial injury. Defendant's conduct may be privileged if it is a proper attempt to protect itself or its interests. If any prong is not met, plaintiff loses.

On the first prong, acting improperly and without privilege, between Globex and AcmeFuel, there may be no valid relationship. If the disputed evidence that a witness who may not be credible suggested that Globex's rights of first refusal are invalid, and they are actually invalid, no valid relationship exists. Whether Globex actually has a valid right of first refusal is at issue here. Facts such as whether it is for a reasonable time, place, manner restriction, whether the contracts had an offer, acceptance, intent to be bound, and consideration, whether they violated the statute of frauds, and others are all relevant to the determination of the validity of the Right of First Refusal. If the interference occurrs as a result of a conduct where the defendant has a right to engage, such conduct is privileged and not actionable. Here, Client is likely privileged to purchase these stations as long as it is due to fair competition. Client looking for a quick purchase of a retail business operation if likely fair competition.

On the second prong, malice, Defendant's knowledge of the relationship is key, and Globex did not record the supply contracts. The financing statements filed do not mention the right of first refusal. These two facts lean toward no knowledge. Financing statements alone are likely not enough to require Client to contact Globex about their business relationship. However, there is disputed evidence Client CEO informed AcmeFuel that Globex's rights were invalid. This is the only fact that might show Client had knowledge of the business relationship. If a judge finds that a reasonable juror might believe that Client had knowledge of the relationship, then the issue should go to a fact finder. There is no evidence of malice or an intent to injure Globex, Client may not have even known of the clause in the first place. On the malice issue, unless more evidence is presented, the case should be dismissed. Globex will likely argue that Client drafting termination of financing statements but not contacting Globex or AcmeFuel telling Client that they should research becoming a BFP should have informed Client that interference was afoot, even if that were true, no evidence of the malice and intent to injure required has been presented.

On the third Prong, financial injury, if the contract for right of refusal was valid, and if client had knowledge, then Client did interfere by purchasing the stations. This is not a disputed prong.

3. Fraudulent concealment

Client's actions do not support the claim for fraudulent concealment. Fraudulent concealment or misreprentation requires misrepresentation of material fact, knowledge the fact was false, intent to induce plantiff to act on reliance, causation (actual reliance), justifiable reliance, and damages. There is generally no general duty to disclose. Also, a defendant is only liable to a third party if they knew the defendant would be likely to rely on this. Client did not disclose any fact to Globex, nor was not in a fiduciary relationship to Globex. The only fact at issue that may be important here would be whether Client had a duty to contact Globex when filing terminations of their financing statements. In Georgia, a termination statement must be filed OR presented to the debtor within 90 days or within 20 days of debtors demand whichever is shorter. No facts state Globex demanded termination statements. I drafted the termination statements. Filing them satisfies our burden. Otherwise Client is not in a contractual relationship with Globex, fiduciary relationship with globex, and owes no duty to Globex. No representations have been made to Globex or concealed. In addition, the acquisition was last month. Even if the statements have not been filed yet, Client still has time to file them and be ok.

Globex can perfect their security interest by filing, but since the filings did not contain the right of first refusal, Clients subsequent filing of termination statement and perfection by possession through the sale is likely sufficient to avoid this claim.

Essay 4 – Sample Answer 2

1. The legal standard for a motion of summary judgement is a claim will be dismissed if it fails to asset a legal theory of recovery cognizable at law or allege facts sufficient to support cognizable claims and the court treats well-pleaded facts as true, resolves doubts or inferences in the plaintiff's favor and views the pleadings in the light most favorable to the plaintiff. In Georgia a motion is treated as a summary judgement motion when the court looks at and accepts matters outside of the original pleading. A motion for summary judgement is filed after the Defendant files an answer and judgement is made on the pleadings. The court will review all pleadings on this motion rather than a failure to state a claim motion which occurs before filing an answer by the Defendant and the court would only review the sufficiency of the plaintiff's complaint. The legal standard the Defendant argues is that even assuming that all allegations in the Plaintiff's pleadings are true, the Plaintiff cannot win.

2. No, Client did not tortuously interfere with Globex's right of first refusal.

Tortuous interference occurs when the defendant knew of a valid contractual relationship between the Plaintiff and a third party, the Defendant intentionally interfered with the contract in a way that substantially exceeds fair competition and free expression, the actions resulted in a breach and the breach caused damages to the Plaintiff. In Georgia a Plaintiff must show that the Defendant acted improperly, without any privilege, the defendant acted purposefully and maliciously, intending to hurt the Plaintiff, the Defendant persuaded a third party or parties not to begin or continue a business relationship with the Plaintiff and the Plaintiff suffered financial fiscal injury. Defenses to this claim are, justified motivation by health, safety or morals; the contract is terminable at will; the Defendant is a business competitor.

This claim is not supported by the facts because Client did not act improperly, purposefully or maliciously towards the Plaintiff. Client was looking to make a quick buck while AcmeFuel's owner was attempting to sell quickly. Despite their desires to close on the properties quickly, the parties agreed to a two week due diligence period. During this period financing statements were discovered that made no mention of a right of first refusal in Globex. As the attorney for Client I drafted terminations of the financing statements but never notified Globex of this. During the due diligence period there is not any facts to stipulate that Client acted purposefully or maliciously toward Globex by attempting to purchase the properties, it seems apparent that Client did not even have knowledge of a right of first refusal based on the completed research. There are not any facts that stipulate that Client and Globex are business competitors. The only harming fact against my client is from a highly suspect witness that claims Client's CEO informed AcmeFuel that Globex alleged rights of first refusal were invalid. This allegation, if true would only prove that there was knowledge of the first refusal not that Client acted maliciously or purposefully toward the Plaintiff. Because Client has not acted in this manner, nor do any facts support this claim, it will not be proven against Client.

3. No, Fraudulent concealment's elements won’t be satisfied.

Fraudulent Concealment is the concealment of a fact from a party with business relations that induces their reliance on the not knowing of the fact and that reliance results in their actions. Misrepresentations can be made intentionally or negligently. Intentional misrepresentations are false assertion of fact, made knowingly or recklessly with intent to mislead and the causes the Plaintiff to act in reliance, the reliance was justified (ordinary care required) and damages occurred that were actual

economic losses, not nominal. Negligent Misrepresentation is the Defendant's profession supplies commercial information, the information provided was false due to negligence, the Plaintiff has a pecuniary injury from reliance on the information and the Defendant must be in contract with the Plaintiff or know the Plaintiff is in a limited group intended to use the information and the Defendant must know the information is intended to influence the transaction

In this scenario, Client's CEO allegedly made a statement to AcmeFuel that Globex did not have a right to first refusal. Based on the investigation this seemed accurate and was told to AcmeFuel because it did not appear in the investigation. There is not a claim for Negligent misrepresentation because the statement was not made by a professional person that supplies commercial information. The statement will not be intentional misrepresentation because the investigation returned no information of the right of first refusal being granted to Globex. Therefore, Globex will not be able to establish that Client's CEO made the statement knowingly or recklessly nor are there any facts that stipulate that the statement was made in order to mislead AcmeFuel because AcmeFuel already wanted to quickly sell to Client.

Essay 4 – Sample Answer 3

1. Standard of granting motion for summary judgment

In order for a motion for summary judgment to be granted, the moving party must show that there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. A material fact is one that will affect the outcome of the case. A material fact raises a "genuine issue" if a reasonable jury could reach different conclusions about that fact. Summary judgment is appropriate when there are no issues of fact, but only issues of law to be decided by the judge. In this case, to win on summary judgment for the entire case (as opposed to only partial summary judgment) we must establish that there are no genuine disputes about any material fact for either claim. All facts in a motion for summary judgment must be viewed in the light most favorable to the non-moving party. Here, that would be in the light most favorable to Globex. If there is disputed evidence, the court should view it in the light most favorable to Globex because it is the non-moving party. At the summary judgment phase, the court is not allowed to make credibility determinations, as this would be an impermissible weighing of evidence reserved for the fact finder. If a reasonable jury could believe the evidence about what the Client's CEO told AcmeFuel, then the court is not allowed to disregard this statement simply because it is a witness with highly suspect credibility.

2. Tortious interference claim

A tortious interference claim requires the plaintiff prove by a preponderance of the evidence that the defendant knew there was a contract between the plaintiff and the third party, and that the defendant acted with the purpose of having the contract breached, or acted in a manner that made it meaningfully harder for the third party to perform their contract with the plaintiff.

Here, to succeed on a tortious interference claim, Globex must establish that Client knew that there was a contract for the right of first refusal between Globex and AcmeFuel, and it intentionally acted with the purpose of having AcmeFuel breach that contract. Facts that support such a claim include the fact that Client discovered some financial statements filed by Globex relating to AcmeFuel, that AcmeFuel told it to research the requirements for being a bona fide purchaser for value, and that a witness claims that the Client's CEO commented on the enforceability of Globex's right of first refusal. The fact that the sales were made suddenly and under what Globex's characterizes as suspicious circumstances regarding AcmeFuel's owner's engagement in criminal charges also lend credit to Globex's claims.

Financial statements are typically filed in connection with security interests and serve as a method for putting the world on notice about another's claim of right in property--here the stores and its equipment, proceeds, inventory, accounts receivable, and intangibles. Such security interests are made to secure a separate contract or obligation. By finding financial statements filed by Globex, the Client was on notice that Globex had done business with AcmeFuel that Globex had secured. However, financial statements may be filed prior to the Security Agreement, which is also required for there to be a valid security interest in the property. Therefore, finding a financial statement in the record does not in and of itself mean that the filer had a perfected security interest, or that the Client knew for a fact that a contract existed between Globex and AcmeFuel. Further, finding a financial statement does not mean the Client had notice of the right of first refusal term at issue, which is the key to proving it tortiously interfered to Globex's contractual rights.

Being told to research the requirements for a bona fide purchaser for value under Georgia law also suggests that the Client was put on notice of a binding agreement potentially at issue between AcemFuel and Globex. To be a bona fide purchaser for value, one cannot take with knowledge that the sale violates the rights of another person. By telling Client to look into this, Globex may be able to establish that Client knew about the contract and knew that its actions may be at odds with proceeding as a bona fide purchaser for value.

Further, the disputed witness testimony that the Client's CEO told AcmeFuel that Globex's right of first refusal was invalid is damaging evidence because, if believed, it establishes that the Client knew about the contract and sought to act regardless of its existence. While this evidence from a witness while credibility problems, the fact-finder will weigh their credibility with the other evidence in the record.

Further facts that do not support such a claim include the fact that the option contract was not recorded and that the parties only engaged in two weeks of due diligence review.

The witness testimony regarding the CEO's statement, especially given the other circumstantial evidence, is likely enough for Globex to defeat Client's motion for summary judgment, as it creates a triable issue of material fact as to whether our Client knew about the contract and sought to buy the stores anyway.

3. Fraudulent concealment claim

A fraudulent concealment claim requires the plaintiff prove by clear and convincing evidence that the defendant maintained silence or failed to disclose a material fact, the defendant had a duty to disclose this fact, and this failure to disclose was reasonably relied upon by the plaintiff. Here, this cause of action would require plaintiff to prove that the Client failed to disclose a material fact to it, that Client had a duty to disclose this fact to Plaintiff, and Client's failure to disclose the fact was reasonably relied upon by the Plaintiff to his detriment. Because this claim involves allegations of fraud, a heightened burden of prove is required--clear and convincing evidence instead of the usual preponderance of the evidence standard applied in civil cases.

The Client did not tell the Plaintiff that it was in negotiations with AcmeFuel to buy the stores, and it did not tell Plaintiff the terms of the proposed deal so that Globex could determine whether it wished to purchase the stores on the same terms as contained in Client's offer. However, the Client's actions likely do not support a claim of fraudulent concealment because it was under no duty to tell Globex of its efforts to buy the stores. A duty to disclose arises if the relationship involves one of trust and confidence, or if good faith requires such a disclosure. The relationship between one corporation and another is typically deemed an arms-length transaction whereby no duty to disclose information is required. Our Client and Globex had no contractual relationship between themselves, and nothing indicates that they were anything other than competitors interested in the same stores.

There is also nothing to suggest that the duty of good faith required Client to go to Globex with its terms. The duty of good faith arises during ongoing contractual disputes between parties. However, as stated above, there was no contractual relationship between Client and Globex. Being a "bona fide purchaser for value" does require that the Client take without knowledge of a competing interest in the property. While taking knowing of such a competing claim may negate Client's right to be considered a

bona fide purchaser for value, meaning that it may have taken the stores subject to Globex's security interest in them, it did not create an affirmative duty to act in good faith with regards to Globex.

Further, because Client and Globex are business entities acting in arms-length transactions (and not even in transactions with one another), it was likely not reasonable for Globex to rely on any material silence on the part of Client as to its offer for the properties. Therefore, while there may have been a material silence or non-disclosure, the Client had no duty to disclose to Globex, and Globex could not reasonably rely on Client's non-disclosure in its dealings with AcmeFuel. Therefore, Client should be able to succeed on a motion for summary judgment as to the fraudulent concealment claim.

AcmeFuel, on the other hand, had a duty via its contractual relationship with Globex to tell Globex of our client's offer, and may be liable to Globex for its failure to disclose our Client's offer to buy.

MPT 1 – Sample Answer 1

To: Isabel Banks

From: Examinee

Date: February 23, 2021

Re: Charlotte Mills matter

Introduction

This memorandum evaluates: 1) whether there is an enforceable contract between our client, Charlotte Mills ("Mills), and Ramble Group ("Ramble"), and 2) what damages Mills is entitled to recover in a breach of contract suit against Ramble.

For ease of reference, Mills' event management group is referred herein as "MEM". Ramble Group's owner-operator Katheryn Burton is referred herein as "Burton." Per your instructions, this memorandum does not address the issues of promissory estoppel and specific performance.

Discussion

A. Whether an Enforceable Contract Exists between Mills and Ramble

There is an enforceable contract between Mills and Ramble. First, the statute of frauds does not apply, so the agreement may be enforceable even though it is oral. Second, all required elements for an enforceable contract are met. The terms of the agreement are sufficiently definite for a court to find a binding contract.

1. The Mills/Ramble Agreement may be oral without violating the Statute of Frauds.

As an initial matter, the statute of frauds does not apply to the agreement between Mills and Ramble. Franklin's statute of frauds requires any agreement that is not to be performed within one year from the date of its making be memorialized in writing and signed by the party against whom enforcement is sought. Franklin Civil Code 20. Here, Mills and Ramble began discussions in June 2020. Mills' performance would be complete within one year of June 2020, as it would be performed by the first or second week of April, when Springfest 2021 would be held. Because Mills could perform within one year, the statute of frauds does not apply to this matter. The agreement between Mills and Ramble does not have to be in writing to be enforceable.

2. All required elements for an enforceable contract are met.

For an enforceable contract to be formed, there must be: 1) an offer; 2) acceptance; 3) intention to create a legal relationship; and 4) consideration. (Daniels v. Smith 2011). All elements are met here.

Offer

The email exchange on June 4, 2020, between Mills and Burton constitutes an offer for performance. Mills provides a proposal to offer her professional event management services for Springfest 2021, which details the scope of work, and the responsibilities of both Mills and Burton. After

the email exchange on June 7, 2020, Mills adjusted her offer regarding her fee for the ticket price. Burton responds by saying, "That sounds fair."

In Daniels v. Smith, the court found a binding contract when the parties exchanged a plan with specifications for building a warehouse, and there was a later modification to one of the proposed terms (the price). The builder initially offered to build the warehouse for $227,000. The defendant responded by saying the job was Daniels' if he could do it for $200,000. Daniels responded by saying he accepted the offer. This is similar to the negotiations that took place here between Mills and Burton. Mills provided her initial proposal and fee structure, and Burton inquired as to whether a lower per-ticket fee was an option given the unique nature of the 5K event. Mills accepted a lower per-ticket fee at Burton's urging. At this point, Mills had made an offer that Burton could accept.

Acceptance

Burton accepted Mills' proposal by saying on June 8, 2020, "That sounds fair." in response to Mills' revised offer with the new per-ticket fee. She again reiterated her acceptance to the contract on June 9, 2020, when she said, "I agree we really need to get going on this."

This statement that they needed to "get going" on planning the event is very similar to the statement made by Smith in Daniels v. Smith, which the court determined was an acceptance. In Daniels, Smith said, "Let's get this thing rolling." in response to Daniel's modified offer. The court interpreted this statement as an intent to be bound by the agreement. A court would likely find the same intent here on Burton's part, as all her email statements to Mills in the June 8-9th exchange indicate she is okay with Mills' terms, notes the urgency of Mills getting started on the work, and asks for specific action items to take place, such as working on the website and booking venues. Because Burton's statements indicate she intended by be bound, a court will likely find an agreement.

Intent to create legal relationship

For many of the same reasons that a court will find acceptance, a court will likely find that the parties intended to create a legal relationship here. Even though several items where not included in Mills' proposal (the offer), the court will likely find that there was a meeting of the minds on all material matters. For there to be a meeting of the minds, the material terms cannot be left for future settlement. (Green v. Colimon). Once all terms and conditions are agreed upon with mutual intention, the contract becomes binding. (Alexander v. Gilligan). Whether there was sufficiently defined terms for there to be a meeting of the minds is judged from the surrounding circumstances. (Jasper Construction v. Park-Central).

In Green v. Colimon and Alexander v. Gilligan, the court noted that parties will be found to intend a binding contract unless there is a need for future negotiations on material terms. In Alexander v. Gilligan, the court determined that email exchanges about the terms for a 6 month business consulting agreement, where there was no formal written contract, was evidence of an agreement between the parties to be bound because there was nothing left for future negotiations. Furthermore, in Jasper Construction v. Park-Central, the court found that the failure to incorporate all terms of the Plans into the Lease did not mean there was a failure of a meeting of the minds on the material terms. A contract can be enforceable even when the price and time of performance is not agreed upon. (Stark v. Huntington).

Here, while there were several items missing in the offer, such as the date of the event and venue, these items were later ironed out in subsequent email exchanges between the parties. All material terms, including the services Mills would provide and how she would be compensated, where specified and agreed to by Mills and Burton in the proposal and subsequent email exchanges. There was a meeting of the minds on all material matters. Therefore, the terms become binding, even without a formal writing summarizing all terms and signed by both parties.

Consideration

There is consideration here, as there is a bargained for exchange. Mills agreed to provide her event planning services in exchange for monetary payment by Burton, of $15,000 for up to the first registrants, with additional per registration fees for general admission and 5K tickets. The monetary payment in exchange for providing services is similar to the types of consideration typically recognized in Franklin. (See, e.g., Daniels v. Smith; Jasper Construction).

B. Damages Available to Mills in Breach of Contract Suit

In a breach of contract suit, damages are available for all detriment proximately caused by the breach of contract, or which, in the ordinary course of things, would be likely to result therefore. (Daniels v. Smith; Fr. Civ Code 100.) However, unascertainable damages cannot be recovered. (Daniels v. Smith; Fr. Civ Code 100.) There must be a certainty as the nature, existence, and cause of the damages (Daniels v. Smith), but a trier of fact may determine the amount of damages if only the amount is uncertain. (Daniels v. Smith)

First, Mills should not be limited to the $2,500, as the event was not "cancelled". The event still took place, just with another organizer. Therefore, Mills should be able to seek reimbursement for her out of pocket expenses and lost profits.

Here, Mills may recover the expenses incurred as a result of the breach. This includes the $3,000 in out of pocket expenses incurred as a result of the breach. The $2,000 deposit already received from Burton should not be deducted from this amount, as the deposit was poised as a non-refundable deposit.

Mills is also entitled to pursue lost profits, either in the form of the profits lost from not being able to manage the event and gain the ticket sale fees, and/or from the fees she forego in giving up other opportunities to manage the SpringFest.

Mills needs to submit some evidence to support her contended damages, and then the trier of fact will determine what she is entitled to in the form of reasonable damages. See Jasper Construction. In Daniels v. Smith, the court took into consideration the builder's years of experience in determining whether the requested damages where reasonable. Here, Mills has less experience than the builder in Daniels, with only 3 years compared to the builder's 13. However, she had demonstrated experience hosting other events, and can point to specific value added, including obtaining the permits, having a new idea for food vendors, and increasing publicity for the event by redoing part of the website. She can also point to Burton's own statements about how 500 people registered last year, and Burton expected a double of registrations this year. She also had inquiries about other events at the same time, which she was unable to commit to as they conflicted with the SpringFest.

Mills is entitled to see the out of pocket expenses, the $15,000 base fee, $3,000 for the expected additional 1,500 general admission tickets, and $500 for the fun-run only registrations. The burden would then be on Burton to contradict this evidence. If Mills' evidence is the only thing in the record, the trier of fact would likely grant these damages as reasonable.

Conclusion

There is an enforceable contract between Mills and Burton. Mills will be able to seek reimbursement for out of pocket expenses and lost profits.

MPT 1 – Sample Answer 2

MEMORANDUM

To: Isabel Banks

From: Examinee

Date: February 23, 2021

Re: Charlotte Mills matter

Issue 1: Is there an enforceable contract between Charlotte Mills and Ramble Group?

Short Answer: Yes, there is an enforceable contract between Charlotte Mills because the Statute of Frauds does not apply and the contract elements of offer, acceptance, the intent to create a legal relationship, and consideration are present. Furthermore, the parol evidence rule does not bar consideration of email and oral communications outside of the formal written, unsigned agreement, and the notions of fair play and justice require the totality of the communications to be interpreted together to prove the existence of the contract.

Analysis:

a. The agreement between Mills and Ramble Group Did Not Need to be a Signed Writing to Constitute an Enforceable Contract Because the Statute of Frauds does not apply.

As an initial matter, the Statute of Frauds would not apply here, and a signed written agreement is not necessary in this instance to show an enforceable contract. Franklin Civil Code Section 20 states that an agreement that by its terms is not to be performed within one year from the date of its making is invalid unless it is memorialized in writing and executed by the party to be charged. The initial contact between Mills and Ramble occurred on June 3, 2020, and the substance of the contract was the planning and organization of Springfest 2021, which was to take place in April 2021. Thus, the services to be performed under any agreement would necessarily take no longer than one year to perform, and there is no applicable statutory requirement that the agreement be in writing to be an enforceable contract.

b. A Contract Between Mills and Ramble was formed because the essential elements of a contract were present, namely offer, acceptance, the intention to create a legal relationship, and consideration.

The essential elements for contract formation are 1) offer, 2) acceptance, 3) the intention to create a legal relationship, and 4) consideration. Daniels v. Smith (Fr. Ct. App. 2011). Here, there is no dispute that an offer was made with Mills' written proposal to Ramble attached to her June 4, 2020 email. This proposal offered to provide Ramble with professional management services for Springfest 2021 which included event logistics, venue and course design, event consultation and guidance, and event marketing and branding. There is also no dispute that the offer contained adequate consideration in the form of payment in the amount of $15,000 for up to the first 1000 registrations or tickets sold and $2 per additional registration or ticket sold. In subsequent email communications between Mills and Ramble, this was modified to include the $15,000 base fee plus a $2 fee per general admission ticket and

$1 fee per fun-run-only ticket. Thus, the remaining issues are whether Ramble accepted the offer and whether there was intent to create a legal relationship.

Ramble accepted the offer and intended to create a legal relationship, similarly to the situation in Alexander v. Gilligan (Fr. Sup. Ct. 2008). In that case, the parties agreed upon the terms of a six-month business consulting agreement through emails and several meetings. However, when the plaintiff presented a written contract for the defendant's signature, the defendant refused to sign. In Ramble's email of June 9, 2020, Ramble representative Kathryn Burton tells Mills to "get started on the website design" and explicitly states she would provide Ramble's initial deposit by the end of the week. She ends the email by stating, "I'm looking forward to working with you to make Springfest 2021 a huge success!" Mills replies in an email of the same date that, once she receives the deposit, she would take care of securing the two potential venues, and Ramble could reimburse her later per their agreement. Importantly, Ramble's representative does not respond to this email to dispute that there is such an agreement. Furthermore, additional phone conversations took place following the June 9th emails where Mills provided regular updates to Ramble's representative, and Ramble's representative expressed no concerns. At no time did Ramble sign the written proposal provided by Mills in her June 2020 email.

In the Alexander case, the court held that the formal written contract was not the agreement of the parties, but instead only evidence of such agreement. The court relied upon previous cases that stated that, "when parties agree orally or via email, upon all the terms and conditions of an agreement with the mutual intention for it to become binding, the mere fact that the formal written agreement has yet to be prepared and signed does not alter the binding validity of the agreement." Daniels (Fr. Ct. App. 2011). Whether the parties agreed for oral or email-based agreement to be binding is to be determined by the trier of fact from the surrounding circumstances, giving effect to the mutual intention of the parties as it existed at the time of contracting. Alexander. Generally, the greater the complexity and/or the larger the size of the transaction, the more likely that informal communications are meant to be only early negotiations and not a binding contract. Haviland v. Magnolia Sec. Inc. (Fr. Ct. App. 2009); 1 CORBIN ON CONTRACTS Section 2.9, at 152 (rev. ed. 1993). Furthermore, the specificity required for an enforceable contract depends on the circumstances. Jasper Construction Co. v. Park-Central Inc. (Fr. Ct. of Appeal 2014). In certain circumstances, a contract can be enforced even where one party asserts that design specifications, price, and time of performance are not agreed upon. Stark v. Huntington (Fr. Ct. App. 2003).Here, since the total of the contract value was in the low $10,000's, it is more likely that the parties intended their email and phone communications to be binding. Additionally, since the only term remaining to be determined at the end of the written discussions was the venue location, which would be easily obtainable (Mills noted she would proceed with securing two potential venues in her June 9th email), there was an enforceable contract between Mills and Ramble.

c. The Parol Evidence Rule Does Not Apply Here and Does Not Prevent the Enforcement of the Contract Between Mills and Ramble.

The parol evidence rule prevents a court from considering prior or contemporaneous agreements that are inconsistent with the terms in the written agreement. Bradley v. Ortiz (Fr. Sup. Ct. 1998). In order for the parol evidence rule to apply, the evidence must indicate that the parties intended that the written agreement be the final expression of their agreement (as by both parties signing it). Thompson v. Alamo Paper Products (Fr. Ct. App. 2017). If the evidence indicates such, the written

contract will supersede all negotiations concerning its matter that preceded or accompanied the execution of the contract. Since here the parties did not both sign the agreement originally provided by Mills, and there is no merger clause or other such indication in the formal agreement itself indicating that it is a complete final expression of the parties' agreement, the court may consider both extrinsic written and oral communication to prove the terms of the contract. Thompson; Bradley.

d. Justice and Fair Dealing Compel the Enforcement of the Contract Between Mills and Ramble.

In addition to the above, the concepts of justice and fair dealing support the recognition of the enforceable agreement between Mills and Ramble. As noted in Daniels, "[o]therwise, a party who has entered into a contract through a combination of telephone conversations, in-person discussions, and email correspondence would be able to avoid the contract by claiming that the contract had not been reduced to another written form." To ensure fairness, the Court cannot permit Ramble to avoid its obligations incurred in the ordinary course of business through its refusal to sign the written proposal which memorializes the terms of Mills' and Ramble's oral and email-based agreement.

Issue 2: If there is an enforceable contract, what damages can Charlotte Mills recover?

Short Answer: Since there's an enforceable contract, Mills can recover expenses and lost profits to the extent such profits are reasonable. She is not limited to the amounts discussed in the formal written, unsigned agreement.

Analysis:

Statutory damages for breach of contract include damages for all detriment "proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom," and unascertainable damages cannot be recovered. FR. CIVIL CODE SECTION 100. However, when there is no uncertainty as to the fact of damage, the same certainty as to its amount is not required. Alexander; Daniels. One whose wrongful conduct has made it difficult to ascertain damages cannot complain because the amount of damages must be estimated as long as the estimate is reasonable. Id.

It is for the trier of fact to determine whether a Plaintiff's valuation of lost profits is fair and reasonable. Daniels. In the Daniels case, even though the Plaintiff contractor was unable to provide subcontractor bids to support his valuation of lost profits, the factfinder's holding that the lost profit valuation was reasonable was upheld as relying on the best evidence available. Here, it will be difficult to calculate lost profits because it is unknown how many tickets would be sold at Springfest 2021. Mills would be entitled to her expenses in the amount of $3000 as well as the base fee of $15,000 (minus the $2000 nonrefundable deposit). Mills may be able to recover anticipated lost profits based off the prior year's ticket sales if the factfinder determines that this is reasonable and the best evidence of what Mills' lost profits would be. Mills would likely not be limited to the provision in the Proposal since that is only evidence of the agreement between Mills and Ramble, rather than the full enforceable agreement between the two.

MPT 2 – Sample Answer 1

To: Marie Smith

From: Examinee

Date: Today

Re: Brief in Support of Pretrial Motion for State v. Kilross

Legal Argument

This Court should exclude Bryan Kilross's prior robbery conviction because the State cannot satisfy the requirements of Franklin Rule of Evidence 609 (FRE 609) concerning the use of prior convictions for impeachment. Mr. Kilross's prior robbery conviction is neither probative of truthfulness nor a crime of dishonesty. Furthermore, Mr. Kilross's prior conviction is seriously prejudicial. As a result, it should be excluded as impeachment evidence.

a. The Court should exclude Mr. Kilross's prior robbery conviction because of its prejudicial effect and lack of probative value under FRE 609(a)(1)(B).

According to FRE 609(a)(1)(B), a crime that is punishable by death or by imprisonment for more than one year must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant. This rule reflects a heightened balancing test and creates a serious preference for exclusion. The Court must consider four factors when weighing the probative value of admitting a prior conviction against the prejudicial effect of its admission under this heightened test. Those four factors are as follows: (1) the nature of the prior crime involved, (2) when the conviction occurred, (3) the importance of the defendant's testimony to the case, and (4) the importance of the credibility of the defendant. See State v. Hartwell (2014). Here, the Court must analyze whether the probative value of Mr. Kilross's prior robbery conviction outweighs its prejudicial effect to Mr. Kilross. The Court will find that it does not.

To first evaluate the "nature of the prior crime" courts consider the impeachment value of the prior crime and its similarity to the charged crime. "Impeachment value" is how probative the prior conviction is of the witness's character for truthfulness. See Hartwell. According to the court in Hartwell, crimes of violence have lower probative value in weighing credibility. The prosecution seeks to have Mr. Kilross's prior conviction of robbery admitted into evidence. Yet, the nature of that crime does not go to truthfulness. Honesty and truthfulness is not mentioned in Fr. Crim. C. Section 29, the statute defining robbery. While the prosecution may argue that "theft" is a predicate offense to robbery, the court in State v. Thorpe held that "deception is not an essential element of theft" and therefore robbery is not a crime requiring proof of "dishonesty or false statement . . . ." Furthermore, the more similar a prior crime is to a current charge, the greater the "danger that prior convictions will be misused as character evidence." Id. Mr. Kilross's prior robbery conviction is extremely similar to the current charge of armed robbery. Therefore, this factor weighs against admission of the past conviction.

Additionally, Mr. Kilross's prior conviction is 8 years old. Although the State may argue that only convictions more than 10 years old are excludable, "even for convictions less than 10 years old, the passage of time can reduce the convictions' probative value, especially where other circumstances suggest a changed character." Hartwell. The circumstances of this case undeniable suggest a changed

character. In the past eight years, Mr. Kilross has stayed away from crime. His worst offenses are two speeding tickets, both of which he pled guilty to and paid the fines for. Mr. Kilross is gainfully employed, having worked his way up to shift supervisor at a warehouse where he loads and unloads trucks. Mr. Kilross has demonstrated a changed character from the person he was eight years ago. Even eight years ago, he demonstrated serious regret and remorse for his crime. Given the age of the prior conviction and the change in Mr. Kilross, this factor weighs in favor of excluding Mr. Kilross's past conviction.

The third factor to consider is the importance of the defendant's testimony to the case. See Hartwell. Here, the entire case rests on the testimony of Benjamin Grier, the store clerk who was on duty the night of the robbery at the Pack 'N Go, and the potential testimony of Mr. Kilross should he choose to take the stand. "If the defendant's only rebuttal comes from his own testimony, the court should consider whether impeachment with a prior conviction would prevent the defendant from taking the stand on his own behalf, severely undercutting his ability to present a defense." Id. In Hartwell, where the defendant's companion chose not to testify, the defendant had only his own testimony to support his theory at trial. Similarly, Mr. Kilross only has his own testimony to support his assertion that he did not commit the robbery at the Pack 'N Go. Ms. Janice Malone last spoke with Mr. Kilross well before 6:30pm and therefore cannot testify as to where he was at the time the crime was committed at 6:24pm (per the store's video feed showing the robbery). To impeach Mr. Kilross would be tantamount to severely undercutting his defense. For that reason, this factor also weighs against admitting Mr. Kilross's prior conviction.

Finally, the Court must weigh the importance of the defendant's credibility. "Where the defendant's credibility is the focus of the trial, the significance of admitting a prior conviction is heightened." Mr. Kilross's credibility is certainly important to this case. Despite its important, though, the other three factors weight against use of Mr. Kilross's prior conviction. Like in Hartwell, where the first three factors weighed against use of the prior conviction and it was therefore excluded, this Court should find that the prosecution has failed to meet its burden of establishing that the probative value of the prior offense for impeachment purposes outweighs its prejudicial impact.

The probative value of Mr. Kilross's prior robbery conviction is minute compared with its substantial prejudicial value. Mr. Kilross's prior conviction was not a crime imputing his honesty. Moreover, Mr. Kilross's prior conviction is similar to the current charge of armed robbery, putting it at risk of being used as character evidence. Mr. Kilross's prior conviction is 8 years old, and since then he has changed his life in numerous positive ways. Furthermore, Mr. Kilross's testimony is highly important to this case. He only has his own testimony to support his assertion that he did not commit the armed robbery he has been charged with. While the prosecution will argue that Mr. Kilross's credibility is a central issue in this case because we are relying on his testimony and his truthfulness, the other factors weigh heavily in favor of excluding Mr. Kilross's past conviction. As such, this Court should find in favor of Mr. Kilross and exclude his past conviction as impeachment evidence.

b. The Court should exclude Mr. Kilross's prior robbery conviction because robbery is not a crime requiring evidence of a dishonest act or false statement and the circumstances of Mr. Kilross's prior conviction do not show he is dishonest.

Mr. Kilross's prior robbery conviction is not a crime requiring evidence of a dishonest act or false statement. Therefore, the law does not require its admission into evidence for impeachment purposes. FRE 609(a)(2) states that, "evidence must be admitted if the court can readily determine that establishing the elements of the crime require proving - or the witness's admitting - a dishonest act or false statement." In State v. Thorpe, the court analyzed what "dishonesty" means in the context of this law. The court found that, as is evidenced by the legislative history of the statute, "dishonesty" means "deceitful behavior, or a disposition to lie, cheat, or defraud." The court very specifically held that Franklin's definition of robbery does not include a requirement that the prosecution prove an act of dishonesty or false statement to obtain a conviction. See Fr. Crim. Code Section 29; see also Thorpe ("Therefore, we hold that the crime of robbery is not a crime with an element requirement proof of dishonesty or false statement that could automatically be used to impeach a witness under Rule 609(a)(2)."). Under this analysis, a prior conviction of robbery need not come in as impeachment evidence. It is not a crime involving dishonesty and therefore is not required to be admitted for impeachment purposes.

The court in Thorpe continued its inquiry by looking beyond the statutory definitions to the factual circumstances underlying the prior offenses. In doing so, the court considered the record and whether it established that the defendant "engaged in any act of deception or false statement" when he committed to unarmed robberies. The court referenced another case, State v. Frederick, as an example. Where a defendant admitted that she had placed unpurchased items in a backpack and then lied about its contents to a security officer, the court held that the prosecution had sufficiently proved acts of deception to use the prior crime to impeach the defendant under Rule 609. Mr. Kilross's case is like that of Thorpe and not that of Frederick. The prosecution can point to nothing in the record that establishes that Mr. Kilross engaged in acts of deception or false statement when he committed robbery 8 years ago. While the prosecution may argue that the use of a toy gun during that robbery was an act of deception, it was Mr. Kilross's friend - Dave - and not Mr. Kilross who had possession of and used the toy gun. It was his friend who pretended to have a gun in his jacket. Mr. Kilross himself did nothing to lead this court to scrutinize his honesty. The prosecution has failed to meet its burden of showing that the circumstances underlying his prior robbery conviction demonstrate that Mr. Kilross was dishonest or deceitful. At best, the prosecution may argue that Mr. Kilross's friend omitted the nature of the gun during the robbery. This is not enough, though. Mr. Kilross himself did nothing deceptive and therefore his prior robbery conviction should be excluded as impeachment evidence.

Given the nature of his past robbery conviction, the Court should exclude Mr. Kilross's prior conviction for its use as impeachment evidence. Robbery is not a crime involving dishonesty or deceit, and the circumstances of Mr. Kilross's particular conviction do not show dishonesty or deceit by Mr. Kilross.

MPT 2 – Sample Answer 2

III. Legal Argument

Kilross's 8-year-old robbery conviction should not be admitted because the prosecution cannot meet the requirements of Rule 609(a)(2) or Rule 609(a)(1)(B).

In a criminal trial in Franklin, impeachment by evidence of a prior criminal conviction is only admitted in limited circumstances because the courts recognize the potential prejudicial effect such evidence may have on the defendant. Under Rule 609(a)(2), conviction of a crime, regardless of the punishment, may be admitted only if the evidence in the prior record establishes that an element of the old crime involved a dishonest act or false statement. Under 609(a)(1)(B), conviction of a crime punishable by imprisonment for more than one year is only admissible if the probative value outweighs the prejudicial effect to the defendant. In this case, the prosecution cannot establish that either of these tests are met. Therefore, this court should preclude admission of Kilross's 8-year-old conviction for armed robbery to ensure he receives a fair trial on the current indictment.

A. The prosecution cannot meet the requirements of Rule 609(a)(2) because there is no evidence in the prior record establishing a dishonest act or false statement.

Kilross's prior conviction is admissible under Rule 609(a)(2) only if the evidence of the prior conviction establishes that the crime involved a dishonest act or false statement. Kilross's prior conviction at issue here is one of robbery. The Franklin Supreme Court has previously held that, for purposes of Rule 609, "dishonesty" is interpreted narrowly, and robbery is not a "dishonest act". (State v. Thorpe). By Franklin's own statutory definition, robbery does not require proving as an element of the underlying crime a dishonest or false statement was made. (Fr. Crim. Code 29; State v. Thorpe). Further, there is nothing in the record of Kilross's prior conviction that establishes that Kilross made a dishonest act or false statement.

In State v. Thorpe, the defendant was indicted for robbery, and the prosecution sought to admit evidence of his two prior unarmed robbery convictions. However, there was no evidence in the record that the defendant in Thorpe made a false statement or engaged in "dishonesty" for Rule 609 purposes. The Franklin Supreme Court therefore refused to allow the introduction of the defendant's prior convictions. In contrast, in State v. Federick, the court allowed the introduction of an earier shoplifting plea under Rule 609(a)(2) because there was evidence in the record that the defendant lied during the commission of the crime.

The record in this case is similar to that at issue in Thorpe, and dissimilar to that of Federick, and the court should therefore disallow the introduction of Kilross' prior conviction. There is nothing in the one-page indictment that demonstrates Kilross made a false statement during the commission of the previous conviction. There is no witness testimony in the record that proves dishonesty, either. The prosecution was not required to prove a falsity occurred in securing the previous conviction. Unlike the defendant in Federick that made an affirmative statement of fact that was not true regarding items in his book bag, there is nothing in the record in Kilross's conviction that the prosecution can point to that was an affirmative, express, direct lie made by Kilross.

While courts may look to the surrounding circumstances of the previous crime to determine whether it involved dishonesty, Kilross' actions did not involve such misrepresentation or deceit to

change the prior robbery from anything other than a taking by a threat of violence. Kilross' accomplice used a toy gun. However, by brandishing what appeared to be a deadly weapon, Kilross and his accomplice carried out the robbery by a threat of a use of force and violence. Such threat of violence is the exact type of crime that the Franklin court deemed to not involve dishonest or false statement. (See Thorpe). Therefore, even though it involved a toy gun, the prior crime was one of violence, and not deceit. Because there is no evidence the prior crime involved a dishonest act or false statement, this court should not allow the conviction into evidence here.

B. The prosecution cannot meet the requirements of Rule 609(a)(1)(B) because the probative value of the prior conviction is outweighed by its prejudicial effect on Kilross.

Conviction of a crime punishable by more than one year in prison is admissible only if the probable value of the evidence outweighs its prejudicial effect on the defendant. Rule 609(a)(1)(B). This is a heightened balancing test, and Franklin courts prefer to exclude such evidence. (State v. Hartwell 2014). Even though Kilross was only imprisoned for six months for his prior robbery conviction, Rule 609(a)(1)(B) and its preference of excluding prior convictions applies because Kilross was punished for a total of eighteen months, via a combination of imprisonment and probation. Kilross only obtained a lighter sentence because of a plea deal, as the crime is punishable by "not less than 1 nor more than 20 years." Fr. Crim. Code 29.

In evaluating the admission of prior criminal convictions under this prong of 609, the court must consider 4 factors: 1) the nature of the prior crime; 2) the age of the prior conviction; 3) the importance of the defendant's testimony to the present trial; and 4) the importance of the defendant's credibility to the present trial. (State v. Hartwell). These factors overwhelming weigh in favor of not admitting Kilross's prior conviction, and are discussed in turn below.

1. Nature of the Prior, Substantially Similar Crime has Low Impeachment Value

In evaluating the nature of the prior crime, the court must consider the impeachment value of the prior conviction, and the similarities of the prior conviction and the charged crime.

a. Impeachment value

Crimes of violence offer lower probative value for impeachment because they do not imply dishonesty. (State v. Hartwell). As discussed above, the prosecution was not required to show that Kilross was dishonest in committing the prior robbery. Allowing into evidence his prior conviction in no way comments on his propensity for telling the truth. Like firearm possession in Hartwell, committing a robbery does not inherently involve dishonesty, as it is an act of violence, and not one involving deceit, misrepresentation, or false pretenses. Therefore, the introduction of the evidence has a low probative value.

b. Similarity between crimes

The more similar the prior crime, the stronger the grounds are for exclusion. (State v. Hartwell). Here, the prior crime is of the exact same nature as Kilross's prior conviction--robbing a convenience store through threat of force. In Hartwell, the prior conviction was also virtually identical as to the one currently charged. In prohibiting the introduction of the prior conviction there, the court noted that there was a high risk that the fact finder would use the prior conviction as character evidence rather

than as impeachment. (State v. Hartwell). That same risk is present here. This high risk for prejudice, combined with the low probative value, weighs against allowing the introduction of the prior conviction.

2. Prior Conviction is Too Old to be Probative of Current Character

The passage of time renders a prior conviction less probative in value. While Kilross's conviction is less than 10 years old, it is stale evidence of his current character. The conviction is 8 years old, and he has had no other major run-ins with the law. In State v. Hartwell, the court prohibited the introduction of a conviction less old than Kilross' (6 years old compared to Kilross's 8 years), noting that the defendant's conduct over time can reflect a change in character from the time of the first conviction. Here, Kilross has had no other major criminal charges and has not been in jail since his 6 month sentence for the prior robbery. He has a steady job, which shows his dedication to providing for himself through legal means and hard work. he has even worked his way up to a supervisory position. His two traffic tickets in no way show dishonesty. Such tickets are common and in no way comment on his ability to be a productive member of society. These tickets should not be held against him. And, even if considered, they must be viewed in relation to the entire situation, including Kilross' near-decade of legal conduct and the remorse shown after his first conviction. Because the prior conviction is several years old and is not indicative of a pattern of behavior, it should not be considered by this court.

3. Importance of the Defendant's testimony

Where the defendant is the only rebuttal witness, the impeachment via a prior criminal conviction would severely undercut his ability to present a defense by taking a stand, by forcing the defendant to choose between not testifying for risk of introducing the prior conviction, or testifying and allowing the fact finder to hear extremely prejudicial evidence of his prior conviction. (State v. Hartwell). Here, there is very limited evidence available to Kilross to contradict the store clerk's testimony without taking the stand. The video from the store does not show Kilross's face, and it only shows the perpetrator wearing very common clothes that Kilross admits to wearing--the jeans and jean jacket. Malone's testimony alone does not provide Kilross an alibi. As in Hartwell where there was a lack of other evidence supporting the defendant's position, here the only way for Kilross to adequate rebut the store clerk's version of events, and give the fact-finder evidence for finding him not guilty, is by taking the stand. Impeaching him with the prior conviction severely undercuts his ability to take the stand and rebut the charges against him.

4. Importance of Defendant's credibility

Where credibility is the focus of the trial, the significance of admitting the prior conviction is heighten. In Hartwell, credibility was the central issue, as it was the defendant's testimony against the arresting officer. Admittedly, Kilross' credibility of central importance, as, like in Hartwell, it is the defendant's testimony against one other person's. However, the court must consider all factors together. The other factors strongly weigh against allowing the conviction into evidence. The fact-finder can still assess Kilross's testimony live, and evaluate his credibility based on how he compares to the store clerk. Therefore, given all four elements, this court should not allow the introduction of the prior conviction.

The prosecution cannot meet its burden of establishing that the probative value of the prior offense for impeachment purposes outweighs its prejudicial impact. Therefore, this court should not

admit Kilross's prior robbery conviction into evidence. This court should also refuse to admit the prior robbery conviction because robbery is not a crime that involves a dishonest or false representation.