February 2021 Georgia Bar Examination Essay and MPT Questions

Essay 1

Your firm represents Big Box Store, Inc. (Big Box Store). Recently, a jury entered a verdict against Big Box Store in a personal injury suit brought by Plaintiff in a Georgia Superior Court. Your senior partner has asked you to determine whether there are any errors in the trial court's evidentiary rulings that could form the basis for the grant of a new trial.

Plaintiff's allegation was that she slipped and fell on a wet substance that was negligently left on the floor of a Big Box Store. Plaintiff alleged she struck her head on the floor and suffered a concussion. She also alleged she suffers from post-traumatic stress disorder (PTSD) as a result of her fall.

While reviewing the file, you gather the following pertinent facts:

1. During Plaintiff's discovery deposition, she testified that she discussed her PTSD with her longtime psychologist, Amy Apple, Ph.D. Plaintiff had been in treatment with Dr. Apple for over a decade. The defense listed Dr. Apple as a witness hoping to establish that the fall did not cause Plaintiff's PTSD and that Plaintiff had communicated symptoms of PTSD to Dr. Apple prior to the fall. In response, Plaintiff filed a motion in limine to exclude Dr. Apple as a witness at trial. The Court granted Plaintiff's motion.

2. During her direct examination, Plaintiff was unable to recall the area of the store where she fell. Plaintiff's counsel showed Plaintiff a written statement made by an eyewitness to the fall. Plaintiff reviewed the statement and then testified that she remembered she was in the frozen food section when she fell.

3. During cross-examination of Plaintiff by defense counsel, Plaintiff was asked if there was a wet floor sign in the area where she fell. Plaintiff responded that she did not remember. On re-direct, Plaintiff's counsel handed her a written statement that Plaintiff made immediately following the fall. After reading her statement to the jury, Plaintiff testified: "As I sit here today, I am unable to recall whether there was a sign, but this statement says that there were no wet floor signs anywhere so that must be true."

4. During cross-examination of Plaintiff by defense counsel, Plaintiff was asked the following:

> Q: If you suffered head trauma when you fell, why did you go to your family doctor instead of going straight to the emergency room?

A: Because Big Box Store's insurance adjuster told me to.

5. During closing argument, Plaintiff's counsel stated the following: "Ladies and gentlemen, this is Big Box Store – a multi-million dollar corporation. A verdict for Plaintiff is not going to put them out of business."

Assuming that timely objections were made as to each of the issues listed above and all objections were ruled upon by the Trial Court, please prepare a memo answering the following:

1. Did the Trial Court err in excluding Dr. Apple's testimony in its entirety? Please explain your answer fully.

2. Did the Trial Court err in allowing Plaintiff to testify about the location of her fall after she reviewed the eyewitness statement? Please explain your answer fully.

3. Did the Trial Court err in allowing Plaintiff to read to the jury the written statement she gave previously regarding wet floor signs? Please explain your answer fully.

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? Please explain your answer fully.

5. Did the 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? Please explain your answer fully.

Essay 2

Darlene and Veronica were business partners in Dublin, Georgia, whose partnership ended when Veronica was fatally shot in the parking lot outside their office. There were no witnesses to the shooting, but several of the business's employees told investigating detectives that they suspected Darlene to be guilty of murder.

Darlene agreed to meet a detective at the police station to answer questions about her whereabouts at the time of the shooting. When Darlene arrived, the detective escorted her to an interrogation room with a bright light and no windows. Darlene asked the detective if she was a suspect, but the detective told her she was not and she was free to go at any time. The detective asked Darlene if she would like a drink, and Darlene exclaimed, "I couldn't have done it; I haven't been to the office in weeks!"

The detective told Darlene he knew her statement to be false because he had seen surveillance video recorded at the entrance to the business's parking lot, which showed Darlene's car entering the parking lot on the day of the shooting. (He actually had not yet seen such footage, but he had requested that the building's owner provide him with it, and he expected to receive it soon.) After Darlene was read the Miranda warning, she said: "Maybe I should get an attorney. Only a fool would talk to the police without a lawyer." The detective responded that if Darlene had not done anything wrong then she would have no reason not to tell him the truth, and he bluntly asked if she shot Veronica. Darlene replied: "I did go to the office, but only to confront Veronica about funds that were missing from some of our accounts." When the detective pressed Darlene to tell him what happened next, Darlene said: "This conversation is over. I'm not talking to you until I have a lawyer." The detective left the interrogation room, but he returned a few minutes later and told Darlene that her fingerprints had been identified on a handgun found next to Veronica's body and that she was under arrest for murder.

About an hour later, as a second detective was booking Darlene into the jail (and before Darlene's lawyer had arrived), Darlene spontaneously said that she was willing to talk, and she signed a standard waiver-of-rights form. The second detective asked Darlene why her fingerprints were on the gun, and Darlene provided the following statement:

> When I called Veronica about the missing funds, she said that I couldn't prove anything and that, in fact, she had been planning to frame me for her embezzlement. I was overcome with rage. I drove straight to the office, and I got there just in time to see Veronica loading my computer into her car! When she told me I better back away from her car or she'd call the police, I didn't even think about what I was doing. The next thing I knew, I had opened the door to Veronica's car and pulled out the handgun she always kept in the glove box. When Veronica laughed and said, "you don't have the guts to shoot me," I pulled the trigger!

You represent the State of Georgia in Darlene's prosecution for murder. An indictment charged Darlene with malice murder and felony murder (and the felony murder was predicated

on aggravated assault). Answer the following, applying current Georgia law, as well as applicable United States Constitutional law:

1. Before trial, Darlene sought to exclude evidence of each of her statements to the detectives. Provide your best argument as to why the following statements would be admissible:

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

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."

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

2. At trial, Darlene presented evidence she had been diagnosed with a condition that made it difficult for her to cope with stress and that she had been subjected to mistreatment by Veronica for decades. (In addition, all of Darlene's statements to the detectives were presented at trial.) Based on this evidence, Darlene requested a jury charge on voluntary manslaughter. Provide your best argument as to why Darlene is not entitled to a jury charge on voluntary manslaughter. Include in your answer a discussion of whether, under Georgia law, voluntary manslaughter is a lesser included offense to malice murder, felony murder, or both, and show that you understand the differences and similarities between malice murder and felony murder.

Essay 3

Joe Jones has been a client of your law firm for years. Your partner Ed, Joe's lifelong best friend, first prepared a simple will for Joe years ago that left Joe's estate to Joe's wife, Mary, if she survived him, or if not, then "to my children and their respective descendants, per stirpes and not per capita." Although Mary died several years ago, Joe has not changed the will. When Ed talked to Joe about updating his will after Mary's death, Joe said that he saw no need to change anything, for it would still assure that his sons, Tom (who by then was married and had twin daughters) and Dick (who then was a single adult), and their children would inherit everything. Tom died in a skiing accident a few months ago and is survived by his widow and the twins. Dick is now married but has no children. No changes have been made to Joe's will since Tom's death.

Ed recently asked you to talk with Joe about a potential lawsuit. Joe has season tickets to the local professional baseball team's home games. He also loves BetterBeer, the brand sold at the ball park. When he heard that anyone who wore BetterBeer gear to a particular game could get a souvenir BetterBeer cup and $1.00 off the first beer purchased, he made sure to wear his BetterBeer t-shirt to that game. The shirt featured the brand's logo, "All's Better with BetterBeer."

Joe's seats are above the park's "short porch" in right field, a location where he thought he had a good chance to catch a homerun. On this special night, with beer in his souvenir mug in one hand and the logo on the t-shirt's front highly visible as he stood, Joe caught a record breaking homer off the bat of the home team's most famous slugger—all without spilling a drop of his beer.

That night, local and national sports shows played this incredible catch. A professional photographer, Mike Smith, managed to take a still shot of Joe's catch in which the details of the beer logo were especially clear. Smith sold rights to this picture to BetterBeer, which has been using it frequently in nationwide television commercials that feature moments when something "better" happened to someone drinking a BetterBeer. Published reports show a big boost in BetterBeer sales since these commercials began to run.

Joe wants advice about whether he has a claim against anyone profiting from using his image. He wrote to BetterBeer demanding compensation, but the reply was that he needed to deal with Smith, whom it had paid for the right to use the picture. Smith had never obtained permission from Joe to take or market the picture, and Joe never even knew the picture existed until he saw the commercials.

Joe has not been feeling well lately. He is anxious to file any appropriate suit as soon as possible because he is concerned that, if he died suddenly without having filed, the claim might not survive his death and benefit his heirs.

Assume for each of the following questions that there would be personal jurisdiction in Georgia over any potential defendant, that venue over any potential defendant is not at issue, and that there is no potentially relevant federal cause of action. All answers should focus exclusively on applicable Georgia law.

1. What cause(s) of action may be available to Joe and against which potential defendant(s) could a claim be brought? In answering, explain your reasoning.

2. What advice will you give Joe about whether the cause(s) of action identified in answering question (1) above would survive Joe's death? Under Georgia law would it make any difference in the survival of a cause of action whether the claim was pending in a suit filed before the plaintiff's death? In answering, explain your reasoning.

3. If Joe dies after you have filed suit on his behalf, what would you need to do procedurally so that Joe's claim, if it survives his death, could be asserted by a legally appropriate party or parties and proceed without needing to be brought in a separate, newly filed suit? In answering, explain your reasoning.

4. Assume that after you filed Joe's suit, he died, and a man named Harry came forward and said that Joe was his biological father. If Harry is Joe's child born out of wedlock, will he share in the bequest to "my children and their respective descendants, per stirpes and not per capita"? If Harry does share, and the assets (exclusive of any consideration of the lawsuit you filed for Joe) that will be distributed pursuant to this provision are sold for $3 million, how would that amount be distributed pursuant to Joe's will? If Harry does not share, how would that amount be distributed? In answering, explain your reasoning.

Essay 4

Last month, you represented Client Corporation ("Client") in connection with Client's purchase of three convenience stores and fuel stations from AcmeFuel Company. Today, the CEO of Client has informed you that she was just served with a lawsuit filed by Globex Oil, Inc. that relates to last month's acquisition of AcmeFuel stores.

In its complaint, Globex claims that Client committed fraud and tortious interference with supply contracts that Globex had previously entered with AcmeFuel. Globex is a wholesale distributor of diesel and gasoline to fuel stations. It entered into two supply contracts with AcmeFuel in 2018, and both of those contracts included the following provision:

> Rights of First Refusal. AcmeFuel shall not sell, lease or otherwise transfer ("transfer") its interest in any of its convenience stores/fuel stations unless it shall have first presented to Globex the identity of the proposed transferee and the terms of the proposed transfer. Globex is hereby granted full right of first refusal to acquire AcmeFuel's interests in the convenience stores/fuel stations on the same terms and conditions as contained in the proposed transfer.

The contracts also granted Globex a security interest in the accounts receivables, inventory, equipment, intangibles, and proceeds of AcmeFuel's operations. Globex, however, did not record the supply contracts on the public record because they contained proprietary and financial information.

Last year, AcmeFuel suddenly decided to sell several of its convenience stores/fuel stations. Globex speculates that AcmeFuel's owner needed money to flee the country, as he was facing potential criminal charges. Around the same time that AcmeFuel was looking to sell the stores, Client was interested in making a quick purchase of a retail business operation. Because both parties were interested in expediting the transfer, they agreed to close after only two weeks of due diligence.

During the due diligence period, you (as Client's lawyer) discovered certain financing statements related to the stores that had been filed by Globex. The statements, however, do not mention Globex's right of first refusal. You drafted terminations of the financing statements but neither you nor Client contacted Globex regarding them. In addition, it is undisputed that AcmeFuel informed Client that it should research the requirements for Client to be considered a bona fide purchaser for value in Georgia, and there is disputed evidence (coming from a witness whose credibility is highly suspect) suggesting that Client's CEO informed AcmeFuel that Globex's alleged rights of first refusal were invalid.

At last month's closing, the deeds to the stores were transferred from AcmeFuel to Client, and Client paid $300,000 cash for the stores. Neither Client nor AcmeFuel provided Globex notice of the transaction before the deeds were transferred.

Globex filed suit against Client in the Superior Court of Georgia, claiming that Client committed fraudulent concealment and tortious interference with Globex's contractual right of first refusal. You filed an Answer the same day.

Your law partner is now preparing a motion for summary judgment, and she has asked you to prepare a memorandum applying Georgia law that addresses, in separate sections, the following issues:

1. What is the legal standard that must be met in order to grant a motion for summary judgment? Include a discussion of how the court should make credibility determinations and view disputed evidence.

2. Do Client's actions support the claim for tortious interference? Explain your answer and include a discussion of any facts that would (or would not) support such a claim.

3. Do Client's actions support the claim for fraudulent concealment? Explain your answer and include a discussion of any facts that would (or would not) support such a claim.

February 2021
MPT-1
Item

In re Mills

In re Mills

FILE

LIBRARY

FILE

WARREN, SANCHEZ & BANKS LLP
Attorneys at Law
2500 Washington Blvd., Suite 160
Franklin City, Franklin 33075

MEMORANDUM

To: Examinee
From: Isabel Banks
Date: February 23, 2021
Re: Charlotte Mills matter

Our client, Charlotte Mills, owns an event planning business that organizes various social and athletic events in the city of Garden Grove. Mills was recently retained by the Ramble Group (Ramble) to plan its annual Springfest, a two-day event featuring a festival and a five-kilometer run. After Mills had already begun preparations for the event, she was informed that Ramble would be using another event coordinator.

Mills wants to know whether she has any legal recourse against Ramble. We have discussed the possibility of pursuing a claim against Ramble for breach of contract based on the communications and/or documents that were exchanged between Mills and Ramble's owner, Kathryn Burton.

I need you to draft a memorandum to me analyzing whether there is an enforceable contract between Mills and Ramble and what damages Mills might be entitled to if she were to sue Ramble for breach of contract. Another associate will assess other potential issues such as promissory estoppel and specific performance.

Do not include a separate statement of facts in your memorandum, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law support your conclusions.

WARREN, SANCHEZ & BANKS LLP
Attorneys at Law

FILE MEMORANDUM

From: Isabel Banks
Date: February 12, 2021
Re: Charlotte Mills matter

This memorandum summarizes my meeting today with Charlotte Mills regarding a potential business dispute:

- Mills is the owner of Mills Event Management (MEM), an event planning and coordination business that handles approximately 20 events per year, including festivals, races, galas, and fundraisers. MEM is basically a "one-woman show"; Mills handles all aspects of the business, bringing in paid helpers as needed.
- Mills has been in the event planning business for three years. Her services are increasingly in demand because she brings a creative perspective to the events she organizes, which boosts event attendance and enhances public and media awareness of the events and their hosts.
- In June of 2020, Mills was contacted by Ramble Group, a company in Garden Grove that hosts the popular Springfest event.
- Springfest is a weekend event that kicks off with a five-kilometer "Fun Run" at 8 a.m. on Saturday, followed by a festival the rest of Saturday and all day Sunday. The festival includes live music, food and beverages, vendor booths featuring local artists, and kids' activities such as face painting.
- Springfest is held in April, typically the first or second weekend of the month. Springfest 2021 will be the fourth annual Springfest.
- Mills's first contact with Ramble Group was a phone call from Ramble's owner, Kathryn Burton, on June 3, 2020. In that phone call, Burton asked about Mills's availability to organize and coordinate Springfest 2021, explaining that the event planning company that Ramble had used in other years was not available.

- During the call, Mills and Burton also brainstormed ideas for Springfest 2021, including possible venues, musical groups, and ways to boost attendance and enhance Ramble's marketing opportunities related to the event. The call ended with Burton saying that she was excited about the prospect of working with Mills.
- Mills and Burton exchanged several emails after the initial phone call, including an email from Mills to Burton that attached a written event planning proposal for Springfest 2021.
- The written proposal was never signed by either party, but Ramble paid the initial $2,000 deposit outlined in the proposal.
- After Mills received the deposit, she began preparations for Springfest 2021, including the following:
    - contacting the city and county and securing the necessary permits for the event, which entailed filling out application forms and paying permitting fees
    - preparing a preliminary budget and master plan for the event
    - creating a new Springfest 2021 website to incorporate the themes and ideas discussed with Burton and paying related webhosting and domain fees
    - reserving Discovery Park and the Garden Grove Promenade as alternate venues for the festival portion of the event
    - designing a preliminary racecourse map for the five-kilometer run
    - contacting local musicians about performing at the event (no bands booked yet, but four bands confirmed to be available)
- In all, Mills's out-of-pocket expenses totaled $3,000.
- While working on these tasks, Mills gave regular updates to Burton, mostly by telephone. At no time did Burton express concerns about Mills's event preparations.
- On August 10, 2020, Mills received a phone call from Burton stating that Burton had decided to use another event planning company for Springfest 2021.
- Mills tried to line up a replacement event planning engagement for around the same time as Springfest 2021 but was unable to do so.

Initial Email Correspondence between Charlotte Mills and Kathryn Burton

From: Kathryn Burton <kburton@ramblefranklin.com>
To: Charlotte Mills <cmills@memfranklin.com>
Subject: Springfest 2021
Date: June 4, 2020

Charlotte, it was a pleasure talking with you yesterday! I like the concepts you have for Springfest 2021, including your idea of inviting gourmet food trucks to serve food in addition to traditional food/beverage booths. I think your ideas for marketing and branding strategies would significantly increase event attendance and enhance Ramble's visibility as the event's host. For the last two years, we have nearly doubled attendance, and I'd like to see that trend continue this year.

Can you send me a proposal outlining the event planning, coordination, and oversight services you provide? We can decide on the event date and location later—it needs to be either the first or second weekend in April 2021, preferably in or near downtown Garden Grove.

From: Charlotte Mills <cmills@memfranklin.com>
To: Kathryn Burton <kburton@ramblefranklin.com>
Subject: Springfest 2021
Date: June 4, 2020

Hi, Kathryn. I'm very excited about the possibility of working with Ramble Group to make Springfest 2021 the best Springfest ever! As to potential event dates, I don't currently have any events booked for the first and second weekends in April 2021, so either weekend would be fine.

Some options for the venue would be the Garden Grove Promenade (which has green space and more room for food trucks), the Old Town Waterfront (across the bridge from downtown Garden Grove), and Discovery Park (probably the best option if you want the event to be in the heart of the downtown). All three venues could accommodate an event of this size. They all have adjacent roadways for the five-kilometer run, so it shouldn't be a problem to get the city permits for the run and police department approvals for road closures along the racecourse.

I'm attaching my proposal. Please review it and let me know if you have any questions.

MILLS EVENT MANAGEMENT PROPOSAL
[attached to Mills's email of June 4, 2020]

Mills Event Management (MEM) is pleased to offer its professional management services for the Springfest 2021 event hosted by Ramble Group (Client). Services include event logistics, venue and course design, event consultation and guidance, and event marketing and branding. MEM will also oversee the hiring of necessary services, equipment rentals and deliveries, apparel ordering, and merchandise and awards if needed.

SCOPE OF WORK

MEM proposes to work alongside Client by providing professional event management services. This proposal outlines the pre-event and event-day services necessary to produce a smooth, safe, and professionally staged event.

RESPONSIBILITIES OF MILLS EVENT MANAGEMENT

Pre-Event Logistics and Planning

- Research and provide guidance on event date and location
- Prepare preliminary budget and master plan including venue and racecourse maps
- Reserve venue(s) and pay initial venue deposit(s) subject to reimbursement by Client
- Obtain necessary approvals and permits from the police department, city, and county
- Website assistance or design if needed
- Coordinate with city officials on necessary road closures, detours, parking areas, etc.
- Assist with selecting an emcee, DJ, and bands, if applicable

* * *

Event-Day Site Logistics

* * *

RESPONSIBILITIES OF CLIENT

- All financial obligations and expenses stemming from the event, including reimbursement of any expenses incurred by MEM. Such expenses may include but are not limited to (1) special event fees and permits, (2) facility rental fees, (3) website hosting, and (4) advertising and marketing.
- Solicitation and recruitment of all volunteers

- Acquisition and purchase of event insurance
- Neighborhood notification of residences and businesses as required by city
- Setup, breakdown, and removal of equipment rented or donated for event

EVENTS INCLUDED IN AGREEMENT

NAME	VENUE	DATE
Springfest 2021	To Be Determined	To Be Determined

It is understood that any event not yet determined or outlined with name, venue, and date will be scheduled according to the availability of MEM.

PAYMENT

Client shall pay MEM $15,000 for up to the first 1,000 registrations or tickets sold and $2 per additional registration or ticket sold. Client shall pay $2,000 of this fee as a nonrefundable deposit before commencement of services.

Client shall reimburse MEM for any event-related expenses incurred by MEM.
All payments and reimbursements are due to MEM no later than seven days following completion of the event.

Should the event be canceled, a minimum payment of $2,500 will be due at cancellation, plus reimbursement of any event-related expenses incurred by MEM. Work will begin after initial deposit is received. Please make checks payable to Mills Event Management.

ACCEPTANCE OF TERMS

We the undersigned accept the terms of payment and scope of work outlined in this agreement.

_____	_____
Ramble Group	Mills Event Management
Name/Title:	Name/Title:
Date: _____	Date: _____

Additional Email Correspondence between Charlotte Mills and Kathryn Burton

From: Kathryn Burton <kburton@ramblefranklin.com>
To: Charlotte Mills <cmills@memfranklin.com>
Subject: Springfest 2021
Date: June 7, 2020

I've reviewed your proposal—everything looks good. One question about your fees. Your fees include a lump sum of $15,000 for the first 1,000 registrations or tickets sold plus $2 for every ticket or registration sale above 1,000. Last year we had general admission ticket sales of about 2,500. However, we also generated about 500 registration fees from people who participated only in the 5K fun run and did not buy tickets for the festival. Does the $2 per ticket fee in your proposal apply only to general admission tickets or would it also include fun-run-only registrations?

From: Charlotte Mills <cmills@memfranklin.com>
To: Kathryn Burton <kburton@ramblefranklin.com>
Subject: Springfest 2021
Date: June 7, 2020

Good question! Most festivals I handle have general admission ticketing—attendees pay a set price and receive a wristband allowing access to all areas of the event. Since Springfest is a combination festival and run, with some attendees participating only in the run, I'm willing to reduce the fee for fun-run registrations to $1 per registration. So, if you had 2,500 general admission ticket purchasers and 500 fun-run participants, the first 1,000 general admission tickets would be included in my $15,000 base fee, the remaining 1,500 general admission tickets would be charged at a rate of $2 per ticket, and the 500 fun-run-only registrations would be billed at $1 per ticket.

From: Kathryn Burton <kburton@ramblefranklin.com>
To: Charlotte Mills <cmills@memfranklin.com>
Subject: Springfest 2021
Date: June 8, 2020

That sounds fair. Are you still available the first weekend in April? That's the date we've chosen.

From: Charlotte Mills <cmills@memfranklin.com>
To: Kathryn Burton <kburton@ramblefranklin.com>
Subject: Springfest 2021
Date: June 8, 2020

Yes, I don't have anything booked for that weekend, but I am already getting inquiries about other events that month, so please let me know as soon as possible if you want me to move forward with

planning the event. If so, we should probably lock in a venue soon because they tend to book up quickly, especially for spring and summer events. I think our best bets are Discovery Park and the Garden Grove Promenade, which have the most flexibility in terms of the number of attendees they can accommodate as well as more space for vendor booths and a stage for the bands. I'd suggest submitting a reservation fee to hold both venues until you're ready to make a final decision.

From: Kathryn Burton <kburton@ramblefranklin.com>
To: Charlotte Mills <cmills@memfranklin.com>
Subject: Springfest 2021
Date: June 9, 2020

I agree that we really need to get going on this. Can you please check on the availability of both sites? Also, I think it's important to freshen up the Springfest website and give it a real facelift this year. Is that something you can help with?

From: Charlotte Mills <cmills@memfranklin.com>
To: Kathryn Burton <kburton@ramblefranklin.com>
Subject: Springfest 2021
Date: June 9, 2020

Absolutely! I've got some great ideas for the website.

From: Kathryn Burton <kburton@ramblefranklin.com>
To: Charlotte Mills <cmills@memfranklin.com>
Subject: Springfest 2021
Date: June 9, 2020

Fantastic! Please get started on the website design. I'll get you Ramble's initial deposit by the end of this week. I'm looking forward to working with you to make Springfest 2021 a huge success!

From: Charlotte Mills <cmills@memfranklin.com>
To: Kathryn Burton <kburton@ramblefranklin.com>
Subject: Springfest 2021
Date: June 9, 2020

Sounds great! Once I receive your deposit, I'll take care of securing the two potential venues and you can reimburse me later, per our agreement.

LIBRARY

Daniels v. Smith
Franklin Court of Appeal (2011)

Plaintiff Sam Daniels sued defendant Angela Smith for breach of an oral agreement to construct a warehouse for Smith. The trial court entered judgment for Daniels in the amount of $57,500. Smith appealed on two grounds—first, the parties' agreement was never reduced to writing and hence no binding agreement resulted, and second, the trial court erred in calculating the amount of damages. We affirm.

In August 2009, Smith sought Daniels's advice regarding the demolition of certain structures on Smith's land where she wanted to build a warehouse. Thereafter, Smith delivered to Daniels a set of plans and specifications, together with an "Invitation to Bid" that contained a "Bid Form." The "Invitation to Bid" included the following sentence: "Selected bidder shall execute a contract for construction of the work within five days of notice of selection."

On September 1, 2009, Daniels delivered his Bid Form to Smith. At meetings on various dates in September and early October, Daniels and Smith discussed proposed changes to the plans and specifications for the warehouse, and Daniels submitted a revised Bid Form on October 5. On October 9, Daniels and Smith met and agreed that there would be no further changes to the plans set forth in the revised Bid Form, which were complete and specific as to the type and grade of materials. The parties also agreed on the method of compensating Daniels and agreed that construction would begin no later than November 1 and be completed within 60 days thereafter.

The next morning, October 10, Smith telephoned Daniels. It is undisputed that during the call, Daniels stated that he could build the warehouse for $227,000 and Smith replied, "If you can do the job for $220,000, you have it." Daniels responded: "I accept your offer, and I thank you very much for the job." Smith then told Daniels to proceed, saying: "Let's get this thing rolling." Daniels replied: "Fine, I will get right on the phone now and start." Immediately thereafter, Daniels began ordering supplies for the project and lining up plumbing and electrical subcontractors. Daniels also sent an email to Smith that day stating, in relevant part, "I am pleased to be awarded this work and hope to produce a warehouse we can both be proud of."

The next day, October 11, Smith emailed Daniels an unsigned, standard form construction contract containing all the terms and conditions reached at previous meetings. Daniels signed the contract and emailed it back to Smith, requesting that Smith execute the agreement as well. Smith, however, did not reply. After trying unsuccessfully to reach Smith for more than a week, Daniels

drove by the site and saw a warehouse under construction by a different contractor. The warehouse was eventually completed at a cost of $205,000 by the other contractor.

DISCUSSION

At the outset, we note that the statute of frauds does not apply here. Under Franklin Civil Code § 20, 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. Smith and Daniels agreed that the warehouse contract would be completed in less than three months after the parties made their contract. Clearly, the parties intended the agreement to be completed in less than one year. Even if they had not agreed on a specific completion date, a reasonable amount of time would be inferred. Thus, there was no statutory requirement that the contract be in writing.

Contract Formation

We now turn to whether the evidence establishes the formation of a contract. The essential elements for formation of a contract are (1) offer, (2) acceptance, (3) the intention to create a legal relationship, and (4) consideration. Here, it is undisputed that an offer was made—specifically, Daniels's revised Bid Form, which was submitted to Smith on October 5, 2009. Nor is it disputed that the alleged contract contained adequate consideration—namely, the construction of a warehouse in exchange for payment of $220,000, which was Smith's counteroffer. However, Smith claims that there was no acceptance (element #2) or intention to create a legal relationship (element #3).

In support of her contention that there was no binding contract, Smith erroneously relies upon *Green v. Colimon* (Fr. Ct. App. 2005), which stated the well-settled rule that "if the parties intend to reduce their proposed agreement to writing before it can be considered complete, there is no contract until the formal agreement is signed." However, in *Green*, there was evidence that the parties intended to be bound only by a written contract, and the preliminary negotiations never reached the point where there was a meeting of the minds on all material matters. As the court noted in *Green*, "[t]here is no meeting of the minds while the parties are merely negotiating as to the terms of the agreement to be entered into. To be final, the agreement must extend to all terms that the parties intend to introduce, and material terms cannot be left for future settlement." Smith's brief fails to identify any further negotiations that might have been necessary to effect a mutual understanding of the parties. Instead, Smith merely argues that the parties intended that neither party would be bound until both signed the written contract.

In *Alexander v. Gilligan* (Fr. Sup. Ct. 2008), we rejected a similar argument in circumstances closely analogous to those here. The parties in *Alexander* finally (through email exchanges) agreed upon the terms of a six-month business consulting agreement after several meetings. But when the plaintiff presented a written contract for the defendant's signature, the latter refused to sign. The *Alexander* court held that the formal written contract was not *the agreement* of the parties but only *evidence of that agreement*. The court cited numerous cases to the effect that when parties agree, either orally or via email, upon all the terms and conditions of an agreement with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement has yet to be prepared and signed does not alter the binding validity of the agreement. Whether parties intend that an oral or email-based agreement should 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*.

Here, the agreement between Smith and Daniels for the construction of a warehouse is not the type of contract that by its very nature indicates that the parties intended to be legally bound only if a formal written contract was executed. *See* 1 Corbin On Contracts § 2.9, at 152 (rev. ed. 1993) ("[t]he greater the complexity and importance of the transaction, the more likely it is that the informal communications are intended to be preliminary only"); *Haviland v. Magnolia Sec. Inc.* (Fr. Ct. App. 2009) (parties did not intend oral agreement for creation of multi-million-dollar venture capital fund to be legally enforceable given unusual complexity and size of transaction).

Justice and fair dealing also support the above principle. Otherwise, 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. Contracts would never be enforceable if parties could avoid the obligations by refusing to sign a written document memorializing the terms of an oral or email-based agreement and thereby evade obligations incurred in the ordinary course of business.

When Daniels submitted his revised Bid Form, Smith counteroffered by stating that she would accept the revised Bid Form if Daniels could do the work for $220,000 instead of $227,000. When Daniels stated, "I accept your offer, and I thank you very much for the job," acceptance occurred, despite Smith's argument to the contrary. In addition, Smith's statement "Let's get this thing rolling" made clear that both parties intended to be legally bound by their agreement, again despite Smith's argument to the contrary. Accordingly, we find that all four elements required for

formation of a contract exist in this case, including specifically Daniels's acceptance of Smith's counteroffer and statements by both parties that evidence an intention to be bound.

Damages

Smith claims that the $57,500 damages award was erroneous due to uncertainty as to Daniels's cost of performance. 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." Fr. Civil Code § 100. Unascertainable damages cannot be recovered for breach of contract. *Id*. However, § 100 has been liberally construed to prevent defendants from avoiding the consequences of their actions. Thus, it has been repeatedly held that where there is no uncertainty as to the *fact* of damage (i.e., as to its nature, existence, or cause), the same certainty as to its *amount* is not required. *See, e.g., Alexander* (although parties had not identified a specific fee, no uncertainty existed on whether fees would be paid). One whose wrongful conduct has made it difficult to ascertain damages cannot complain because the amount of damages must be estimated, provided that the estimate is reasonable. *Id*. If damages can be calculated with reasonable certainty, they will be upheld.

Here, Daniels sought to recover the expenses he incurred prior to Smith's breach, as well as the benefit of the bargain or the profit that he would have made had Smith not breached the contract and Daniels had been allowed to build the warehouse. Daniels submitted receipts for $7,500 in expenses and a cost breakdown showing lost profits of $50,000, both of which were received into evidence at trial. Because not all the items in the cost analysis breakdown were supported by subcontractor bids, Smith claims that the lost profit damages were uncertain. Daniels testified, as a contractor with 13 years of experience, that the difference between the contract price and his cost of construction was $50,000. It was for the trier of fact to determine whether Daniels's valuation of the items unsupported by bids was fair and reasonable. Daniels's testimony and documentation were uncontradicted and appear to have been the best evidence available. Thus, the trial court did not err in awarding damages of $57,500.

Affirmed.

Jasper Construction Co. v. Park-Central Inc.
Franklin Court of Appeal (2014)

Defendant Jasper Construction Co. (Jasper) appeals from a trial court judgment finding that Jasper breached a contract to construct and lease a parking garage to Park-Central Inc., which leases and operates public parking garages. We hold that the contract is sufficiently specific to be enforceable and that the trial court properly awarded damages for breach of contract.

In March 2008, Jasper and Park-Central signed a standard commercial lease (Lease) under which Jasper agreed to construct a parking garage on property it owned and to then lease the garage to Park-Central for 20 years. Under the terms of the Lease, Jasper would "proceed diligently" with the construction of the parking garage and give Park-Central the right to terminate the Lease if construction was not completed by July 1, 2010. The Lease set forth the monthly rent to be paid by Park-Central to Jasper and specified the square footage, numbers of floors and parking spaces, and locations of entrances and exits for the parking garage. The Lease further provided that the parking garage "shall be constructed in accordance with certain plans and specifications (Plans) to be prepared and approved by the parties" and gave Jasper the right to terminate the Lease if the Plans were not approved by January 1, 2009. Plans were prepared by Jasper's architect and approved by both parties before the January deadline. When Jasper subsequently refused to construct the parking garage, Park-Central sued.

Jasper contends that the parties' failure to incorporate the Plans into the Lease means that, as a matter of law, the Lease was not sufficiently definite and certain to give rise to a legal obligation. That contention is without merit. Case law does not support the notion that specifications are an essential condition of an enforceable contract. To the contrary, the specificity required for an enforceable contract depends upon the circumstances. Thus, in *Stark v. Huntington* (Fr. Ct. App. 2003), a contract was enforced notwithstanding the defendant's assertion that "neither design specifications, nor price, nor time of performance have been agreed upon." Jasper places great weight on the fact that the parking garage was not to be built until the parties had approved plans and specifications. There is, of course, nothing unusual in a contract containing a right of prior approval, which is construed as implying a covenant of reasonableness.

Jasper also challenges the damages award. We conclude that the trial court's finding of damages is supported by the evidence.

Affirmed.

Thompson v. Alamo Paper Products Inc.
Franklin Court of Appeal (2017)

This appeal involves an employment contract. The trial court granted summary judgment to defendant Alamo Paper Products Inc. (Alamo). Plaintiff Marie Thompson appeals, contending that her alleged oral contract with Alamo is not barred by the parol evidence rule. We affirm.

The parties entered into a written employment agreement whereby Alamo hired Thompson to serve as its chief financial officer at an annual salary of $150,000. The agreement was silent as to any salary increases or bonuses. When Thompson did not receive a bonus, she sued Alamo, alleging that the parties had orally agreed before executing the written contract that after a six-month probationary period, Alamo would increase Thompson's salary and pay her a bonus.

Thompson argues that the parol evidence rule does not bar her claim based on Alamo's alleged breach of the oral contract. We disagree. When contracting parties have entered into a valid written agreement dealing with the particular subject matter, and the evidence indicates that the parties intended that written agreement to be the final expression of their agreement (as by both parties having signed it), the written contract supersedes all negotiations concerning its matter that preceded or accompanied the execution of the contract.

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). Thus, when the parties intend to reduce the entire agreement to writing, the terms of the agreement are to be ascertained from the writing alone, if possible. In such a case, extrinsic evidence is admissible only to interpret contract terms that are ambiguous or uncertain. *Id*. In contrast, when the parties do not intend to reduce the entire agreement to writing, both written and oral communication may be relevant to prove the terms of the contract. *Id*.

The alleged oral agreement between Thompson and Alamo concerns exactly the same subject matter as the underlying written employment contract, and it directly contradicts a specific provision in the agreement (i.e., Thompson's salary) and would add a material term that the parties did not reduce to writing (i.e., Thompson's eligibility for a bonus). The written employment agreement contains no ambiguous or uncertain terms. Because the alleged oral agreement is inconsistent with the written employment agreement and the written agreement contains no ambiguous or uncertain terms, the alleged oral agreement is unenforceable.

Affirmed.

MULTISTATE PERFORMANCE TEST DIRECTIONS

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

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

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

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

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

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

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

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

February 2021
MPT-2
Item

State v. Kilross

State v. Kilross

FILE

LIBRARY

FILE

Smith & Smith LLP
Attorneys at Law
85 West 12th Street
Centralia, Franklin 33708

MEMORANDUM

To: Examinee
From: Marie Smith
Date: February 23, 2021
Re: State v. Kilross

We represent Bryan Kilross in a criminal case. The State of Franklin has charged Kilross with armed robbery, a felony. The State alleges that Kilross robbed a liquor store using a handgun.

Kilross agrees that he was at the liquor store early in the evening of the robbery. However, he denies committing the robbery that occurred soon after he left and tells us that he was elsewhere at the time. He has only his own statement to confirm where he was when the robbery occurred. The prosecution's case rests on the testimony of a single witness, the liquor store clerk. We must, therefore, seriously consider having Kilross take the stand to testify in his own defense.

In making this decision, we will have to anticipate any impeachment evidence that the State might use against Kilross as a witness. Kilross has an eight-year-old felony conviction for robbery, for which he long ago completed his sentence. Before making a final decision on whether Kilross will testify, we will file a pretrial motion seeking to prevent the prosecution from using the prior robbery conviction for impeachment.

I want you to draft our brief in support of this pretrial motion. You should argue that the prosecution cannot satisfy the requirements of Franklin Rule of Evidence 609 concerning the use of prior convictions for impeachment. As you know, the Franklin Rules of Evidence are identical to the Federal Rules of Evidence. Do not address the admissibility of this evidence under any other evidentiary rule.

Follow the attached guidelines for writing persuasive briefs in trial courts. Draft only the "legal argument" section; others will draft the statement of facts.

Smith & Smith LLP

OFFICE MEMORANDUM

To: Associates
From: Marie Smith
Date: July 8, 2018
Re: Guidelines for Persuasive Briefs in Trial Courts

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

I. Captions

[omitted]

II. Statement of Facts

[omitted]

III. Legal Argument

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

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

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

Do not assume that we will have an opportunity to submit a reply brief. Anticipate the other party's arguments and respond to them in the body of your argument. Structure your argument in such a way as to highlight your argument's strengths and minimize its weaknesses.

Transcript of Interview with Bryan Kilross
November 20, 2020

Att'y Smith: Bryan, tell me what happened.

Kilross: I was going downtown to pick up a woman I had started dating, Janice Malone, to go out for dinner. We were going to have some drinks before going out. I decided to buy a bottle of wine. The Pack 'N Go was on the way, so I stopped there.

Smith: Had you been there before?

Kilross: Yes, the day before, for some beer. The guy behind the counter kept watching me and wasn't very friendly. But that didn't bother me at the time.

Smith: What time did you go to the Pack 'N Go on the next day?

Kilross: I was supposed to get to Janice's place at 6:30, so probably a little after 6 p.m.

Smith: What happened when you went in?

Kilross: I went over to the wine section and spent some time deciding what to get. I got some red wine that I'd heard about and wanted to check out. The same guy was working behind the counter, giving me the same nasty look. He carded me, which was fine, and I paid and left.

Smith: Where did you go?

Kilross: I was heading to Janice's apartment building when she called and said that she had to cancel. She said that she had heard some bad news from her parents, who needed her to come home right away. I guess they live about three hours away, in Columbia City, so she had to leave then. I told her to call me when she got back.

Smith: And then?

Kilross: I wasn't sure what to do. I didn't want to go out on my own, but I didn't feel like going home. So I just drove around for a while.

Smith: Why didn't you go straight home?

Kilross: I wanted to cool down. I had been looking forward to being with Janice and felt like she had just blown me off. It turns out she was telling the truth, but I didn't know that then.

Smith: Where did you go?

Kilross: I don't really remember. I know I drove through downtown, then out into the countryside for maybe an hour. Then I came home, around 8 p.m.

Smith: What happened when you got home?

Kilross: I was at my front door when two police officers came up behind me. They asked if they could come in and said they had some questions. I told them yes. They asked whether I had gone to the Pack 'N Go earlier and I said yes. One of them got a call and stepped outside. When she came back in, she arrested me for robbing the liquor store. They cuffed me, took me downstairs, and then drove me to the police station.

Smith: And then?

Kilross: They put me in a room. After a while, a detective came in, gave me the Miranda warnings, and started questioning me. He asked me why I had gone back to the store, where I had put the money, and where I had stashed the gun; he thought I had robbed the place. I kept telling him what had happened, but he didn't believe me. He kept talking about my old conviction. Eventually, I shut up and called your number. I was glad you answered.

Smith: After you called, what happened?

Kilross: Not much, until the lineup, which you saw.

Smith: Yes, the clerk from the Pack 'N Go identified you. We'll be getting copies of his statement soon. Let me ask you, were there any other people in the Pack 'N Go when you bought that wine?

Kilross: No.

Smith: Did you see anyone else when you left?

Kilross: No.

Smith: What were you wearing that night?

Kilross: Jeans, a jean jacket, a T-shirt. I think a wool knit hat: it was cold.

Smith: All right. Now, tell me about your old conviction.

Kilross: Eight years ago, I pled guilty to robbing a convenience store with a friend of mine. It was a stupid thing to do, but I didn't know any better. I confessed as soon as I was caught, and my lawyer got me six months in jail and a year on probation. My friend was arrested a few days later and he also pled guilty.

Smith: Can you tell me what you did?

Kilross: Not much to tell. I drove, and we parked in front of the convenience store, put on ski masks, and went inside. My friend pretended to have a gun in his jacket while I held

out a bag for the store clerk to put the money in. He gave us the money and we left. Apparently the parking lot video camera recorded my license plate, and the police found me later that night. Like I said, it was stupid to do it at all.

Smith: Since you got off probation, what has happened?

Kilross: I've stayed out of trouble. It was hard finding a job at first, but then I got work at a warehouse, loading and unloading trucks. I worked my way up to shift supervisor. I'll lose that job if I get convicted again.

Smith: Any other trouble with the law?

Kilross: Two speeding tickets. I pled guilty to both and paid the fines.

Smith: Okay. I see that you posted bail. . . .

* * *

Smith & Smith LLP

FILE MEMORANDUM

From: Adrienne Burns, Investigator
Date: January 29, 2021
Re: State v. Kilross, Case No. 2020 CF 702: Summary of Evidence

This memorandum summarizes the evidence that the district attorney's office has disclosed to us and the information that I have acquired through my investigation.

Statement of Benjamin Grier: Grier is the store clerk who was on duty the night of the robbery at the Pack 'N Go. He stated that at about 6 p.m. that night, he saw a man who he recognized as Bryan Kilross enter the store. He recognized Kilross because Kilross had bought beer at the same store the previous day. He stated that Kilross went to the wine section and lingered for a few minutes before selecting a bottle. Grier asked Kilross for ID, which he gave. Kilross paid and then left.

According to Grier, about 15 minutes later, a man came into the store wearing the same clothes as Kilross: jeans and a buttoned jean jacket. The man had a stocking pulled over his head and held a gun. He asked Grier for the money in the cash register, which Grier gave him. Grier said he was pretty sure it was the same guy who had just bought the wine because he looked and sounded the same. Then the man left. Grier didn't see him drive away. Grier called the police and gave them Kilross's name, which he remembered from the ID.

Lineup: The police brought Grier in to view a lineup later that night. Grier identified Kilross as the robber with no hesitation.

Store Video: The police have two video feeds from the store, one from the interior and one from the parking lot. The interior video shows the back of a man matching Kilross's description bringing something to the counter at 6:12 p.m. This man has a hat on. The clerk appears to ask for ID, which the buyer offers. At no time is Kilross's face visible.

The interior video also shows another man approaching the counter at 6:24 p.m., with similar pants and jacket to the first, but with a stocking over his head and what appears to be a weapon. The events that follow match Grier's statement. At no time is this man's face visible.

The parking lot video does not show either Kilross or the other man driving into the lot, entering the store, or driving away.

Statement of Janice Malone: In my interview with her, Ms. Malone confirmed that she and Kilross were set to meet at her apartment at 6:30 p.m. At 5:45 that night, Ms. Malone received news from her parents and decided she had to leave to go visit them immediately. She stated that she called Kilross well before 6:30 to let him know. She did not remember the time of the call. She did not have further contact with him that night.

Prior Conviction: The police file contains a copy of the indictment and a transcript of the hearing on Kilross's guilty plea to the felony of robbery in 2013.

STATE OF FRANKLIN
DISTRICT COURT OF MERCIA COUNTY

State of Franklin,

Plaintiff,

v. **Case No. 2013 CF 427**

Bryan Kilross,

Defendant.

INDICTMENT

The Grand Jury of Mercia County, State of Franklin, charges that on or about May 30, 2013, Bryan Kilross committed the felony of robbery under Franklin Criminal Code § 29. The Grand Jury more specifically states as follows:

1. That on or about that date, Bryan Kilross did take the property of the Quik Pantry convenience store located at 1507 Perimeter Drive, Franklin City, Franklin.

2. With the intent to commit theft, Bryan Kilross used force, or used intimidation, threat, or coercion, or placed employees of the Quik Pantry in fear of immediate serious bodily injury to themselves.

Wherefore, Bryan Kilross did act against the peace and dignity of the State of Franklin.

Dated: June 26, 2013

Glen Hodas

Glen Hodas
District Attorney
Mercia County
State of Franklin

A TRUE BILL;

Jean Schmidt

Jean Schmidt
Presiding Juror of Grand Jury
Mercia County

Excerpt from Hearing on Plea Agreement of Bryan Kilross, Case No. 2013 CF 427
July 17, 2013

. . .

Court: Mr. Kilross, please describe what happened.

Kilross: Yes, sir. Dave and I drove to the Quik Pantry convenience store in my car. We parked in front of the store. Dave had a toy gun, which he put in his jacket pocket. We put on ski masks, because we thought that if we had the masks on, no one would recognize us and we wouldn't get caught. When we went into the store, Dave pointed the toy gun through his jacket pocket at the clerk and asked for all the money in the register. Dave said, "I have a gun." I held open a paper bag while the clerk put all the bills into it. When we had the money, we ran out of the store, got in the car, and drove away.

Court: Anything else, Mr. Kilross?

Kilross: No, sir. That's what happened.

Court: Do you have any other statement you want to make?

Kilross: Yes, sir. I am really sorry that I did this. I know that it was wrong and that I should not have done it. Also, I want the court to know that all the money was returned to the store.

Court: Is the state satisfied?

The State: Yes, your honor. . . .

LIBRARY

Excerpts from Franklin Criminal Code and Franklin Rules of Evidence

Franklin Criminal Code § 25 Theft

A person commits the offense of theft when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated.

. . .

Franklin Criminal Code § 29 Robbery

(a) A person commits the offense of robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another

(1) by use of force;

(2) by intimidation, by the use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another; or

(3) by sudden snatching.

(b) A person convicted of the offense of robbery shall be punished by imprisonment for not less than 1 nor more than 20 years. Robbery under this section is a felony.

Franklin Rules of Evidence

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that was punishable by death or by imprisonment for more than one year, the evidence

. . .

(B) 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; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

State v. Thorpe
Franklin Supreme Court (2012)

This case requires us to determine whether a prior conviction for robbery can be used to impeach a witness under Franklin Rule of Evidence 609(a)(2). This is a case of first impression in Franklin. Courts in other jurisdictions have reached contradictory conclusions on this question.

Jerome Thorpe robbed three different stores, on three separate days in July 2008. Thorpe pled guilty to two of these robberies, both of which were unarmed. In the third robbery, Thorpe and an accomplice presented a threatening note to a cashier; the accomplice had a pistol, which he pointed at the cashier. Thorpe contested the charge of aiding and abetting a robbery, claiming that he did not know that his accomplice had a gun.

Before trial, Thorpe indicated that he would testify and filed a pretrial motion to exclude the use of his guilty pleas to the two unarmed robberies for impeachment under Rule 609(a)(2). The trial court denied the motion. Thorpe testified and was impeached with the two guilty pleas. Thorpe was convicted, and the court of appeal affirmed. We review for abuse of discretion.

In relevant part, Rule 609(a)(2) provides generally that evidence of a prior conviction of a crime for which at least one element required proof of dishonesty or false statement, whether a felony or misdemeanor, may be used for impeachment, regardless of the severity of the offense. If a prior conviction falls within this category, the proponent of this impeachment evidence has an absolute right to use it for that purpose.

"Dishonesty" has at least two meanings. Broadly, the word connotes a breach of trust, including a "lack of . . . probity or integrity in principle," "lack of fairness," or a "disposition to betray." Robbery may fit within this broad definition. More narrowly, "dishonesty" is defined as "deceitful behavior, or a disposition to lie, cheat, or defraud." Robbery does not fit this definition because it is a crime of violent and not deceitful taking.

The Franklin Rules of Evidence are identical to the Federal Rules of Evidence. Given this, we have held that our courts may use federal legislative history as persuasive authority in interpreting the Franklin Rules. We find that the federal drafters intended the narrower definition of the term "dishonesty or false statement" [citations omitted]. Congress intended Rule 609(a)(2) to apply only to crimes that require proof of an element of misrepresentation or deceit, such as perjury, false statement, or criminal fraud, any of which bear directly on a witness's propensity to testify truthfully.

Franklin's definition of robbery includes no requirement that the prosecution prove an act of dishonesty or false statement to obtain a conviction. *See* Fr. Crim. Code § 29. Moreover, the definition of robbery references "theft" as a predicate offense. The crime of theft may involve dishonesty or false statement. But deception is not an essential element of theft; the definition in Franklin Criminal Code § 25 also does not require such proof. Therefore, we hold that the crime of robbery is not a crime with an element requiring proof of dishonesty or false statement that could automatically be used to impeach a witness under Rule 609(a)(2).

However, our inquiry does not end there. The State contends that recent revisions to the Federal and Franklin Rules of Evidence permit the court to look beyond statutory definitions to the factual circumstances underlying the prior offenses. We agree, but only up to a point. A 2007 amendment to Franklin Rule 609(a)(2) mirrors an identical 2006 amendment to the Federal Rules. This amendment permits use of a prior conviction for impeachment if facts in the record establish an act of dishonesty or false statement.

The Federal Advisory Committee Note to the 2006 amendment offers clear guidance on this new language:

> Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute, . . . a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the fact-finder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. But the amendment does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding. . . .

In the case at hand, the prosecution can point to nothing in the record that establishes that Thorpe engaged in any act of deception or false statement when committing the two unarmed robberies. The prosecution could have done so by relying either on the language of its indictment or on facts admitted by the witness during the hearing on his guilty pleas, but it did not.

By way of example, in *State v. Frederick* (Fr. Ct. App. 2008), the defendant was charged with theft. The prosecution sought to introduce the defendant's plea to an earlier shoplifting case. At her plea hearing in the shoplifting case, the defendant admitted that she had placed unpurchased items in a backpack and then lied about its contents to a security officer. We held that the prosecution had sufficiently proved acts of deception to use the prior crime to impeach the defendant under Rule 609. By contrast, in this case, the prosecution offered no such proof. In admitting the evidence, the trial court abused its discretion.

Reversed.

State v. Hartwell
Franklin Court of Appeal (2014)

Michael Hartwell was convicted of being a felon in possession of a firearm under the Franklin Criminal Code. In this appeal, Hartwell contends that the trial court erred in admitting evidence of a prior conviction for firearms possession to impeach his testimony at trial.

Hartwell was arrested after a police officer allegedly saw him pull a weapon out of his pocket and hold it behind his back while he and Tim Wagner walked past the officer's cruiser. The officer jumped out of the car and advised Hartwell and Wagner to drop their weapons. The officer testified that he saw a gun drop to the ground between Wagner's legs. Hartwell was arrested. As he was taken into custody, Hartwell exclaimed, "That's not my gun. You didn't see me with a gun." Later, a records search revealed that Hartwell was a convicted felon who was not permitted to possess a firearm.

At trial, Hartwell sought to prove that Wagner had possessed the gun and sought to impeach the testimony of the arresting officer. Hartwell also took the stand to testify that he had pulled his cell phone from his pocket, not a gun. Relying on Franklin Rule of Evidence 609(a)(1)(B), the trial court permitted the State to impeach Hartwell with a certified copy of a six-year-old federal conviction for possession of a firearm by a convicted felon, a federal offense identical to the one for which Hartwell was on trial. Hartwell was convicted.

Rule 609 permits evidence of a prior felony conviction to be offered to impeach a testifying witness. However, when the testifying witness is also the defendant in a criminal trial, the prior conviction is admitted only "if the probative value of the evidence outweighs its prejudicial effect to that defendant." Fr. Rule of Evid. 609(a)(1)(B). This reflects a heightened balancing test and creates a preference for exclusion. We review evidentiary decisions for abuse of discretion.

We consider four factors when weighing the probative value against the prejudicial effect under this heightened test: (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.

(1) The nature of the prior crime: In evaluating the "nature of the prior crime," courts should consider the impeachment value of the prior conviction and its similarity to the charged crime. "Impeachment value" refers to how probative the prior conviction is of the witness's character for truthfulness. Crimes of violence generally have lower probative value in weighing

credibility. By contrast, crimes that by their nature imply some dishonesty have much higher impeachment value. In this case, Hartwell's prior conviction for possession of a firearm does not imply dishonesty and thus has relatively low probative value as impeachment.

As to "similarity," the more similar the prior crime is to the present charge, the stronger the grounds for exclusion. Admission of evidence of a similar offense can lead the jury to draw the impermissible inference that, because the defendant was convicted before, it is more likely that he committed the present offense. As stated in the Advisory Committee Notes to Rule 609, "the danger that prior convictions will be misused as character evidence is particularly acute when the defendant is impeached." Given this potential prejudice, evidence of similar offenses for impeachment under Rule 609 should be admitted sparingly if at all. Hartwell's prior conviction is for a crime virtually identical to the one for which he was tried in this case, maximizing the risk of prejudice.

(2) The age of the prior conviction: The Franklin Rules presumptively exclude convictions more than 10 years old. But even for convictions less than 10 years old, the passage of time can reduce the conviction's probative value, especially where other circumstances suggest a changed character. A prior conviction may have less probative value when the defendant has maintained a spotless record since the earlier conviction. Here, the prior conviction is six years old, and Hartwell has incurred no further convictions during that time.

(3) The importance of the defendant's testimony: The third factor focuses on the importance of the defendant's testimony to his defense at trial. 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. By contrast, if the defendant can establish his defense with evidence other than his own testimony, impeaching with a prior conviction would have less of an impact on the defendant's case. Wagner, Hartwell's companion, chose not to testify, exercising his Fifth Amendment right against self-incrimination. Thus, Hartwell had only his own testimony to support his theory at trial.

(4) 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. But if the defendant testifies to unimportant matters or to uncontested facts, his credibility matters less and the need to impeach with prior convictions is lessened.

Hartwell's credibility is a central issue in the case, as is that of the arresting officer. But all other factors weigh *against* use of the prior conviction. The probative value of the prior conviction for attacking the defendant's credibility is low and is lessened still further by its age (six years) and the defendant's spotless record since that time. Further, the fact that the past conviction is virtually identical to the present offense creates a heightened risk of prejudice, one that has a significant impact on the central theory of the defendant's case.

We hold that the State has failed to meet its burden of establishing that the probative value of the prior offense for impeachment purposes outweighs its prejudicial impact. Thus, the trial court abused its discretion in admitting this evidence.

Reversed.

MULTISTATE PERFORMANCE TEST DIRECTIONS

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

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

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

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

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

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

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

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