July 2023 Georgia Bar Examination Sample Answers

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Essay 1

Sample 1

(1) (a) Cap's personal representative will be able to recover for Cap's wrongful death, as well as his twin daughters and his son, Tom, who may assert their own claims. At issue is who is entitled to recover for a wrongful death in Georgia. Under Georgia law, an action to recover for wrongful death survives the decedent and can be brought by the decedent's estate. Importantly, this is the *decedent's own claim* for their own wrongful death. Thus, Cap's personal representative will be able to assert and recover for Cap's wrongful death. However, a decedent's relatives also have their own recovery for a wrongful death. This right to recovery is first by the decedent's spouse; or, if there is no living spouse, by the decedent's children; or, if there is not a surviving spouse or surviving children, by the personal representative of the decedent's estate, as stated above. In this case, Cap's wife is already deceased. However, he does have living children: the twins, and Tom. The twins will certainly be entitled to recovery for Cap's wrongful death because they are the legitimate, marital children of Cap and his deceased wife, Sally. With regard to Tom, he likely will be entitled to recovery as well, assuming he has been properly legitimized. Under Georgia law, a father can legitimize himself as the parent of a non-marital child through a positive paternity test, and paternity is presumed if the test demonstrates at least a 97% chance of fatherhood. In this case, the facts don't explain exactly how certain the paternity test was, but Cap did undergo one, and began meeting with Tom several times after undergoing the test. This is likely enough evidence to demonstrate that Tom has been legitimized as a child of Cap. Thus, the twins will be entitled to recover for Cap's wrongful death, and so will Tom.

(1) (b) Bill's estate will be able to recover for Bill's wrongful death. At issue is who is entitled to recover for a wrongful death in Georgia. As stated above, Georgia's survival statute allows an action for wrongful death to survive the decedent and may be asserted by the decedent's estate. In this case, Bill has no spouse nor children living. However, his personal representative (likely his sister Jane, but the facts do not specify) will be entitled to assert Bill's wrongful death claim in his name. If a decedent's estate prevails on a wrongful death claim, any recovery is held for the benefit of the decedent's heirs. In this case, Bill's closest living relative is his sister Jane, who would likely be Bill's heir under the intestate statute unless Bill had a will providing

otherwise. Thus, Bill's estate may assert the claim for wrongful death and any recovery will be held for his heirs.

(2) Cap's estate and his children will be entitled to recover for his conscious pain and suffering. At issue is who may recover for a decedent's pain and suffering. Under Georgia law, the decedent's estate may recover for the decedent's own pain and suffering. As stated above, the estate is entitled to assert the decedent's claim and hold any benefit for the decedent's heirs. A recovery for wrongful death includes recovery for any pain and suffering, which are general damages presumed to flow from the tortious conduct. This means they do not have to be specially plead or proven. Moreover, physical pain and suffering is *always recoverable*, while mental pain and suffering is recoverable if it accompanies a physical injury. The measure of damages for pain and suffering is found by "the enlightened conscience of an impartial juror." In this case, Cap would be entitled to recover for both physical pain and suffering, as well as mental pain and suffering because he certainly experienced physical injury that lasted for weeks, and he likely experienced mental anguish that accompanied the physical harm. More specifically, Cap has a strong claim and would likely receive a large award from a juror because: (i) he was injured in the initial accident; (ii) he died *weeks later* after undergoing *numerous* surgeries; and (iii) he experienced significant pain as a result of the wreck. Thus, Cap's estate will be entitled to recover for his pain and suffering, with the damage award to be found by an enlightened conscience of an impartial juror.

(3) In order for a settlement to be final, the twins grandparents will need to be made the guardian of the twins. At issue is how a settlement will be given finality where the potential plaintiff is a minor child. Under Georgia law, a 14-year-old child cannot generally bring a legal action. However, if a child has a claim, a parent or guardian is entitled to bring the action in their stead. A related rule is that a minor cannot *settle* a claim by themself in Georgia. This is due both to policy concerns, and because minor children lack capacity to contract. Thus, in order for a settlement on the twins to be binding, their legal guardian or representative must agree in their place. In this case, the twins have a right to recover for Cap's wrongful death. Unfortunately, they are only 14-years-old. Thus, in order to settle with the children, their guardian or legal representative must agree instead. Here, the twins have living grandparents who will likely be appointed as their legal guardian because they have no other living relatives. Once this happens, the grandparents may settle the claim in the place of the children.

(4) The insurer should implead BI into the case. At issue is how a party may assure that it can seek indemnity against a non-party. As a preliminary matter, under Georgia law, an impleader claim (or third-party claim) is a derivative claim. In other words, a party is asserting that *if* they are liable, the third-party is *liable to them* for that amount. Importantly, an impleader claim does not assert that the third-party is the party who is actually at fault in an attempt to shift liability away from the defendant. Here, the insurer is wants to make sure that if it settles any claim, it still has the option to protect itself in making a claim against BI for indemnity. This raises two distinct issues: first, how any settlements should be phrased to avoid a preclusive effect between the insurer and BI; and second, whether BI needs to assert an impleader claim immediately, or whether it can wait.

The first issue is thus how the insurer should go about settling any claims. Under Georgia law, the doctrine of issue preclusion is recognized. Issue preclusion applies where: (i) the party against whom preclusion is sought was a party to a former action; (ii) the same issue was actually litigated and ended on a valid final judgment; and (iii) the issue was essential to the judgment. When a judgment is used and given preclusive effect by a party who *was not* a party to the initial action, it is referred to as non-mutual issue preclusion. Georgia only recognizes non-mutual defensive issue preclusion, meaning that a party who was not a party to the first action may use the issue to defend itself against a party who was a party to the original action. Here, the insurer will need to make sure that any settlements avoid language of fault or taking entire liability. Although settlements are not generally considered a valid final judgment where an issue was actually litigated, the insurer could open themselves up to BI asserting nonmutual defensive issue preclusion if any settlements contain language where the insurer admits *sole fault*. Thus, this should be avoided.

The second issue is whether the insurer should implead BI into the case immediately, or if they may wait. Under Georgia law, an impleader claim is permissive, not compulsory. In other words, if a party decides not to implead the third-party defendant in this case, they do not waive their indemnity claim. In this case, the insurer thus has the choice of bringing BI into the case immediately through impleader, or they may wait and seek indemnity later, in a separate case.

Sample 2

(1) Who is entitled to recover for (a) Cap's wrongful death? (b) for Bill's wrongful death? Explain.

(a) A representative for Cap's daughters, and potentially Tom, are entitled to recover for Cap's wrongful death.

In Georgia, a wrongful death suit may be brought by a decedent's surviving spouse. If the decedent does not have a surviving spouse, the suit may be brought by the decedent's children. If the decedent's children are minor's, a representative for the children may bring the suit on their behalf. Here, Cap's wife Sally predeceased him. Therefore, Cap's surviving children can bring a claim for wrongful death. Here, Cap has twin 14-year old daughters who are in the custody of Cap's parents. Cap's parents can likely bring a wrongful death suit on behalf of Cap's underage daughters.

The remaining issue as to Cap is whether Tom can bring a wrongful death suit on his behalf. In Georgia, paternity is presumed where a man is the husband of a child's biological mother. Here, it does not appear that Cap was the husband of Tom's mother. However, paternity can also be established through a order judgment establishing paternity, by the putative father acknowledging the child's birth certificate, or by the father maintaining a relationship with the child and holding the child out as their own. Here, the facts state that Tom has a positive paternity test and that he met with Cap several times, but that Cap's wife and daughters did not know about Tom. Without more, it is not clear that Tom has enough evidence to establish Cap's paternity post-mortem. In Georgia, a positive paternity test creates a presumption of parenthood. However, since Cap's parental status as to Tom was not established by court order or any of the other methods above during Tom's life, it is unlikely that paternity can be established after Cap's death. If this is the case, then Tom will not be able to bring a wrongful death suit stemming from Cap's death. However, if Tom is permitted to bring a suit to establish paternity after Cap's death (which can be brought by the mother, the putative father, the child, the Georgia Department of Human Services, or a caretaker of the child functioning as a parent), then the positive paternity test combined with Cap's relationship with Tom throughout Tom's life may be sufficient to establish paternity by clear and convincing evidence, as is required in Georgia. In this case, Tom would be able to bring a wrongful death suit for Cap's death. If Tom were permitted to bring a suit, he would have to share any proceeds from the suit in equal parts (per stirpes) with Cap's other surviving children. So Tom would get 1/3 of the recovery and the twins would each get 1/3. If Tom was not able to bring the suit, which is more likely given that Tom can likely not establish paternity after Cap's death, then each twin would recover 1/2 from the recovery. This amount would likely be placed in a trust account for them, as is required in Georgia for minors where the sum exceeds $15,000.

(b) An appointed representative for Bill would likely be able to bring a wrongful death suit on Bill's behalf.

In Georgia, where a decedent dies with no surviving spouse or surviving children, a representative appointed by the court is permitted to bring a wrongful death suit on their behalf. Here, the facts state that Bill was single and had no children. Therefore, an appointed representative will be able to bring a wrongful death suit on Bill's behalf. The court may choose to appoint Jane, Bill's closest living relative and sister, as the representative for his estate, but the court could exercise its discretion and appoint someone else.

(2) A representative appointed by the court would be able to bring suit to recover for Cap's conscious pain and suffering and the recovery would go towards Cap's estate.

Under Georgia law, a representative appointed by the court on the decedent's behalf may recover for a decedent's conscious pain and suffering. A claimant may bring a suit for pain and suffering so long as the claimant survives, at least for a period of time, after the accident. Here, Cap survived the accident and did not perish until weeks later after undergoing multiple surgeries and "experiencing significant pain." Damages for pain and suffering are awarded according to the "enlightened conscious of an impartial jury" who would likely consider these facts in crafting an award for pain and suffering. The damages recovered for Cap's pain and suffering would then go toward Cap's estate and, under these facts, likely be awarded either in accordance with his will or to his descendants, per stirpes. In Georgia, if a decedent dies without a surviving spouse and without a will, the decedent's estate goes entirely to the decedent's descendants per stirpes. Here, it is not clear whether Cap had a will. If he did not have a will, then the damages that went into his estate would be divided either equally between his two twin daughters or, depending on the outcome of Tom's paternity suit, equally to his twin daughters and Tom.

(3) If Cap's twins are entitled to recover for wrongful death and/or conscious pain and suffering, BFC needs to ensure that the twins' interests are adequately represented and that the settlement is approved by the court to achieve finality via a settlement with their paternal grandparents.

In order to achieve finality in a settlement with Cap's twins, as represented by their paternal grandparents, BFC needs to ensure that the twins are fairly and adequately represented by their grandparents acting on their behalf in the settlement negotiations and that the court approves the settlement and issues a decree as to its finality. First, if Cap's twins are not adequately represented by their grandparents during the settlement discussions, a court later on may find that they cannot be bound by the settlement and therefore that it is not final as to them. If this happens, then BFC and its insurer could be subject to more liability down the road stemming from the incident with Bill and Cap. Therefore, BFC needs to ensure that the grandparents serve as adequate representatives for the girls' interests during the settlement process.

Additionally, BFC needs to seek court approval as to the terms of the settlement in order to prevent future claims from being brought stemming from the same facts. Without court approval of the settlement, there is no binding judgment that would prevent claimants from bringing further claims stemming from Cap and Bill's incident. Therefore, BFC needs to seek court

approval of the terms of the settlement and a decree that the settlement serves as a final disposition as to the parties' claims regarding the accident.

(4) If BI refuses to be part of any pre-suit settlement discussions or to pay any portion of any settlement amounts with any of the claimants, the insurer should preserve its right to seek indemnity in the settlement agreement and refrain from statements, admissions, or conduct as to total liability or fault to best protect a future indemnity claim.

Indemnity is a claim against a third party seeking to recover the entire amount of a judgment against the party seeking indemnification. In litigation, a claim for indemnity or contribution (seeking part of the amount of a judgment) can be brought in the initial case or in a subsequent cause of action. Here, to best protect itself in preserving its rights to later seek indemnification from BI stemming from their defective product, the insurer should ensure that the settlement agreement preserves the insurer's right to seek indemnity from third party. Moreover, the insurer and should refrain from admitting total liability for the accident in the settlement negotiations. Under the Georgia Rules of Evidence, evidence of settlement negotiations or surrounding statements or conduct would not be admissible in subsequent proceedings to show fault. However, such evidence could be admissible for other purposes in one of the exceptions to the general rule, and therefore the insurer should ensure that neither it nor BFC makes complete admissions as to liability or fault during the course of the settlement agreement in order to best preserve a future claim against BI for indemnity.

Sample 3

1 (a) The first issue is who may recover for Cap's wrongful death. Under Georgia law, a spouse or children may recover in an action for wrongful death against a tortfeasor. Such damages are based upon the value of life that would have remained for the deceased, reduced to present value, and includes considerations such as loss of consortium and loss of services. In determining the amount of a wrongful death award, the factfinder looks to the age and future earning capacity of the deceased. Where the deceased child is a minor, the child's representatives are entitled to file an action on behalf of the minor child. Here, Cap's wife predeceased him, but his minor twin daughters are still alive. Thus, Cap's parents may recover on behalf of Cap's twin daughters, but not on behalf of themselves, because parents generally do not have a cause of action for wrongful death in Georgia.

Further, Tom should be able to recover for Cap's wrongful death as well. Half-siblings are treated the same as full-blood siblings under Georgia law. Additionally, although Cap never told his wife and daughters about Tom, the facts state that there is a positive paternity test. In Georgia, paternity is established by: (1) the father signing the birth certificate of the child; (2) a court order establishing paternity; or (3) other *clear and convincing* evidence. Georgia law further provides that a DNA test establishing paternity is sufficient under the third method listed above, as they have an accuracy of over 97%. Thus, regardless of the fact that Cap never told his wife and children about Tom, Tom will be able to recover for Cap's wrongful death as Cap's child.

Though the facts do not state what age Cap was when he died, but they do suggest that Cap was relatively young. The facts further state that Cap had high earnings as a partner at a prominent Atlanta law firm. Thus, the factfinder would take these facts into consideration, along with actuarial calculations, to determine the amount of wrongful death damages to award to Cap's children.

1(b) The second issue is who may recover for Bill's wrongful death. Here, the facts suggest that Bill was single and had no children, and that his closest living relative was his sister, Jane. Unfortunately, wrongful death actions may only be brought by spouses or children of the deceased. Thus, neither Jane nor any other living relative would be entitled to recover for Bill's death.

2. **The personal representative of Cap's estate will be entitled to recover for Cap's conscious pain and suffering**.

Under Georgia law, one's pain and suffering is a personal injury that may only be recovered by the victim of the tort or the victim's representative, unlike with wrongful death actions, which are brought to recover for the loss of life to the family of the victim. Pain and suffering are recoverable general damages under Georgia law. Though mental pain and suffering are actionable, they generally must be paired with some physical impact or injury, as Georgia

courts are hesitant to award damages for mental distress alone. Further, the plaintiff must have been conscious during the times of pain and suffering in order to recover.

Here, the facts do not state whether Cap died testate (with a will) or intestate (without a will). If Cap died testate, the named executor of his estate would be entitled to bring the action for personal injury. If Cap died intestate, or his will were silent on the issue, then the court would appoint a personal representative for whom all beneficiaries/heirs select. Absent such unanimous consent, the court will then appoint a personal representative with the capacity to manage the estate according to what the deceased would have intended, beginning with the closest relatives and ending with a court-appointed representative. Here, assuming an absence of a will and the absence of a unanimous decision, the court would likely appoint one of Cap's parents because of their willingness to take custody of the children. Thus, one of Cap's parents would likely be entitled to recover for Cap's conscious pain and suffering for the weeks during which Cap was hospitalized, underwent multiple surgeries, and experienced significant pain, as long as they are the personal representative or executor of Cap's estate.

3. At issue here is what would be needed for Cap's twins to achieve finality via a settlement with Cap's parents. Under Georgia law, a settlement or offer to settle are not final until both the plaintiffs and defendants agree to the terms of the settlement in writing, and the court enters a dismissal with prejudice. Filing a dismissal with prejudice operates as a judgment on the merits, and the issues may not be litigated again by the same parties. Further, the twins will likely need to be appointed a guardian ad litem to assure that their interests are correctly asserted before the court, as opposed to the interests of the twins' grandparents.

4. At issue is what steps the insurer should take to protect itself in making an indemnity claim against BI. The insurer could first make a formal offer through the court. If a plaintiff (or third-party plaintiff, as the insurer is here) makes a formal offer of judgment, BI rejects the offer, and the insurer wins at trial or receives a better judgment than originally offered, the defendant (or third-party defendant, as BI is here) would be liable to pay the costs of litigation after the offer was made.

Another way that the insurer could protect itself is by including a clause in the settlement agreement that they are not relinquishing any claims against BI for indemnification, thus allowing them to continue to litigate the issue of BI's liability without breaching any release provisions of the settlement agreement.

Essay 2

Sample 1

Breach of Contract

SVR likely has a claim for breach of contract against HCorp. Under Georgia law, a valid contract requires an offer, acceptance, and consideration. Here, SVR and HCorp entered into an agreement for advisory and operational services as it related to patient-billing practices. This agreement was initially created in 2016, and it has been extended a total of six times. The contract is for services beyond one year, so it is correctly reduced to writing to satisfy the Statute of Frauds.

HCorp has breached this contract by terminating the deal shortly after the HCorp and Globe merger finalized in 2018. HCorp then sent a letter to SVR listing several alleged material breaches, and it then stated it wished to terminate the contract. Under Georgia law, a material breach of a contract justifies the non-breaching party to discharge any obligation owed under the contract. However, this agreement explicitly stated terminations could only occur in the event of an uncured material breach. Here, no such uncured material breach has occurred because SVR has not been given the opportunity to cure. HCorp simply decided that SVR has not been able to provide the necessary services and terminated the agreement. This action is in direct violation of the Agreement between the two parties, so this constitutes a breach of contract. SVR was owed the opportunity to cure any material breach per the terms of the contract. Furthermore, Georgia law does not permit the termination of a contract due to dissatisfaction with price, nor can one terminate in the event of a merger. This agreement was negotiated to by sophisticated parties, so termination of an agreement is not allowed when one party believes they have made a bad deal in hindsight. Not to mention, mergers are not an adequate defense to a contract termination, and instead the merged entity must assume any pre-existing contractual duties. Therefore, HCorp, and Globe by merger, can both be liable for breach of contract.

The appropriate remedy for a breach of contract is typically expectation damages which will put the non-breaching party in the position they expected to be at the conclusion of the contract. In addition to expectation, a party may also seek incidental damages and consequential damages. Typically, consequential damages are only granted when they can be proved with sufficiency certainty and are foreseeable. Here, SVR can surely argue foreseeability as it is likely that a breach of a service contract by one of the parties to the deal will create los profits for the non-breaching party. Lost profits must be shown with some specificity in order to be recovered. SVR has a strong argument that its lost profits are not speculative. In 2016 and 2017, SVR made $2 million each year. It is not clear what SVR made in 2018, but three years of profits is likely enough time to provide some amount of lost profits with certainty. The court could decide SVR would have made $2 million in each of the next 4 years, and then it can reduce that value to its present value using the appropriate discount rate. This will provide SVR with a lump sum value today for the value of lost profits over the next several years.

Tortious Interference with Contractual Relations

SVR likely has a claim of interference with contractual relations against BC Healthcare. Under Georgia law, intentional interference with contractual relations occurs when a non-privileged party, maliciously interferes with an existing contractual relationship, and the interference creates a financial harm. Malice is proven when the interfering party has knowledge of a pre-existing contractual relationship, and it knowingly attempts to interfere with it.

Here, BC Healthcare was hired as a consultant to evaluate the value of SVR's services to HCorp, and it then had to determine whether those services were worth it going forward with the merger. The facts indicate that the true purpose of hiring BC was to fabricate alleged breaches of the agreement. This likely constitutes the required malice needed to prove this claim because BC was not hired to do an honest job of evaluating SVR's services, but rather it was hired simply to create a scenario where HCorp-Globe could terminate the agreement for cause. Furthermore, it goes against BC that it is a competitor of SVR in this field because it was likely aware of the plan to replace SVR employees with BC employees. The resulting termination of SVR certainly caused them financial loss since it has already been shown that SVR likely expected $2 million a year from this agreement.

The only defense BC will have to this claim is whether it acted with privilege. A party acts with privilege rather than intentionally interferes with a contractual relationship when the accused party is a competitor in the industry, uses normal business means to get a client, acts when there is not a valid contract in existence, or does anything else expected within the industry. Here, BC will not be able to claim privilege. While it is a competitor with SVR, it interfered with a contract that was already in existence. Furthermore, it did not use fair business practices to compete with SVR. Rather, BC engaged in fraudulent conduct to fabricate alleged breaches to get SVR's contract terminated, and it did not even abide by the fake contract where it was supposed to give notice to SVR about its various reports.

Assuming this claim is proven, SVR will want to pursue the lost value of the contract. This again may be lost future profits which again would be reduced to its present value. Furthermore, SVR could pursue a claim for punitive damages. Punitive damages are granted when a party acts wantonly or maliciously and injures another party. Since interference with contractual relations requires a showing of malice, then SVR could seek punitive damages subject to the $250,000 cap under Georgia law. Furthermore, SVR may seek damages for the value of future services that it would have rendered but for the interference by BC. SVR could argue it should receive the present value of its future services that could have been rendered to the HCorp-Globe entity. It is likely that the $2 million profits SVR saw in 2016 and 2017 may have increased to a much larger number once it began providing its services to a larger entity. However, SVR will never be able to receive the value of these future services due to BC's tortious interference with its agreement with HCorp, so this led to not only lost profits, but a loss in future services. These consequential damages must be proved with some certainty, but it requires less specificity as opposed to a lost profits claim under breach of contract.

Conspiracy to Commit Breach of Contract

SVR may be able to pursue a conspiracy to commit breach of contract since multiple parties have conspired to terminate this agreement between SVR and HCorp. Under Georgia law, a party to a contract can be found guilty of conspiring to commit breach of contract when multiple parties come to an agreement with the intent to breach the contract. Here, HCorp, Globe, and BC all came to an agreement to hire BC with the sole intent to fabricate breaches of contract. There was an agreement because BC was hired with the sole purpose to fabricate these alleged breaches, and it is believed this was simply to get out of the Agreement. It was Globe's idea to hire BC, and it decided this contract needed to be terminated to replace SVR with BC employees. Therefore, it is likely that the three parties conspired to commit breach of contract. Globe and HCorp knew it could not terminate absent material breaches, so it agreed with BC to create those breaches.

SVR will likely seek similar damages as it has sought in the previous claims such as lost profits.

Fraud

SVR may also seek a fraud claim against HCorp for its fraudulent misrepresentations regarding BC. Part of the original BC agreement was for BC to evaluate SVR's services. SVR was told by HCorp that it was solely to evaluate services, and it would receive any reports created by BC. However, this was a misrepresentation by HCorp since it really wanted BC to fabricate the alleged breaches. Fraud by misrepresentation occurs when one party knowingly makes a false statement with the intent for the other party to agree. Here, SVR would have never agreed to this BC agreement if it knew the true purpose, so it was fraudulently induced into agreeing to anything with HCorp.

SVR can likely seek the same breach of contract damages it has already sought, but it may be entitled to punitive damages as well since this was a fraudulent action by HCorp.

Sample 2

MEMORANDUM

TO: Examiner

FROM: Applicant

DATE: July 25, 2023

RE: SVR Consulting

Claims Against HCorp, Globe, and BC Healthcare

As discussed below, SVR can sue HCorp for material breach of the Agreement. SVR can also sue BC Healthcare as a third-party beneficiary of the BC Healthcare-HCorp contract. Third, SVR could sue HCorp and BC Healthcare for fraud. Finally, SVR could recover from HCorp, Globe, and BC Healthcare for conspiring to breach the Agreement. Damages issues relating to the definiteness of lost profits, the value of future services is discussed further, causation of damages, punitive damages, and the one-recovery rule are assessed independently at the end of this Memorandum.

a. SVR Can Sue HCorp for Breach of Contract Because HCorp Terminated the Contract Without Providing SVR the Opportunity to Cure Any Material Breach and BC Healthcare for Breach of Contract as a Third-Party Beneficiary.

A contract is a promise or set of promises for the breach of which the law provides a remedy or recognizes a duty to perform. A contract requires offer, acceptance, and consideration. The common law governs contracts for services and any contract other than for the sale of goods. A material breach occurs when a party fails to substantially perform the contract--the non-breaching fails to receive the substantial benefit of their bargain. Upon material breach, the non-breaching party's obligations are discharged. If only an immaterial breach occurs, the non-breaching party must still perform and can only sue for damages. The parties may define for themselves their intent of what constitutes a breach or the grounds for termination upon a material breach.

Here, the common law applies because the parties contracted for consulting, a service. The facts state that SVR and HCorp entered into a valid contract. The contract specifically states that termination before December 2022 is prohibited except "in the event of an *uncured* material breach." HCorp terminated the agreement in 2018, three years early. HCorp asserted that SVR committed material breaches of the contract due to its SVR did not provide HCorp with sufficient services. The letter rejected the fee structure that HCorp was responsible for negotiating. The letter also vaguely referred to impacts on short-term and long-term aims of the patient-billing operations. No evidence suggests that SVR failed to substantially perform its obligations. If SVR

did not commit a breach or committed only an immaterial breach, HCorp would be in breach of contract for failing to perform. Even if SVR did, however, the contract required the breached-against party to give notice and an opportunity to cure. HCorp did not do so. It only gave notice of the termination and declared the contract terminated. Therefore, SVR has a valid breach of contract claim against HCorp.

A third-party beneficiary is a person who is identified in the contract as a beneficiary of the parties' contract. A third-party beneficiary has standing to sue for breach of contract. The parties may modify the contract until the third-party beneficiary's rights vest upon (1) learning of the agreement and consenting; (2) materially changing position; or (3) suing on the contract.

Here, when HCorp and BC Healthcare contracted for BC Healthcare to assess SVR's capabilities, BC Healthcare indicated it would send SVR contemporaneous copies of all reports. SVR was an intended third-party beneficiary of the contract becauseBC Healthcare specifically agreed to send its reports to SVR. SVR would presumably use the reports to improve its services and therefore stood to benefit. ButBC Healthcare did not send SVR copies until February 2019 after the termination.BC Healthcare breached the contract. No facts indicate that the parties modified the agreement before SVR manifested its assent by consenting to the evaluation of its services. Therefore, SVR can sueBC Healthcare for breach of contract of the HCorp-BC Healthcare contract as a third-party beneficiary.

b. SVR Can Sue Globe and BC Healthcare for Interference with Business Relations.

Georgia recognizes the tort of interference with business relations, which protects a party's contract rights from tortious interference. To prove the claim, a plaintiff must show (1) an unprivileged (2) action undertaken with malice and the intent to injure (3) to induce a party not to begin or to terminate its business relations with the plaintiff (4) where the plaintiff suffers harm as a result. The plaintiff may recover compensatory and punitive damages. Privileges include normal economic competition.

Here, SVR can sue Globe and BC Healthcare for interference with business relations. As to Globe, it lacked privilege because it was seeking to acquire HCorp not to compete with SVR in the healthcare consulting market. Globe's actions in seeking to acquire HCorp and its "urging" of HCorp to hire SVR's competitor BC Healthcare shows the intent to injure. Globe induced SVR to terminate its contract with SVR by urging it to contract with BC Healthcare. And SVR suffered damages in the form of the lost profits on the contract for the remaining three years. Globe cannot defend by arguing that it was a party to the contract--and thus not an outsider for purposes of the tort--because Globe's tortious conduct occurred before Globe and HCorp merged. Therefore, SVR can sue Globe for this tort.

As to HCorp, the claim is less likely to succeed. HCorp will argue that its act was privileged because it merely engaged in normal economic competition. It will argue that it did not act with malice or the intent to injure--it simply produced the reports to show HCorp the deficiency of SVR's services. HCorp will argue that SVR was the party who made the decision to terminate the contract. Therefore, HCorp will will probably not be liable to SVR for the tort because HCorp's acts were privileged.

c. SVR Can Sue HCorp and BC Healthcare for Fraud and Can Sue HCorp, Globe, and BC Healthcare for Conspiring to Breach the Agreement.

Fraud is the intentional misrepresentation of a past or present material fact undertaken with the intent to deceive the other party where the other party is deceived, reasonably relies, and suffers harm as a result. A future promise can be grounds for fraud if the party did not intend to honor the promise at the time they made the statement.The tort allows recover for compensatory and punitive damages. Punitive damages seek to punish the wrongful actor. They are capped at $250k unless the plaintiff can prove by clear and convincing evidence that the wrongful actor acted with specific intent. Damages are awarded in the enlightened conscience of impartial jurors.

Here, SVR can sue HCorp and BC Healthcare for fraud based on two misrepresentations. First, they represented that BC Healthcare would send SVR copies of BC Healthcare's reports. This was a material fact because the evidence indicates that SVR would not otherwise have consented to BC Healthcare evaluating SVR's services and capabilities. The statement was false because SVR did not receive the reports contemporaneously. HCorp and BC Healthcare will argue that the misrepresentation was only a promise that it failed to perform. SVR will argue that the entire course of conduct--evaluating HCorp during a merger, BC Healthcare's close working relationship with Globe, the subsequent contract termination, and the failure to produce the reports--shows that they never intended to honor their promise. Second, SVR will point out that "the true purpose of the evaluation was to fabricate alleged breaches of the Agreement so that Globe and HCorp could terminate the Agreement." Thus, it was a false representation of present fact that the purpose of the agreement was to learn about SVR's services and assess its capabilities. SVR relied on those misrepresentations by assenting to the evaluation based on the representation. It suffered harm in the form of the contract termination, but his harm may not have been caused by the tort if HCorp was going to terminate the contract anyway due to SVR's material breach, if any. In short, SVR likely has a claim for fraud against BC Healthcare and HCorp. SVR could recover compensatory damages for the value of the contract profits it lost. SVR could also recover unlimited punitive damages for the intentional violations of its rights.

Georgia recognizes a claim for conspiracy to breach a contract. The claim applies when parties--even those to a contract--agree among themselves to wrongfully breach a contract.

Here, SVR can sue HCorp, Globe, and BC Healthcare for conspiracy to breach the HCorp-SVR contract. The parties seem to have acted in concert in an entire scheme resulting in the termination of the contract with SVR after the merger. Indeed, they conspired to allow BC Healthcare to review SVR's capabilities for "the true purpose [of] . . . fabracat[ing] alleged breaches of the Agreement." More evidence would be necessary on the scope of the parties' agreement and their concerted action to prove this claim, but this claim is very likely to succeed.

d. Lost Profits and Value of Future Services Damages Issues

First, damages for breach of contract must be caused by the breach and proved with reasonable certainty. Consequential damages are generally unforeseeable and unavailable in contract--the harm must be the probable consequence of the breach. Consequential damages must be specifically pleaded in the complaint.

Here, as to the breach of contract claim with HCorp for consulting, HCorp will argue that any damages are speculative. It will argue that the lost profits are consequential damages that cannot be proved with reasonable certainty. But that argument will likely fail. The parties have renewed their agreement six times, and the hourly rate of pay tends to show reasonably certain projections of expected profits. Indeed, SVR consistently received $2 million in payments in 2016 and 2017, which tends to show that damages would not be speculative.

For all other claims, the defendants would argue that the lost-profits damages were not caused by their tort or breach because SVR was materially breaching the contract and because HCorp was bound to terminate the contract anyway (or, with respect to the intentional interference with business relations claim, that HCorp could have wrongfully terminated anyway after the Globe merger). Such factual issues would need to be further developed in order to prove damages, but based on the current evidence, it seems that SVR was not in material breach.

Second, a party can recover future damages for the money it would have earned in future contracts in the form of consequential damages.

Here, SVR could try to recover for lost profits on future renewals of the Agreement. But those damages will likely not be available because it is speculative whether HCorp would have renewed the contract after 2022, especially after the Globe merger where Globe strongly favored BC Healthcare's services. Moreover, SVR was paid hourly, and the scope of its services would have increased dramatically--and therefore unpredictably--after the merger with Globe. It would be extremely difficult for SVR to prove with reasonable certainty the value of its future services.

Finally, under the single-recover rule, a contract or tort plaintiff can only recover on breach of contract or interference with business relations, not both claims. Georgia law does not allow double recoveries.

Here, SVR would have to choose its recovery: in contract against HCorp for breach of the Agreement or against Globe and BC Healthcare for intentional interference with business relations.

Sample 3

TO: Partner

FROM: Examinee

DATE: July 25, 2023

RE: SVR LLC

MEMORANDUM

A. Breach of Contract

SVR likely has a viable claim for breach of contract against HCorp. The issue is whether there was a valid contract between SVR and HCorp, and if so, whether HCorp breached the contract. This fact pattern involves a contract for services, not a contract for the sale of goods; thus, Georgia common law applies instead of the UCC as adopted by Georgia. A valid contract exists where the parties to the contract mutually assent to be legally bound by an agreement. Additionally, there must be consideration, which is bargained-for exchange, from each of the parties. Consideration is satisfied where a detriment to each party works to the benefit of the other. Here, SVR and HCorp formed a valid contract in 2016, wherein SVR promised to provide advisory and operational services to HCorp, and HCorp promised to pay an hourly rate basis for the work SVR did.

Modifications generally require additional consideration to be given. Though the facts do not state what new consideration was given under each amendment to the contract, the fact that the parties continued to perform after the amendments would likely be upheld by a court because a sufficient meeting of the minds is evidence. The final amendment, extending the term of the Agreement through December 2022, was a modification of the first, but it was clearly supported by consideration. SVR promised to continue performing services under the agreement past the expiration date of the original Agreement, while HCorp promised to continue paying for the services. The terms of the December 2022 provided that the Agreement could only be terminated early in the event of an uncured material breach.

Here, assuming, arguendo, that HCorp's "notice" of the twenty material breaches were true, HCorp did not provide SVR with a chance to cure the alleged breaches. Where there is a breach of contract, Georgia law provides that the breaching party must be given a reasonable time to perform correctly. Even if the time for performance had passed, an additional reasonable time is given if the breaching party had reason to believe that the non-breaching party would accept the performance. Here, the contract is even stricter than Georgia law in that the parties provided for the opportunity to cure expressly in the contract. Thus, even if SVR had breached the contract, HCorp's premature termination of the contract based on those breaches was not appropriate.

Thus, HCorp breached the contract because of its early termination. Although HCorp will argue that one of the grounds given for termination—that the merger with Globe had impacts on HCorp's needs and objectives—constitutes impracticability, because it would cause undue hardship for HCorp to have to continue performing under the contract if it could save money by switching to BC Healthcare. However, Georgia courts generally do not consider "saving money" or the fact that performance has merely become more expensive as a grounds for discharge of a contract based on impracticability.

HCorp could further argue that the fee structure is unconscionable, based on the notice provided by HCorp about a month after the merger. However, this argument will likely fail because of the fact that HCorp was the one who negotiated and agreed to just a few months before the notice was sent. Where the parties have equal bargaining power, Georgia courts are much less likely to provide relief for a party who claims unconscionability if they played an active role in negotiating the terms themselves.

B. Interference with Contractual or Business Relations

Georgia recognizes tortious interference with contractual or business relations. To prevail on such a claim, the plaintiff must show that the defendant, acting without privilege, maliciously kept a third party from entering into or continuing a business relationship with the plaintiff. Malice as used here is defined as knowledge of the consequences or a conscious and reckless disregard of them. A defendant is privileged in interference with contract or business relations where they stand to gain from the interference (in effect, to encourage healthy competition in the market).

Here, SVC would likely fail in a claim for tortious interference with contractual or business relationship against both Globe and BC Healthcare. While SVR could prove that BC Healthcare especially inserted itself into the business dealings between HCorp and SVR by purporting to evaluate the Agreement while fabricating alleged breaches by SVR, BC Healthcare was acting as an interested party in the transaction because they would have been awarded the contract that would have been taken away from SVR. Further, though Globe was the party who urged HCorp to hire BC Healthcare, SVR's competitor, Globe also had a stake in the outcome of this dispute, because HCorp and Globe were in talks to merge their businesses and indeed did so. Globe had an interest in controlling the cash flow of HCorp after the merger. Thus, although SVR would have prevailed if either BC Healthcare or Globe were disinterested "meddlers," SVR will not prevail because they were privileged to interfere with the contract and the business relations.

C. Fraudulent Misrepresentation

Fraudulent misrepresentation is actionable under Georgia law where the defendant makes a statement that it knows to be false at the time the statement is made, with the purpose of inducing the plaintiff to take some action or inaction, and which does induce the plaintiff's action/inaction, thereby causing the plaintiff economical or physical injury. Notably, in Georgia, fraud must be pled with particularity to survive a motion to dismiss for failure to state a claim.

Here, SVC likely has a viable claim against BC Healthcare for fraudulent misrepresentations. BC purported to be evaluating the Agreement to learn about SVR's services

and to assess capabilities going forward, presumably to facilitate SVR's growth. BC further promised to send SVR's contemporaneous copies of all reports. This induced SVR to consent to the evaluation. Because BC Healthcare had no intention of actually evaluating SVR's capabilities but instead to fabricate breaches of contract, and such fabrications which were made possible only because BC had access to SVR's facilities led to HCorp's termination of the Agreement, SVR will likely prevail in an action against BC for fraudulent misrepresentation. However, additional facts or evidence would be necessary to determine whether BC truly had no intention at the time of SVR's consent to the evaluation to actually conduct an evaluation, which would need to be pled with particularity in SVR's complaint.

D. Conspiracy

Assuming that Georgia law recognizes a cause of action against conspiracy to breach a contract, SVR would likely have a cause of action against HCorp, Globe, and BC Healthcare. A conspiracy occurs when parties agree to a course of action, and take some overt steps in furtherance of the agreement, with the intent that the course of action indeed occur. Here, Globe urged HCorp to hire BC, knowing SVR, with whom Globe had the existing Agreement, was a competitor. Globe also determined that terminating the agreement early would save Globe-HCorp several million dollars. With this in mind, HCorp retained BC Healthcare to fabricate breaches to justify HCorp's exit from the Agreement. The facts suggest that this "true purpose" was known to Globe, HCorp, and BC. Thus, SVR would likely prevail on a claim for conspiracy.

E. Lost Profits

Lost profits are consequential damages under contract law that allows a plaintiff to recover those foreseeable lost profits as long as they are concrete. They cannot be speculative, and the damages must have been foreseeable at the time the contract was formed. Generally, where the breaching party would have had no reason to know that its breach would result in consequential damages, the plaintiff will not be able to recover. For a plaintiff to recover for lost profits, the plaintiff must be able to show a pattern of profits, thus making it more difficult for new or struggling businesses to recover for such losses.

Here, HCorp and SVR entered into an extension of the original agreement at or around the beginning of 2018. At that time, SVR had been paid $2 million in each of 2016 and 2017. Though additional facts would be required to determine how much it cost SVR to render the services under the agreement to HCorp, the difference between the $2million payments and the cost of rendering services would be SVR's profits. If SVR can prove that each year they profited, and that they expected to continue profiting through December 2022, SVR would be entitled to lost profits.

Essay 3

Sample 1

1. Jane does have a right to use the restaurant parking lot because it is an easement appurtenant whose benefit runs with the land. Under Georgia law, an easement appurtenant exists when an agreement is created that is meant to benefit one parcel of land and burden the other parcel of land. Here, the dominant tenement is Lot 1 since it receives the benefit of the easement, and Lot 2 is the servient tenement since it is burdened. Also, an easement is a right in the land, so it should generally be memorialized in a signed writing subject to the Statute of Frauds.

Here, Mary and Andy created an express easement appurtenant shortly after Andy bought Lot 2. This agreement was then memorialized in a recorded agreement. For the dominant tenement, an easement appurtenant will automatically run with the land regardless of notice. For the servient tenement, the easement will run automatically to a subsequent purchaser as long as it takes with notice. Since Jane is the dominant tenement, the easement automatically runs to her. Therefore, the issue is whether Bill had sufficient notice such that the easement will run to him.

Notice can be established by actual, record, or inquiry notice. Actual occurs when one inspects the land, and the easement is apparent to them. Inquiry notice involves anything that would come up through a proper search, such as by inspecting the land prior to the sale. Record notice is when an easement is properly recorded under Georgia's recording statute. Here, the facts indicate the easement agreement between Andy and Mary was memorialized in a recorded agreement. Therefore, Bill likely bought Lot 2 subject to the easement since he was on notice of its existence by way of the agreement being recorded. Therefore, the easement will run, and Jane can use the restaurant parking lot for the movie patrons.

2. Bill likely does not have a right to erect the restaurant sign on Lot 1. Under Georgia law, an easement can be created through an express agreement, by implication, by prescription, by necessity, or when a license is coupled with detrimental reliance. An express easement is created when it is memorialized in writing by the two parties, but this is not present here since Bill and Mary orally agreed over the phone to allow the sign to be on Lot 1. An easement by implication arises based on the previous owner's prior use, so this will not work for Bill since he is the one who called Mary about the sign. An easement by prescription exists when a party creates an easement through continuous use, such use is open and notorious, the use is actual, and the use is hostile. Such an easement does not exist in this instance because the use is not hostile. Bill explicitly sought Mary's permission to put the sign on Lot 1, and Mary granted such permission. This would defeat any claim of hostility, and the necessary 7 year period for a prescriptive easement has also not occurred.

Bill's strongest argument is that he has a license that is coupled with reliance to create an easement. Under Georgia law, an easement must be expressed in writing unless the party can prove its existence by way of implication, necessity, or prescription. Under Georgia law, a verbal easement is typically considered a license. Unlike an easement, a license is simply permission to use another's land, but it does not grant any right in the land. Licenses are revocable, so Jane could argue she revoked Bill's license when she took the sign down. However, a revocable license

could become an irrevocable license when the license is coupled with an interest or reliance. Under Georgia law, unrevocable licenses are treated as easements. Bill simply asked for Mary's permission to erect a sign on Lot 1, so there is no indication there was an interest granted along with the license. However, Bill may argue there was reliance on his part when Mary granted the license. The facts are unclear how large this restaurant sign is, but if Bill expended a great deal of money in procuring the sign and putting it on Lot 1, then there is a strong argument of reliance. However, if the sign was easily removable then Jane can likely argue an absence of reliance. The facts state that Jane removed the sign, so this could mean it was done with relative ease in which case this falls short of the detrimental reliance that is necessary to make the license an irrevocable license that becomes an easement. If Bill does succeed, then he will also have to show that Jane bought Lot 1 with notice of this easement, which would be satisfied under a notice inquiry since the sign was on Lot 1 when she purchased it.

3. Bill may seek to assert claims against Andy for misrepresentations regarding the land. In every land sale contract, there is an implied warranty of marketability of title, and there is an implied warranty against fraud or misrepresentation. Bill would argue that Andy committed fraud and misrepresentation by knowingly concealing the mold, and then did not tell Bill about this during the sale. Bill will likely have to prove that Andy both knew about the mold, and he knowingly covered the mold up to induce the sale. Bill may also argue that Andy breached an implied warranty of habitability since the mold made the restaurant unfit. Furthermore, Bill could bring an action against Andy for negligent hiring of the contractor that did the work.

Andy will likely argue that he did not commit any of these actions since he marketed the restaurant "as is" which put Bill on notice that he was not representing anything with respect to the house. Generally, an "as is" disclaimer can alleviate the seller of any defects that would likely be discovered in an inspection period. With land sales, there is generally a period between the contract signing and the closing which is called the escrow period. This period allows Bill to inspect the premises and discover any potential defects in the structure. Andy may lose this argument since the mold was covered with new panels, so it may not have been reasonable for Bill to discover this in an inspection. Not to mention, if Andy never told Bill about the previous mold, then Bill would have no reason to consider it was under the new panels. Therefore, Andy may likely lose on a misrepresentation claim despite the "as is" disclaimer. Andy could defend against the warranty of habitability claim since he did not sell a dwelling, but instead a commercial structure. The negligent hiring claim may be imputed on Andy depending on what Andy knew when he hired the contractor. The facts state he hired him because he was the cheapest rate. This alone will likely not be enough to create a negligent hiring case, but if Andy also knew this contractor had shoddy reviews, then this may be enough.

4. Jane likely does not have a right to cross Gold Creek for painting purposes. When Mary sold Lot 2, she wrote into the deed that reserved language for her to cross Lot 2 for painting purposes. The deed expressly grants this right to Mary. Furthermore, this easement is given to Mary alone, with no reference to her land. Under Georgia law, this easement is likely considered an engross easement. These easements require only a servient tenement of land, but are granted instead to a person or entity. This easement was meant to benefit Mary. Unlike the parking lot easement that was meant to benefit the land, this easement was for Mary's personal benefit. Ingross

easements do not run with the land, and are only transferable if the easement is commercial in nature. This easement was granted to Mary for her personal benefit, so she could paint the Gold Creek landscape. Therefore, this easement is Mary's, and it did not transfer to Jane when Lot 1 was sold. Furthermore, since the easement is personal, Mary cannot transfer it to Jane anyways.

Sample 2

(1) Jane does have a right to use the restaurant parking lot for movie theater parking because she has a valid covenant.

The issue is whether Jane has the right to use the restaurant parking for movie theater parking. Jane's right to use the restaurant parking as movie theater parking depends on what kind of right Jane received from Mary. Mary and Andy likely created an covenant when Andy agreed to let Mary's customers use the restaurant parking for theater customers. Andy gave Mary a covenant because when he agreed that her customers could park in his parking lot, he was allowing Mary and her theater business interest in his land in the form of a permission to park there. Here, Mary's land (Lot 1) would be the benefitted estate and Andy's land (Lot 2) would be the burdened estate because Mary is getting the benefit of having parking for her customers and Andy's land is having the burden of Mary's customers parking there.

The issue is whether the covenant is still binding on Jane and Bill. An easement is binding on the burdened estate where: (1) the parties have notice; (2) there is a writing; (3) the easement touches and concerns the land; (4) the parties intended the easement to run with the land; (5) there is vertical privity (a non-adverse nexus between subsequent landholders); and (6) there is horizontal privity (for instance, where the original easement-makers were in a grantor-grantee, mortgagor-mortgagee, or lessor-lessee relationship).

Here, Lot 2 is the burdened estate. As noted above, a writing exists regarding the covenant because Mary and Andy memorialized the covenant in a recorded writing. Since the writing was recorded, then subsequent landowners would presumed to have record notice of the covenant, so the notice requirement would be satisfied. Moreover, it appears that the parties intended for the covenant to run with the land because it was reasonable that Mary wanted the benefit of her theater using the parking to continue onward to subsequent landowners and Andy would understand that the covenant would continue on because the theater would continue to need parking. Moreover, the fact that the parties recorded the covenant suggests that they intended it to run with the land. Further, the covenant touches and concerns the land because it affects the parties' use and enjoyment of the land because it allows Mary to provide parking to her theater customers and burdens Andy's use of the land. Moreover, there was vertical privity between Andy and Bill because Bill did not obtain Lot 2 through adverse possession. There was also horizontal privity between Andy and Mary because Mary was the grantor of Lot 2 to Andy. Therefore, the covenant is binding on Lot 2 the burdened estate, and thus on Bill.

The next issue is whether the covenant is binding on the benefitted estate. For the covenant to be binding on the benefitted estate there must be (1) a writing; (2) the covenant must touch and concern the land; (3) the original covenanting parties must have intended the covenant to run with the land; and (4) there must be vertical privity. Here, the writing, touch and concern, and intent elements are all satisfied as explained above. Moreover, there was vertical privity between Mary and Jane because Jane obtained Lot 2 by buying it and not through adverse possession.

Therefore, the covenant created between Mary and Andy for the theater customers to use the restaurant parking is binding on both Jane and her benefitted estate (Lot 1) and Bill and

his burdened estate (Lot 2) and therefore Jane has a right to use the restaurant parking for movie theater parking.

(2) Bill likely does not have a right to erect his restaurant sign in Lot 1.

An easement is a possessory right to the land of another. An easement appurtenant is an easement that touches and concerns the land, meaning it burdens one parcel and benefits another. An easement in gross is created when there is no benefitted estate, but rather an individual obtains a right to do something on another person's land (the burdened estate). Easements in gross are non-transferable unless they are for commercial purposes.

A positive easement is a right to do something on another person's land, for instance a right-of-way or a right to enter the land for other purposes or place a fence on the land of another. A negative easement is a right to restrict another's use of their land, usually in regards to usage of water, air, and sunlight. An easement can be created through various methods, such as an express easement, which is created by an express agreement between the parties. If the easement is intended to last more than a year, it is subject to the statute of frauds and must be in writing. Easements can also be created through implication, where it was clear that the original parties intended the easement to run with the land and the easement effects the parties' use and enjoyment of the land, through necessity when the grantor breaks up land and conveys a parcel without a right-of-way, and through prescription (where one party uses another's land openly, continuously (in Georgia, for 7 years), notoriously, and in a manner that is hostile to the landowners possession).

A failed attempt to create an easement often creates a license, which is a right to enter the land of another for an express purpose. A license is freely revocable unless the other party has detrimentally relied upon it. Here, it is not clear that an easement was created between Bill and Mary when she agreed to let Bill put his sign up on Lot 1. Although an express easement could have been created, it was impliedly perpetual and thus falls under the statute of frauds and therefore would be invalid for lack of a writing since Bill and Mary just had a verbal agreement. Moreover, the sign has not been up long enough to satisfy the 7-year statutory time frame for a prescriptive easement in Georgia. No easement was created by necessity since putting the sign up was not a right-of-way. Therefore, it is likely that no easement was created and instead Bill had a mere license to put the sign up. As such, Jane was likely free to take the sign down. Bill could potentially argue that Jane should be estopped from taking the sign down because he detrimentally relied on Mary's agreement for him to put it up in buying the sign and putting it up. However, this argument would be unlikely to succeed since the sign would likely be up in perpetuity and Jane, as the new landowner, has the right to take it down.

(3) Bill likely will be unsuccessful in asserting any claim against Andy unless Andy knew about or had reason to know about the mold.

When a seller conveys property to a buyer, the seller has a duty to inform the buyer of any latent defects or hazardous conditions on the property that the seller knows about that cannot be discovered upon reasonable inspection by the buyer. Here, the mold would be such a defect because Bill could not discover the mold through a reasonable inspection because it was

concealed by the new paneling that the contractor put over the walls. Therefore, even though Bill sold the property to Andy "as is," Bill could still be held liable for the mold if Bill knew about the mold.

Bill's best defense to Andy's claims would likely be a lack of knowledge or ability to discover the mold if Bill did not himself know about it. Bill hired contractor to fix make repairs to the property after the flood and to remove the mold. The facts state that the contractor made some repairs and placed paneling over the mold. It is not clear from the facts that Bill knew that the mold was still in the walls and, if the contractor covered the mold up with new paneling before Bill knew it was still there, Bill would have no reason to believe the mold was still present. If this were the case, then Andy's claim against Bill would likely fail because Bill did not know about the defect or have a reason to know.

Andy could bring a negligence claim against Bill for hiring negligent hiring of a bad contractor. Negligence claims require (1) duty; (2) breach; (3) cause-in-fact and proximate cause; and (4) damages. Here, Bill did have a duty to Andy because Bill was selling his restaurant to Andy and owed a duty to inform Andy of any existing defects that Bill knew about or had reason to know about. However, it is not clear that Bill did anything to breach this duty. The facts state that Bill hired the contractor with the lowest rate Bill could find, but this in and of itself is not a breach of duty. Moreover, from the facts it does not appear that Bill knew the contractor did not remove the mold. As such, Bill likely committed no breach and will not be held liable. If Bill did commit a breach, then Bill's breach would be a cause-in-fact of Andy buying the restaurant with mold in it and Bill's injury of buying a moldy restaurant without being informed would be foreseeable from Bill's breach, thus causation would be met. Moreover, Andy suffered damages because he has to hire a new contractor to fix the mold. Therefore, if Bill did know about the mold's presence or was negligent in hiring the contractor, then Andy could recover from Bill for negligence. However, from these facts it does not appear that Bill acted negligently and therefore Andy likely has no recovery against Bill.

(4) Jane does not have a right to access Gold Creek across Lot 2 for purposes of painting the landscape because Mary's easement in gross did not pass to her.

No. An easement in gross exists where one party obtains a right to do something on the land of another, but there is no benefitted estate, only a burdened estate. Here, Mary retained a right for herself to enter Lot 2 to paint. However, the easement does not touch and concern the land and there is no benefitted estate, only Mary benefits from the arrangement. An easement in gross is non-transferable unless it is for commercial purposes. Here, the easement Mary obtained was just an easement for Mary personally to paint, so it was not commercial. Therefore, the easement did not pass to Jane when she acquired Lot 1 from Mary and therefore Jane does not have an easement to access Gold Creek across Lot 2 for purposes of painting the landscape.

Sample 3

1. Yes, Jane does have the right to use the restaurant parking for theater goers. The court may either construe this as an easement or a covenant. Generally easements lasting more than one year must be in writing, signed by the parties, and sufficiently indentify the land to be enforced. An exception to that rule are implied easements such as easement by prescription, easement by necessity, and easement by estoppel. Easement by prescription require (1) twenty years, (2) of open and notorious, (3) use (though not exclusive), (4) without permission. An easement by necessity occurs when a lot owner splits two lots cutting the other lot off from access to roads without providing a way to cross. Finally, and easement by prescription occurs when one person detrimentally relies on the permission of another that they have the right to make some use of the land of the other. Easements can either be easements appurtenant or easements in gross. Easements appurtenant are attached to the land and give the owner of the dominant parcel the right to do something on the servient parcel. Easements in gross are instead owned by an individual and are not attached to the land. Easements in gross cannot be sold and exist only with the initial holder. All of the aforementioned implied easements will be easements appurtenant though an explicit easement recorded by contract may be an easement in gross if it is written to be personally owned by an individual rather than by the dominant parcel. Buyers of land take the land free of easements if they are a good faith purchaser. To be a good faith purchaser, one must (1) pay value and (2) not have notice of the easement. Notice can come in three ways: (1) record notice, (2) inquiry notice, and (3) actual notice. Record notice is when the easement is recorded in the county recording system or on the deed. Inquiry notice is when the land is in such a manner that the subsequent purchaser has reason to inquiry about what makes up the easement. Finally, actual notice is where one actually knows of the easement. A covenant can be enforced either in law or in equity. To in either, the benefit and burden must be shown to run. In the burden is enforceable if it (1) was in writing, (2) where parties had the intent for it to run with the land, (3) that the interest touches and concerns the land, (4a) the parties were in horizontal privity (meaning that it was created as part of a transfer), (4b) that there is vertical privity between the one who accepted the burdening covenant and the one who obtained the burdened coventant meaning that it was by sale or devise rather than title by proscription, and (5) that their was notice of the covenant to the new owner in the manners described with easements. The benefit runs in law when (1) there was a signed writing, (2) there was intent for the covenant to run with the land, (3) it touches and concerns the land, and (4) that there was horizontal privity. The burden runs in equity where (1) there was a written agreement, (2) that was intended to run, (3) that touches and concerns the land, and (4) that the new owner had notice of. Finally for the benefit to run in equity there must be (1) written agreement, (2) the was intented to run with the land, (3) that touches and concerns the land.

If construed as an easement, it would be an explicit easement comporting with the statute of frauds as a written agreement signed by the parties. Since it is not part of the deed, it would need to adequately identify the land either by addresses or some other method giving a sufficient description that one may determine what land is being referred to. As an easement appurtenant, it would run with the land so long as Bill has notice of the easement prior to his purchase. This might come through being told of it, it being recorded in the deeds (though it appears it wasn't), or by seeing patrons using the lots in such a manner as inquiry notice.

If construed as a covenant, it was memorialized in writing but there isn't evidence of intent to run so there would need to be more from the agreement to prove that. The right to use the parking lot does touch and concern the land. There was not horizontal privity but there was vertical privity. Finally, there would need to be some notice, either by recording, inquiry, or actual notice. There would need to be evidence of one of these but Bill may have had inquiry notice by observing patrons of the theater using the parking prior to his purchase. This would not be enforceable in law (for damages) due to the defects in privity but if the court finds there to be intent for it to run and that there is notice, Jane could enforce with equitable remedies.

2. Both easement by prescription and easement by necessity are inapplicable here. Prescription fails as Bill had permission from Mary to put his sign on Lot 1 and the time following Jane's purchase has not been long enough to obtain under the statute. Easement by necessity is inapplicable as this is not related to access and is instead about being allowed to build a sign. Bill has obtained an easement by estoppel because he relied upon Mary's promise to allow him to put up his sign when he put up his sign which he presumably paid some expense to put up. Here, the easement survives Jane's purchase as she had inquiry notice as to the existence of the easement. Since the sign was on the land, she had reason to inquiry and cannot be a good faith purchaser despite paying value for the land.

3. Generally sellers of property do not have convey any sort of implied warranty of habitability or fitness for any purpose to the purchaser. That said, they do have a duty to not make any false representations about the land which is being sold or disabuse them of any unilateral mistake of the purchaser that the seller knows of. Here Andy sold the property "as is." Only if Bill inquired as to mold and was deceived could Bill attain any recovery. A court may construe the paneling a misrepresentation about the property since it concealed the mold, but this is unlikely as Bill sold the property "as is" which served to warn of issues so it is likely only if Bill explicitly lied to Andy that there would be recovery,

4. Jane does not have a right to access Gold Creek via Lot 2. As mentioned above, easements appurtenant are attached to the parcels and are transferred with the deed to the land. Easements in gross are owned by a person individually and are not alienable. Because the terms of the easement to access Gold Creek state that Mary has the easement rather than that Lot 1 has the easement, it did not transfer to Jane when she purchased Lot 1 and is instead an easement in gross personal to Mary. If for some reason the court were to construe the easement as an easement appurtenant, it would survive the sale from Mary to Jane as it is an easement appurtenant and it would survive the sale from Andy to Bill as it was recorded in the Andy's deed meaning Bill can't take free as a good faith purchaser.

Essay 4

Sample 1

(a) Joe's claim will likely fail under the Equal Protection Clause. At issue is whether the SUPPORT Act violates the Equal Protection Clause of the 14th Amendment to the United States Constitution by discriminating on the basis of age or weight. The Equal Protection Clause prohibits state governments from classifying on the basis of protected characteristics or traits. Government classification triggers equal protection when the law in question is either: (i) facially discriminatory; (ii) facially neutral, but applied in a discriminatory manner; or (iii) facially neutral, but has a disparate impact on the protected class, *and* there exists some evidence that the purpose behind the law was motivated by discrimination. Mere disparate impact without evidence of a discriminatory motive is not enough. Furthermore, there are both suspect, and quasi-suspect classes. Suspect classes are: (i) race; (ii) national origin; (iii) alienage; or (iv) any fundamental right. Quasi-supect classes are: (i) gender; or (ii) marital or non-marital child status. If a government regulation classifies on the basis of a suspect class, strict scrutiny will apply, while if a classification is made on the basis of a quasi-suspect class, intermediate scrutiny applies. For all other classifications, mere rational basis will apply to the law in question. In this case with regard to Joe's claim, he will argue that the Section 3 and and 5 of the Act are classifying on the basis of age and weight of individuals, respectively. Neither age nor weight falls into a suspect or quasi-suspect class. Thus, rational basis review will apply. Under rational basis, the challenger bears the burden of proving that the law is not *rationally related* to a *legitimate government interest*. Generally, a law will be upheld under rational basis as long as it is not arbitrary. Here, the government has a legitimate interest in setting an age and weight requirement for police. The State is attempting to "rebuild its police force," and has found that "most traffic related encounters that involve the discharge of a weapon involve older officers." The interest of improving the police force is certainly legitimate, and reducing the age of officers by instituting a mandatory retirement age is rationally related to this interest. On the other hand, there does not appear to be any reason for the weight requirement. The State will likely advance the same interest (rebuilding the police force and ensuring officer effectiveness in a physically demanding job), but in this case the state has given no reason why that weight was chosen, nor why people over 200 pounds make ineffective officers. Thus, it is possible a court could find the weight classification to be wholly arbitrary and violate the Equal Protection Clause. Regardless, the age requirement will certainly be valid as against Joe because of the state's legitimate interest.

(b) Mary's claim will likely fail under the Equal Protection Clause. At issue is again whether the SUPPORT Act violates the Equal Protection Clause of the 14th Amendment. As stated above, the Equal Protection Clause prohibits state governments from classifying on the basis of certain suspect or quasi-suspect classes. In this case, Mary is arguing that the SUPPORT Act Section 4 discriminates against women, who are less likely to meet the weight lifting requirement. As explained above, where a law is not facially discriminatory, the court looks to see whether a law is being *discriminatorily applied* or whether it disparately impacts a suspect class, and evidence exists that shows the motivation for passing the law was to discriminate against that class. In this

case, the law is facially neutral; it merely sets a lifting requirement. Moreover, there is no evidence that is being applied in a discriminatory manner as against women, nor is there evidence of a discriminatory motive. Thus, Mary's claim will likely fail to even prove a discriminatory classification. However, for the sake of argument, if Mary's claim was found to discriminate against women, it would have to pass intermediate scrutiny as a quasi-suspect class. Under intermediate scrutiny, a law is invalid unless it is *substantially related* to an *important government interest*. The government bears the burden of proving an exceedingly persuasive justification to the law. Here, the State will again assert that it has an important interest in ensuring the effectiveness of its police force, which has been dwindling. The State will argue that requiring its officers to lift a minimum amount of weight is substantially related to this interest, because policing is physical, labor intensive work. Mary will respond that the provision of the Act wrongfully discriminates against women, who are less likely to lift as much as men. Mary will further argue that there is no evidence that *this* type of lifting or fitness has anything to do with policing. This is not a weak argument. The State has shown no specific reason why a police officer needs to *bench press* their own weight plus 25lbs to further the State's interest in effective policing. Ultimately, Mary will likely lose because she will be unable to prove that the Support Act is discriminatory within the meaning of the Equal Protection Clause, but if she can pass this hurdle, a court would probably find in her favor that the bench press requirement of this section of the Act is not substantially related to the State's interest.

(c) Peter will likely prevail because the SUPPORT Act is burdening a fundamental right. At issue is again whether the Act violates the Equal Protection Clause as applied to Peter. As explained above, a State law which classifies on the basis of a fundamental right is subject to strict scrutiny. The fundamental rights include rights such as: (i) the right to vote; (ii) certain privacy and family rights; (iii) free speech; and importantly, (iv) the right to travel. In this case, the SUPPORT Act is likely discriminating on the fundamental right to travel. The right to travel is implicated when the government places residency requirements on certain actions in the state. In this case, the SUPPORT Act requires a citizens to reside in the state for at least one year prior to applying for employment as an officer. Thus, the fundamental right to travel is implicated by the Act and strict scrutiny will apply. Under strict scrutiny, the State bears the burden of proving that the law is *necessary* to achieve a *compelling government interest*. This typically means that there are no less restrictive means available to further the State's interest. In this case, the State will again argue that it has a compelling interest in its police officers coming from its own population, and the residency requirement is necessary to achieve this interest. Peter will respond that even if having a police force coming from the State is a compelling interest, the one year requirement was not necessary because it was not the least restrictive means available. This argument has merit. In the past, the Supreme Court has found certain residency requirements to be valid in very rare occasions, for instance: a one year residency requirement to get a divorce in a state, or a thirty day residency requirement to vote in state. However, under these facts, it is very unlikely a court would find that a one year residency requirement is necessary to achieve the State's interest. There is no reason a much shorter length of time wouldn't accomplish the exact same goal. Thus, this section of the Act likely fails strict scrutiny for discriminating against the fundamental right to travel and Peter will prevail.

(d) Eduardo will likely fail, even though the SUPPORT Act discriminates against a suspect class, because policing is a important government function. At issue is again whether the Act violates the Equal Protection Clause as applied to Eduardo. Eduardo is challenging Section 6 of the Act, which requires any applicants to be a citizen of one of the 50 States. As stated already, when a suspect class is discriminated against, strict scrutiny applies. In this case, the suspect class of alienage is being discriminated against because the job is expressly limited to people who are citizens of a state, rather than a nonresident alien. However, there is an important exception that allows a State to discriminate based on alienage when the discrimination relates to important functions of the government. One such example is that a state may discriminate against a nonresident alien with regard to jury duty service. Here, Eduardo will argue that strict scrutiny should apply, and the Act fails strict scrutiny because it is not necessary to achieve a compelling government purpose. The government will in turn argue that the discrimination is for an important governmental function: its policing force. In this case, the State will likely prevail because policing is indeed a very important, traditional government function, and a State can rightfully condition such employment on Citizenship.

Sample 2

The court will likely find that § 6 is partly unconstitutional.

I. Equal Protection Challenges and Standards of Scrutiny Applicable.

The Fourteenth Amendment Equal Protection Clause prohibits states from unreasonably treating similarly situated individuals differently without sufficient justification. If a law classifies based on race, alienage (states only), or national origin, strict scrutiny applies: the government must show that the law is necessary to achieve a compelling government interest. One exception to the alienage classification rule is when states enact laws under the "self-governance exception": states can restrict the hiring of certain positions, such as police officers or elementary school teachers, to citizens because those functions are integral to the state's democratic self-governance. By contrast, hiring engineers is not related to self-governance and cannot be restricted to citizens.

If a law classifies (1) on its face or (2) by intentional purpose and effect based on the marital status of a person's parents or gender, intermediate scrutiny applies: the government must show that the law is substantially related to an important government interest. For gender classifications, the government must show "an exceedingly persuasive justification" for the classification, other than one based on stereotypes about women. If a law does not classify on its face based on gender and is not intentionally designed to classify by purpose and effect, rational basis review applies.

For classifications based on age, weight, or wealth, rational basis review applies: the challenger must show that the law is not rationally related to a legitimate state interest.

Finally, if a law classifies based on who can exercise a fundamental right, strict scrutiny applies. Interstate travel is a fundamental right. The Supreme Court of the United States has struck down durational residency requirements that restrict certain privileges to long-term residents.

Here, the State is bound by the Fourteenth Amendment, and the law constitutes state action.

(a) Joe

Joe will challenge the law based on §3 and §5. §3 classifies based on age: only individuals 55 or younger can serve as police officers. Age is not a suspect or quasi-suspect classification. So rational basis review applies.

(b) Mary

Mary will challenge the law based on §4. The law classifies on its face based on lifting ability, not gender. Mary argues that it is designed to classify based on gender: to discourage women from applying. But the State will argue that no evidence indicates that the legislature intended for the law to classify based on gender. Indeed, the State passed the law in direct response to the shortage of female police officers with less than three years of service. Moreover, as to the effect of the law, the State will point out that §4's weight-lifting requirement changes based on body weight. So presumably women who weigh less than other men have a

lower weight requirement to lift. That the weight requirement changes on based on body weight tends to show that it does not have the effect of discriminating against women. Unless Mary can show that the law was designed to discriminate against women and actually has that effect, rational basis review will apply.

(c) Peter

Peter will argue that §6 is an unconstitutional durational residency requirement. He is a citizen who holds the right to interstate travel. But the durational residency requirement prevents him from traveling freely between states. Therefore, strict scrutiny applies because the law classifies individuals and prevents some from exercising a fundamental right.

(d) Eduardo

Eduardo will argue that §6 classifies based on alienage and that strict scrutiny should apply. But the self-governance exception applies because the SUPPORT Act applies to the hiring of police officers. The use of the state's monopoly on force is a matter of self-governance and democracy. As a result, rational basis review applies.

II. Application.

(a) Joe

The court will likely uphold the statute as constitutional. A state would be seeking to further the legitimate interest of controlling crime. And a state could reasonably conclude that individuals over the age of 55 or who weigh more than 200 pounds lack the vigor, mobility, calmness under pressure, and physical abilities that being a cop demands. So limiting the maximum age is rationally related to achieving the desired ends. It is constitutionally irrelevant that Joe is, in fact, in great shape for his age and weight and can complete Iron Man Competitions. Therefore, §§3 and 5 are constitutional.

(b) Mary

The court will uphold the law. Again, the Sate is seeking to achieve the legitimate goal of hiring more police officers to repress crime. A rational way to achieve that goal is to restrict member in the police academy to individuals who can life their own weight plus 25 pounds because that requirement would tend to show that the person can physically apprehend suspects and handle the physical demands of the job.

(c) Peter

A court will apply strict scrutiny and strike down the law. Controlling crime is likely a compelling state interest. But the means chosen are not necessary. No evidence indicates that out-of-staters or those who have lived in the state for only a short time lack the ability to serve as a police officer. Recent movers may have just as much ability, such as a Secret Service officer from DC or a detective from Florida who just relocated here. The State will argue that it is seeking to ensure that new movers have strong ties to the state before investing state funds in their training and hiring, such as the short durational residency requirements courts have upheld for

the granting of a divorce. But a shorter durational residency requirement or more stringent interviews could achieve this goal. §6 is unconstitutional because it burdens the right to travel.

(d) Eduardo

A court will uphold the law. Controlling crime is a legitimate state interest. Only allowing citizens of the United States is a rational way of achieving that goal--the State will argue that non-citizens lack the fierce commitment to democracy and self-governance that citizens understand and also seek to promote. The State will argue that non-citizens may not as rigorously seek to enforce the law. Whether this argument is agreeable or not, it is rational way of achieving the State's goal and therefore satisfies rational basis review.

Sample 3

The Fourteenth Amendment to the US Constitution provides that all individuals are entitled to equal protection under the laws. Thus, state action that denies equal protection by discriminating against similarly situated individuals on certain bases will be deemed unconstitutional if it does not pass the standard of review. Each standard of review will be discussed in turn as applied to each applicant/employee.

(A) Joe

Joe claims that section (3) violates his right to equal protection by discriminating based on age, and that section (5) violates the same by discriminating based on weight. The Supreme Court has divided the standards of review for governmental classifications of individuals into three categories: strict scrutiny, intermediate scrutiny and rational basis review. Strict scrutiny will apply where the state action discriminates against a "suspect class," which the Court has held to include race, alienage, and nationality. Such discriminatory action will not be upheld unless the state can prove that the action is necessary to achieve a compelling governmental interest. Thus, because neither weight nor age are suspect classifications, strict scrutiny will not apply as to Joe's claims.

Intermediate scrutiny will apply where the state action discriminates against a "quasi-suspect class." Under intermediate scrutiny, state action that discriminates based on gender or legitimacy will not be upheld unless the state carries its burden of proving that the action or law is substantially related to achieving an important governmental interest. Again, none of these classifications are at issue here, and thus intermediate scrutiny will not apply to Joe's claims.

Finally, Courts will apply a rational basis standard of review when the state action discriminates on any other basis. Under rational basis, the plaintiff will have the burden of proving that the state action is not rationally related to a legitimate government interest. In other words, the plaintiff must show that the state action is arbitrary. Here, both age and weight fall within this last category because the Supreme Court has not classified either as either suspect or quasi-suspect. This standard is a hard one for plaintiffs to overcome, because if the government has any rational basis for the law or regulation, the fact that more narrowly tailored or less discriminatory means are available will be of no use to the plaintiff.

Here, Joe may argue that the age of 55 is arbitrary, especially in light of the fact that Joe is an active man. Further, as the official retirement age is 65, Joe will argue that setting the forced retirement age for officers at a random age below this limit has no rational relation to accidental discharge of weapons. However, the State will likely be able to show evidence that "most traffic related encounters that involve the discharge of a weapon involve older officers," such a limitation on the age for serving as police officers is rationally related to reducing the legitimate government interest of lowering the incidences of gun deaths during traffic encounters. Joe may further argue that the second reason given for the age limitation, that police work involves physical challenges, may be overcome by requiring older police officers to undergo physical and mental examinations to determine fitness for continued employment. Again, this argument will likely fail because, as discussed above, the state need not choose the least restrictive means of achieving its legitimate interest under the rational basis standard.

Second, Joe will argue that the weight requirement is arbitrary, especially in light of the lack of findings related to this section of the SUPPORT Act, and because Joe will likely be able to produce evidence that muscle mass is heavier than fat, and that one may be physically fit and capable while weighing over the arbitrary 200-pound limit. The State may argue that it has the legitimate goal of ensuring that the police force is in good shape to respond to emergencies. However, the state would likely fail here. No facts suggest a rational reason for setting the limit at 200 pounds, and the government's offered reason of keeping only those officers in shape is already furthered by the requirements in sections (3) and (4). Thus, a court could very well strike down section 5 of the SUPPORT Act.

(B) Mary

Mary claims that Section (4) of the SUPPORT Act discriminates against women by discouraging them from applying. Because this classification is based on gender, a quasi-suspect class, intermediate scrutiny, as explained in Answer (A) above will apply if Mary can prove that the law is either facially discriminatory, or that there is disparate impact on women *coupled with* discriminatory intent.

Here, the text of Section (4) is neutral, as it does not explicitly limit applications by gender, but merely by the weight that the applicant can lift. Thus, Mary will have to prove that the drafters of the SUPPORT Act were acting with discriminatory intent. Unfortunately, this analysis would likely require extensive discovery from Mary, as the intent of the act as stated in the preamble is to restore faith and trust in the police force and bolster retention and recruitment of police officers.

Assuming, arguendo, that Mary is able to prove discriminatory intent, the state would then have to show that the section is substantially related to an important government interest. The state would likely argue that being a police officer often requires lifting heavy objects, including unconscious bodies of those who may need assistance. Acting as a police officer requires quick action, and an officer who cannot perform his or her duties in the heat of the moment for lack of the ability to lift his or her own weight plus 25 pounds would lead to slower response times. Further, the state would argue that this 25-pound restriction is substantially related to this interest because it takes each individual's body weight into consideration instead of laying out a blanket bench press minimum. Mary may argue that there are better ways to test one's abilities as a police officer, such as requiring officers or applicants to undergo endurance tests, and that bench pressing a certain weight is not "substantially related" to official duties because of the many other duties engaged in by an officer every day. However, this argument would likely fail. Under the intermediate scrutiny test, the state need not show that it is using the least restrictive means. Thus, Mary's equal protection claim would likely fail.

(C) Peter

Peter claims that section (6) of the SUPPORT Act violates his equal protection rights because it discriminates against him based on state citizenship. State citizenship has not been found to be a suspect or quasi-suspect class under Equal Protection analysis, but a court will apply strict scrutiny where a fundamental right is involved. The Supreme Court has long held that the right to interstate travel is a fundamental right (which also implicates the Privileges or Immunities Clause of the Fourteenth Amendment). Thus, where state action infringes on the right of a newly-

arrived citizen to partake in certain activities, the court will apply strict scrutiny, and the state action will be upheld only if the government can show that the action is necessary (or narrowly tailored) to achieve a **compelling** government interest.

Here, the court will likely find that the state cannot pass muster. Though the state does have compelling government interests in ensuring a robust and trusted police force, not allowing American citizens who have recently moved from another state to apply for the police force is not narrowly tailored to that interest. Strict scrutiny lies at the other end of the spectrum from rational basis and is often deemed "fatal in fact." The state must use the least restrictive means when either discriminating based on a suspect class or infringing on a fundamental right. Peter could argue that less restrict means are available, for example, having a month buffer, or requiring the applicant to state their intention of staying in the state for the foreseeable future. Thus, the requirement that the applicant reside in the state for at least one year before being eligible for the police force will likely be invalidated.

(D) Eduardo

Eduardo would claim that section (6) of the SUPPORT Act violates the equal protection clause because it discriminates against him based on his alienage. Though alienage is a suspect classification that triggers strict scrutiny, a court will apply rational basis scrutiny where the state discriminates against aliens in making employment decisions for jobs that implicate self-governance. Serving as a police officer is one of those jobs that is essential to self-governance. Thus, a court would likely apply rational basis and uphold the law because loyalty in carrying out and enforcing the law are legitimate government interests, and the requirement that applicants be US citizens is rationally related to this interest.

However, assuming that the court finds that being on a police officer is not essential to self-governance, strict scrutiny will apply, and the law will likely be invalidated.

MPT 1

Sample 1

III. Legal Argument

This court should rule in favor of the plaintiff's motion *in limine* on all three issues. First, Doris Gibbs' proposed testimony should not be allowed as inadmissible hearsay because it does not meet the requirements for an adopted statement by silence and it is unfairly prejudicial. Second, Dr. Miller's deposition trial should not be allowed as inadmissible hearsay because it is inadmissible hearsay and unfairly prejudicial. Third, the plaintiff should be allowed to introduce evidence of the defendant's insurance policy for the limited purpose of proving control and ownership.

A. Doris Gibbs' proposed testimony is inadmissible hearsay that cannot be attributed to the plaintiff as an opposing party statement because it fails to meet the requirements for an adopted statement by silence.

Under the Franklin Rules of Evidence (FRE), a statement made by an out-of-court declarant that is being offered to prove the truth of the matter asserted in the statement is defined as hearsay and is generally not admissible. R. 801. In this case, Ms. Gibbs' statement is an out-of-court statement that will be offered for the truth of the matter asserted, and thus should be excluded unless the FRE otherwise allows it in. The FRE lists enumerates several exceptions or exclusions to this rule. One such 'exclusion' that the rules expressly define as "not hearsay," is the opposing party statement. R. 801(d)(2). An opposing party statement is a statement being offered against an opposing party, and the statement was made by the party in an individual or representative capacity, or the statement is one the party manifested that it adopted or believed to be true.

In *Reed v. Lakeview*, the Franklin Court of Appeal acknowledged that the second part of this test could be met by a party's silence in the face of a statement by another. In other words, a party's silence when faced with a statement of fact can lead that statement to be attributed to them, and thus admissible as non-hearsay under the rules. The court set out four preconditions that must be met for a statement to be acquiesced by silence: (1) the party must have heard the statement, (2) the party must have understood the statement; (3) the circumstances must be such that a person in the party's position would likely have responded if the statement were not true, and (4) the party must not have responded. Moreover, the court explained that "context is exceedingly important," when analyzing whether a party has adopted a statement through silence.

The defendant in *Reed* sought to use the plaintiff's silence against her as an opposing party statement. In that case, the plaintiff was informed she was being fired and told "you know that you weren't doing your job competently," and the plaintiff failed to respond. The court found that this silence was sufficient for the plaintiff to adopt the statement as her own because the meeting between the parties was in a serious business setting and this was the type of statement you would expect a person to deny. Similarly, in *Hill v. Hill* the court found a similar

adoption by silence where a husband was told "you are having an affair," by his wife and failed to respond to the statement. In both cases, the courts recognized that the context and manner of the party's silence was enough to satisfy the four preconditions listed above. In contrast, the court in *State v. Patel* found that a party did not adopt a statement through silence when the statement was made at a loud party attended by over 100 people because it was unclear if the defendant had heard the statement at all, and even if he did someone in his position would not necessarily respond at a loud social event.

Here, opposing counsel will argue that Doris Gibbs' statement made to the plaintiff that "we have all been clumsy before. I bet that you were trying to get to the store quickly. And I would guess, like most of us, you were on your phone at the time," should be admissible as non-hearsay under FRE 801(d)(2) because of the plaintiff's silence in the face of the statement. This is incorrect. Although it can obviously be conceded that Mr. Dobson did not respond to Ms. Gibbs' statement, none of the other *Reed* preconditions are met here. Ms. Gibbs' statement does not satisfy all of the preconditions, and the context in which the statement was made favors not admitting it. First, it is not clear that Mr. Dobson even heard the statement. Ms. Gibbs explained that the conversation was happening in a reasonably noisy restaurant setting, and Mr. Dobson was drinking alcohol at the time. Second, it is not at all clear that the plaintiff understood the statement. Mr. Dobson was taking a drink while Ms. Gibbs' was talking, set his drink down, and then stared at Ms. Gibbs as she finished her statement. Following this, none of the parties spoke for "about a minute" (Roger Cole Memorandum). Third, the circumstances were not of the type that a person in the party's position would have responded. The present facts are most like that of *Patel*, where the court found that the context of a social, party setting was enough to make the defendant not want to respond to a statement. Here, the parties were at dinner together and socializing. This is not the context in which a party would normally make a big deal and deny the setting. This is in stark contrast to *Reed* or *Hill* where the subject matter was of a very serious sort and was made in a private, serious setting (an office or privately between spouses). Thus, Ms. Gibbs' statement is inadmissible hearsay under the FRE and must be excluded.

B. This Court should find that Dr. Miller's deposition testimony is inadmissible hearsay because Dr. Miller is unavailable to testify as a witness and his previous deposition testimony was not made to a party that had a similar motive and opportunity to develop it on cross or direct, and Dr. Miller's testimony should be excluded as unfairly prejudicial under Rule 403.

As stated above, the FRE explicitly lists certain exceptions to the general rule that a hearsay statement is inadmissible. One of these is only available where: (i) the declarant is unavailable to testify at trial; (ii) the witness has given former testimony at a prior trial, hearing, or lawful deposition, whether given during the current proceeding or a different one and (iii) the testimony is now offered against a party who had--or, a civil case, whose predecessor in interest had--an opportunity and similar motive to develop the testimony by direct, cross, or redirect.
In this case, the plaintiff's treating physician, Dr. Miller, is unavailable to testify at trial because he has passed away. However, prior to his death, Dr. Miller gave deposition testimony in a separate proceeding between the plaintiff and the City of Bristol. That case concerns the City's failure to properly accommodate the plaintiff after his injury. Dr. Miller's testimony at that trial

is not admissible under Rule 804(b) because it was not offered against a party who had a similar opportunity and motive to develop the testimony.

The court in *Thomas v. Wellspring* faced a similar issue. In that case, the court explained that the party against whom evidence was previously introduced must have had a "similar, not necessarily an identical, motive to develop the adverse testimony in the prior proceeding." In order to satisfy this "similar opportunity and motive to develop testimony," requirement, a two-part test is applied: (1) whether the question is on the *same side* of the *same issue* at both proceedings, and (2) whether the questioner had a substantially similar interest in asserting that side of the issue. The court in that case found prior testimony admissible because the statements in question were made at a prior trial, and were general in nature (not directed at a specific person). Similarly, the court in *State v. Williams* found prior testimony admissible where the prior testimony was made at a deposition, the same counsel represented the defendant in both cases, and the counsel in that case had plenty of time and opportunity to impeach the witness' testimony at the deposition.

In this case, Dr. Miller will not be available to testify at trial, but his prior deposition statements still should not come in under FRE 804(b) because the plaintiff's counsel at the deposition simply did not have the same motive to develop Dr. Miller's testimony. First, plaintiff was represented by different counsel at the deposition in the other case. That counsel admitted that his focus at the deposition was purely "on the level of accommodations given to Dobson." This is a vastly different motive than exists in the instance action, where the plaintiff's injury is directly at issue. This is much different than *Thomas* where the prior statements were made at a trial (not a deposition) and the statements in question were generalities rather than anything specific. The *Thomas* court even pointed out that it was easier to allow such evidence when the statement was made at trial, rather than at a deposition, as is the case with Dr. Miller's testimony. Here, the plaintiff's injuries are directly at issue and counsel must have the opportunity to develop any of Dr. Miller's opinions on such topic at cross. Moreover, the present case differs from *Williams* because in that case the party was represented by the *same attorney*, and the only difference between the cases was that one was a civil action, while one was criminal. In this case, the plaintiff is represented by different counsel and completely different issues are before the court; counsel in the previous proceeding was only interested in accommodation, rather than the degree of plaintiff's injury. Thus, Dr. Miller's testimony does not fit the exception for an unavailable witness' prior statement and should be excluded.

Moreover, even if Dr. Miller's testimony is found to be admissible as an exception to the hearsay rule, it still must not be admitted because it is unfairly prejudicial toward the plaintiff and fails a balancing test under FRE 403. Under Rule 403, a trial court has discretion to exclude otherwise relevant evidence where such evidence's probative value is substantially outweighed by a danger of unfair prejudice. In this case, Dr. Miller's former testimony broadly referenced the plaintiff's injuries, but did not go into detail at all about them. Dr. Miller's haphazard conclusion that the plaintiff's concussion "did not look that serious," and his statement that he is asking away from work for more time than necessary is extremely prejudicial toward the plaintiff who will not have time to develop this testimony on cross, and its probative value is extremely low. Thus, the testimony should be excluded anyway.

C. Plaintiff must be allowed to introduce evidence of the defendant's insurance policy because such evidence is admissible for the limited purpose of proving ownership or control, and the evidence would not be unfairly prejudicial toward the defendant.

Under the FRE evidence of a party's liability insurance is generally inadmissible to prove fault or negligence. R. 411. However, the rule explicitly states that "the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control." The advisory committee notes further explain that "evidence of insurance may be admitted to prove any fact other than fault or lack of fault," (importantly, in this jurisdiction courts may rely on the advisory committee notes in analyzing the Rules of Evidence. See *Smith v. State).*

In this case opposing counsel is improperly seeking the total exclusion of the existence of defendant's liability insurance on the property. Defendant is asserting that they neither own nor control the sidewalk in front of their business. Plaintiff must be allowed to rebut this evidence by introducing the defendant's liability policy which *explicitly covers sidewalks adjacent to the property*. The FRE explicitly and clearly says that a party may introduce such evidence for this purpose. Thus, the plaintiff may introduce the evidence.

Furthermore, as explained above, FRE 403 allows a court the discretion to exclude otherwise relevant evidence if the probative value of such evidence is substantially outweighed by: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needless presentation of cumulative evidence. Opposing counsel will almost certainly try and argue that introducing the defendant's liability policy is unfairly prejudicial and might result in juror confusion. This argument should not be given any weight. The mere existence of defendant's liability policy is not likely to a confuse the jury as long as it is properly limited to demonstrating ownership or control. Moreover, the probative value of this evidence is extremely high. The defendant is arguing that they do not own or control the sidewalk in question. If this argument succeeded, they would not likely be liable. The policy however, directly refutes this defense and gives the plaintiff an avenue for recovery. Thus, the evidence is very probative of whether the sidewalk was within the defendant's control, and it is not likely to confuse the issues as long as it is offered for this limited purpose.

Sample 2

To: Samantha Burton

From: Examinee

Date: July 25, 2023

Re: Dobson v. Brooks Real Estate Agency

I. Introduction

Hi Samantha, please find my draft of the argument section of the motion *in limine* attached.

II. Argument

A. Doris Gibbs's trial testimony should not be admitted because Mr. Dobson did not acquiesce by silence to her statement at their dinner.

"Four preconditions must be met for a statement to be acquiesced by silence: (1) the party must have heard the statement, (2) the party must have understood the statement, (3) the circumstances must be such that a person in the party's position would likely have responded if the statement were not true, and (4) the party must not have responded." Reed (Fr. Ct. App. 2015).

i. Because the conversation with Ms. Gibbs at dinner took place in a social, non-serious setting, Mr. Dobson was not able to hear or understand the statement, nor were the circumstances such that someone in Mr. Dobson's position would have responded if the statement were not true.

In Reed, the court held that statements were acquiesced by silence, and thus admissible, because of the circumstances surrounding the statement and the nature of the conversation. The Reed court noted that those statements were made during a serious conversation in an office setting, meaning the plaintiff was able to hear and understand the statements. The Reed court further noted that the plaintiff should have expected the topic of conversation, her allegedly wrongful termination, to come up in an office setting with her HR director--therefore the plaintiff, who felt that she was being terminated unlawfully, would have responded to statements regarding reasons for her termination. The Reed court also distinguished Patel (Fr. Ct. App. 2010), in which the statement was made at a loud party with over 100 people, thus it was unclear whether the defendant had heard and understood the statement. The Reed court also noted that someone in the defendant's position in Patel, at a loud social event, would not necessarily be expected to respond to such a statement.

Here, unlike in Reed, the conversation was at dinner in a restaurant, where each party had had an alcoholic beverage, rather than in a serious office meeting. A social dinner at a

restaurant is much more like the loud party in Patel, which created an environment in which the defendant could not hear and understand the statement, nor was the defendant expected to respond to an accusatory statement. Moreover, Mr. Dobson was having dinner with a supportive neighbor in Ms. Gibbs, unlike in Reed, which involved a meeting with the plaintiff and and adverse party in the proceeding, her HR manager. Therefore, Mr. Dobson could not have expected the topic of his purported fault in the slip-and-fall to come up in conversation, even though the Dobsons scheduled the dinner to thank the Gibbs' for their generosity during his recovery. Because the conversation was in a social setting with a supportive neighbor, rather than in a serious office setting with an adverse party, the facts here resemble Patel moreso than Reed--therefore, Mr. Dobson should not be deemed to have acquiesced by silence to Ms. Gibbs's statement at dinner, and Ms. Gibbs's testimony should not be admitted as nonhearsay.

ii. Even if Mr. Dobson is deemed to have acquiesced by silence to Ms. Gibbs's statement at dinner, the statements should not be admitted because the danger of unfair prejudice substantially outweighs the probative value of the statements.

Rule 403 allows a judge to exclude evidence if the danger of unfair prejudice substantially outweighs the probative value of that evidence. Reed. "Unfair prejudice" creates an undue tendency to suggest decision on an improper basis or make an impermissible inference. Id. In Reed, the court found that the probative value of the evidence was high relative to the risk of unfair prejudice because of the circumstances under which the statement was made: a conversation between an employee and her HR manager in an employment proceeding. Here, unlike in Reed, the probative value is not high because the statement was not made in a conversation between adverse parties, or one where Mr. Dobson's fault in a slip and fall was likely to come up. Therefore, unlike in Reed, the risk of unfair prejudice (that a jury would assume negligence by Mr. Dobson), substantially outweighs the relatively low probative value of a conversation between Dobson and Gibbs.

Because Mr. Dobson was not able to hear or understand Ms. Gibbs's statement, and the circumstances of the conversation were not such that someone in Mr. Dobson's position would have responded if the statement were not true, he did not acquiesce by silence to her statement and her testimony on the conversation should not be admitted. Even if he did acquiesce by silence to her statement, Ms. Gibbs's testimony should still be excluded under Rule 403, because the danger of unfair prejudice from the statement substantially outweighs the probative value.

B. The prior deposition testimony of the emergency room physician who examined Mr. Dobson should be excluded because Mr. Dobson did not have a similar opportunity and motive to develop the physician's testimony in the prior proceeding.

To admit former testimony under FRE 804(b)(1), the proponent must satisfy three requirements of the rule: (1) the witness must be currently unavailable; (2) the former testimony was given as a witness at a trial, hearing, or lawful deposition; and (3) the testimony is being offered against a party who had a similar motive and opportunity to develop the challenged testimony at the earlier proceeding. State v. Holmes (Fr. Sup. Ct. 2009).

i. Because Mr. Dobson had a different attorney in the prior proceeding and that attorney failed to explore avenues by which the physician's story and credibility might be attached, Mr. Dobson did not have a similar opportunity and motive to develop the physician's testimony in the prior proceeding.

In Thomas v. WellSpring Pharmaceutical Co. (Fr. Ct. App. 2017), the court held that former testimony was admissible under FRE 804(b)(1) because Thomas's predecessor in interest had a similar opportunity and motive to develop the physician's testimony in the prior proceeding. The Thomas court cited State v. Williams, in which the same counsel represented the party seeking to exclude the evidence in both the prior case and the case at issue, and the defense counsel spent considerable time impeaching the witness and exploring his motive in the prior deposition, thus the party had a similar opportunity and motive to develop testimony and the evidence was admissible. The Thomas court noted that the decision to admit the former testimony was even easier than the Williams case, because in Thomas, the former testimony occurred at a trial, not a discovery deposition (where the motive is to merely obtain a preview of a witness's testimony). The Thomas court further noted that even in a deposition, a prudent attorney would explore how the witness's story and credibility might be attacked. Indeed, the attorney in Williams *did* spend considerable time impeaching the witness and exploring his motive in that deposition testimony. Here, unlike in Thomas, the prior testimony of Mr. Dobson's ER doctor occurred at a deposition, not a trial, thus the motives on cross-examination were different. Further, unlike in Williams, Mr. Dobson had a different attorney in his prior proceeding than he has in his current proceeding. That different attorney failed to adequately explore how the ER physician's story and credibility might be attacked, because he imprudently chose to focus only on the level of accommodations given to Dobson. And while Mr. Dobson's former attorney did spend time attacking the physician's credibility, he focused on prior malpractice suits against her, a collateral issue, rather than exploring her story to poke holes in it or assessing her perceptive credibility on the date of the actual ER treatment. Because the former testimony here occurred at a deposition rather than a trial, the facts of Mr. Dobson's case fall short of Thomas. Further, because a different, imprudent attorney failed to adequately explore the witness's story in the prior testimony, the facts here also fall short of Williams. Therefore, Mr. Dobson did not have a similar opportunity and motive to develop the physician's testimony in the prior proceeding, and that deposition testimony should be excluded. Further, even if Mr. Dobson is deemed to have had a similar opportunity and motive to develop the physician's testimony in the prior proceeding, the probative value of this testimony is substantially outweighed by the danger of unfair prejudice, thus it should also be excluded under FRE 403.

C. The Brooks Real Estate Agency property insurance policy should be admitted because it serves to prove control, a permissible purpose, rather than to prove negligence or fault.

FRE 411 and the Advisory Committee notes to that rule provide that evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

Here, Mr. Dobson seeks to admit evidence of the BREA property insurance policy solely to prove that BREA controls the sidewalk on which he slipped and fell. BREA claims that it does not control the sidewalk and therefore was not responsible for clearing it of ice. However, the deed shows that BREA owns the building on Elm Street, and the property insurance policy explicitly covers sidewalks adjacent to the property, where Mr. Dobson fell. Mr. Dobson does not seek to use the insurance policy to prove that BREA was negligent. As such, evidence of the policy is admissible for the limited permissible purpose of proving that BREA controls the sidewalk. Further, it also satisfies FRE 403 because its probative value substantially outweighs its danger of unfair prejudice. As such, the policy should be admitted.

III. Conclusion

Thank you for allowing me to complete this research for you. Please let me know if you need anything else or have any questions.

Sample 3

III. Legal Argument

This motion contests the admissibility of two pieces of evidence and argues for the admissibility of a third.

A. Trial testimony by Doris Gibbs about Mr. Dobson's silence in response to her statement should not be admitted under FRE 801(d)(2) as a statement by an opposing party because the circumstances surrounding his silence were not such that a person in his position would have likely responded to protest the validity of the statement. In the alternative, it should be excluded under 403.

Under Franklin Rule of Evidence 801(c), hearsay is a statement that the declarant did not make while testifying at the current trial or hearing and that a party offers into evidence to prove the truth of the matter asserted. FRE 801(d)(2) excludes from the definition of hearsay statements that are offered against an opposing party and was made by the party themself. Statements include statements that the party manifested that it adopted or believed to be true. Courts have included statements that were admitted by silence, referring to statements that a party acquiesces to by remaining silent. These may be introduced against that party. Reed v. Lakeview Advisers LLC (Fr. Ct. App. 2015).

For a statement to be considered acquiesced by silence, four preconditions must be met: (1) party must have heard the statement, (2) party must have understood the statement, (3) circumstances must be such that a person in the party's position would likely have responded if the statement were not true, and (4) the party must not have responded. Reed (2015).

In determining whether the four preconditions are met, context very important and the court should carefully consider circumstances under which the statement and alleged acquiescence were made. For example, in State v. Patel (Fr. Ct. App. 2010), the court excluded an alleged statement by acquiescence where the statement was made at a loud party attended by over 100 people. The court found it was not clear D had heard and understood statement and additionally, that someone in Ds position would not necessarily have responded in such a loud and public social event.

Conversely, in Reed, which involved a plaintiff suing her employer for wrongful termination, the statements and acquiescence at issue were made made during a meeting between the plaintiff and her human resources representative about her termination. This was a serious conversation in an office and the court found that there was every reason to believe P understood them. Additionally, because the plaintiff believed she was being terminated unlawfully, one her position would reasonably have responded to being told that her termination was for reasons like lateness and failure to complete work. Similarly, in Hill v. Hill (Fr. Sup. Ct. 2010) involved a divorce action between a husband and wife. The court found the husband had acquiesced by silence by not responding to the wife accusing him of adultery during a serious conversation about their marriage and admitted the acquiescence as a statement by a party opponent.

Here, the statement that Dobson is being alleged to have acquiesced to was made by his neighbor, Doris Gibbs. Ms. Gibbs was helpful to Dobson after his injury, bringing by food and checking in on him. As a thank you after he recovered, Dobson and his wife invited Ms. Gibbs and her wife out to dinner at a restaurant At that dinner after they had each had a beer, Ms. Gibbs said, "We have all been clumsy before. I bet you were trying to get to the store quickly. And I would guess, like most of us, you were on your phone at the time." She stated this in an understanding, statement of fact way that was not accusatory. There was usual background noise of a restaurant and Mr. Dobson appeared to be listening, he looked at her and set his beer down while she spoke. Mr. Dobson did not respond and no one said anything for a minute, then conversation resumed.

Like the party in Patel, Mr. Dobson was in a public, social setting when this statement was made. He was out to dinner with friends and his wife. Additionally, unlike in Hill and Reed, Ms. Gibbs statement was not made in an accusatory way and was made in a normal conversation, not one of high stakes like accusations of adultery or employment termination.It was reasonable that Mr. Dobson would not have responded. After all, he was taking Ms. Gibbs out as a thank you and would likely not want to contradict her and come off as rude. Further, Ms. Gibbs's statement was entirely based on her own assumptions about Mr. Dobson's behavior with no personal knowledge of the actual facts of Mr. Dobson's fall. This is very different from the statement in Reed in which the human resources agent was reporting the company's perspective.

Additionally, this testimony should be excluded because its probative value is substantially outweighed by the burden of unfair prejudice under Rule 403. Probative value is defined as the ability of a piece of evidence to make a relevant disputed point more or less likely to be true. Every piece of evidence may be prejudicial to a the party against whom it is admitted. Rule 403 is concerned only with prohibiting unfairly prejudicial evidence. Unfairly prejudicial evidence is evidence tht allows or encourages the jury to reach a verdict based on an impermissible ground or to make an impermissible inference.

Here, the evidence is not merely weakening Mr. Dobson's case, as the court held in Reed. Rather the evidence would improperly lead the jury to conclude that Ms. Gibbs knew what she was talking about in making her statement. In reality, she had no personal knowledge of Mr. Dobson's falls and her statement was pure speculation. As such, it is more prejudicial than probative and should be excluded.

<u>B. The deposition testimony of Dr. Miller should be excluded because Mr. Dobson did not have a similar motive and opportunity to develop the testimony in the prior proceeding and in the alternative, it should be excluded under Rule 403</u>.

Under Franklin Rule of Evidence 801(c), hearsay is a statement that the declarant did not make while testifying at the current trial or hearing and that a party offers into evidence to prove the truth of the matter asserted. To admit former testimony under Frankline Rule of Evidence 804(b)(1), the proponent must satisfy three requirements: (1) the witness must be cucrently unavailable; (2) the former testimony was given as a witness at trial, hearing, or lawful deposition; and (3) the tesitmony is being offered against a party who had - or in a civilc case, whose predecesssory interest had - a similar motive and opportounty to deelop the challenged testimony at the earlier proceeding. (State v. Holmder (Fr. Supp. Ct. 2009))

Here, the witness is undisputably unavailable as Dr. Miller is decesased. Additionally, the former testimony was given at a deposition. Finally, the party against whom the testimony is being offered is actually the same party. Dr. Miller's deposition was taken by Mr. Dobson's attorney Mr. Chen for Mr. Dobson's suit against the City for failing to given him sufficient accommodations to recover from his injuries from this same slip and fall.

Mr. Dobson, however did not have a similar motive and opootunity to devleop the challenged testimony. Regardless of whether the party against whom the testimony is being introduced is the same, the court must still consider whether there was a similar but not necessarily identical motive to develop adverse testimony at prior proceeding. (Jacobs v., Klien (Fr. Sup Ct. 2002). The court will apply a two-party test, asking whether the questioner was on the same side of the same issue at both proceedings, and whether questioner had a substantially similar interest in asserting that side of the issue. Here, Mr. Dobson was on the same side.

Turning to the question of interest, interest requires an evaluation of both motive and opportunity. For opportunity, the court will consider whether the party in the earlier case the opportunity to develop the testimony- not whether the party did indeed develop the testimony. The court will also consider motive. In State v. Williams, the court stated that while primary motive of deposition is to obtain preview of witness's testimony, this does not exclude the need to understand witness's story and credibility. A prudent attorney would explore such avenues in a deposition. The court in that case found that the attorney did pursue such avenues and that the defendant failed to explain how he was prevented from fully pursuing lines of questioning or how they would have been pursued differently at trial.

In Thomas v. WellSpring Pharamceutical Co., Franklin Ct. App. 2017, the former testimony occurred at a trial which the court said made it even easier than in Williams, where the testimony was a deposition, to find similar motive and opportunity. The court found that the first plaintiff's attorney had engaged in robust cross and that the plaintiff had same opportunity and similar motive on the same issue of the cold medicine side effects.

Here, Dobson did not have a similar motive and opportunity to develop the testimony in the prior deposition of Dr. Miller. Therefore, he fails the second part of the test. Chen focused his questioning in the deposition on the level of accommodations given to Dobson and on Dr. Miller's credibility by questioning about prior malpractice lawsuits. Chen made the strategic decision to not focus on the extent of injuries. What is at issue in this case is the extent of injuries, not Dr. Miller's assessment of the accommodations. Additionally, the two cases here are about very different things. In the first, Chen was targeting what accommodations were needed so Mr. Dobson could get paid by the city. Here, Mr. Dobson would be focusing on the extent of his injuries. While a prudent attorney may have explored all avenues as per State v.Williams, where the Chen did evaluate credibility which was the issue in Williams. The issue here is therefore distinct from Williams.

Additionally, this testimony should be excluded because its probative value is substantially outweighed by the burden of unfair prejudice under Rule 403. Probative value is defined as the ability of a piece of evidence to make a relevant disputed point more or less likely to be true. Every piece of evidence may be prejudicial to a the party against whom it is admitted. Rule 403 is concerned only with prohibiting unfairly prejudicial evidence. Unfairly prejudicial

evidence is evidence tht allows or encourages the jury to reach a verdict based on an impermissible ground or to make an impermissible inference.

Here, the testimony will unfairly diminish Mr. Dobson's injuries without actually providing anything of relevant value to Brook's case. It is undisputed that Mr. Dobson was injured and that can be proven by other evidence like medical records.

As such, this should be excluded

C. Brooks Real Estate Agency's insurance policy should be admitted under Rule 411 to show that Brooks exercises control over the sidewalks.

Under rule 411, liability insurance is inadmissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, like proving agency, ownership, or control. Additionally, the advisory notes to Rule 411 state that the illustrations in rule are merely illustrations. If relevant, evidence of insurance may be admitted to prove any fact other than fault or lack of fault.

Here, it is undisputed that Brooks Real Estate Agency has insurance for the building that covers the sidewalks adjacent to the property. Mr. Dobson is presenting this evidence to dispute Brooks's claim that it does not control the sidewalk and was therefore not responsible for the ice.

Brooks may argue that this should be excluded under Rule 403 because its probative value is substantially outweighed by the danger of unfair prejudice. This argument should fail however, because as discussed in Reed, the mere fact that evidence weighs against a party's case does not warrant exclusion under 403. Rather, here, the evidence is extremely probative to control of the sidewalk by Brooks and is not unfairly prejudicial. As such, it should be admitted.

D. Conclusion

In conclusion, the testimony of Ms. Gibbs and the prior testimony of Dr. Miller must be excluded. The liability insurance of Brooks, however, must be admissible under Rule 411.

MPT 2

Sample 1

To: Mr. Martin

From: Examinee on behalf of Bradley Wilson

Re: Claim Against the Den Breeder

Date: July 25, 2023

Dear Mr. Martin,

This letter serves to describe the potential rights and remedies that you may have against Simon Shafer, doing business as "The Den Breeder." We are sorry to hear about the health problems that your dog Ash is experiencing and hope that this letter is helpful to you as you examine this potential claim against Mr. Shafer. You asked us to determine whether you are able to keep Ash, whether you are able to recover the purchase price of $2,500 you paid for Ash from Mr. Shafer, and whether you are able to recover the cost of the veterinary bills of $8,000 for treating Ash's liver condition. Each of these items are discussed in detail below.

1. **Can Mr. Martin Keep Ash and Recover the Cost of the Corrective Surgery?**

Short answer: Likely Yes. Under §753(b)(3) of the Franklin Pet Purchaser Protection Act (FPPPA), a pet owner is able to retain the animal and also receive reimbursement from the pet dealer for veterinary services from a licensed veterinarian of the purchaser's choosing to cure the animal.

The governing law in Franklin regarding the purchase of pets is the Franklin Pet Purchaser Protection Act (FPPPA). The FPPA is also known as the "Pet Lemon Law" (Cohen). It governs the sale of household pets, including dogs (Cohen.). The FPPPA provides purchasers with a remedy if they provide a certification by a licensed veterinarian about the animal's condition. (Cohen). The veterinarian must provide this certification within certain time limits: 14 business days for an illness or symptoms of an infectious disease, or 180 calendar days for a congenital defect. Here, your veterinarian, Dr. Miller, has indicated that she is willing to provide such a certification (Miller Email), and you should attempt to get her to provide this certification as soon as you can because of the 180 day limitation for congenital defects. You have enough time now, as Ash is only three and a half months old, but this may be a priority soon due to his diagnosed congenital defect.
Your case is similar to a previous case in our state, *Cohen v. Dent*. In this case, Cohen purchased Buddy a Bulldog from Dent, Dent Bulldogs. THe dog started limping, was incapable of bearing weight on left rear leg, and the conidition was diagnosed as hip dysplasia, a congenital defect like liver shunts. (Cohen). The Vet in Cohen suggested surgery of $4000 to resolve the issue, and the

vet also signed a certification of unfitness of dog or cat for purchase, which your vet, Dr. Turner, indicated that she would sign. (Cohen, Turner Email).

The first issue to discuss are the provisions in the Dog Purchase Agreement between you and Mr. Shafer which provide timelines for how to handle the dog's replacement and notification of the diagnosis of the dog. When interpreting a contract, the court first looks to the language in the document itself. If the terms of the contract are unambiguous, the court applies those terms to the dispute at hand, unless they conflict with relevant statutes. (Cohen). Here, the terms of your contract with Mr. Shafer likely conflict with the FPPPA, which provides that a pet purchaser has a remedy under this section, because the timeframes in the contract are much shorter than those provided in the FPPPA.

In addition, the terms of the contract between you and Mr. Shafer are likely ambiguous and will be interpreted in your favor. (Cohen). A contract is ambiguous when it does not address refunds or other monetary damages. (Cohen). Here, your contract does not address refunds or monetary damages but merely states that they are entitled to replacement of the dog. A contract is ambiguous when it does not define a starting point for a remedy, and In Cohen, the contract was ambiguous because it stated a one-year remedy when a pet has a congenital condition, but fails to specify the start date for the year. Here, your DOg Purchase Agreement states that "if the dog shows signs of illness" the buyer must take to a licensed veterinarian. THis is ambiguous because there is no timeframe on the dog showing signs of illness, but merely states that the dog can be returned within 48 hours of purchase. However, this appears to limit the illness of the dog to within 48 hours of purchase, which is somewhat ambiguous because the phrasing "if the dog shows signs of illness" appears not to be limtied to a certian timeframe. A contract is also ambiguous if it does not address most of the key issues in the case. (Cohen). Here, the main issues you are seeking are a refund of Ash's purchase price as well as veterinary costs. but the Dog Purchase Agreement does not discuss these issues. When a contract contains ambiguous terms, the court must construe it most strongly against the party who prepared it, and favorably to a party who had no voice n the selection of its language. (Cohen citing O'day). Here, Shafer prepared the DOg Purchase Agreement, and it does not appear that you had any say in its terms. THerefore, the contract will likely be construed in your favor, rather than in Shafer's favor.

The FPPPA describes three remedies available to a purchaser, allowing the purchase to choose any of the three remedies. (FPPPA 753). These remedies are: (1) Return the animal and refund purchase price, (2), Return the animal an receive an exchange animal of purchaser's choice and vet costs related to certification of unfitness or original animal, and (3), retain the animal and receive reimbursement from the pet dealer for vet services from licensed vet of purchaser's choosing for purpose of curing or attempting to cure the animal. Here, your selection would likely be number three out of these options, because you wish to retain Ash as a pet, as well as seek damages for the cost of Ash's vet bills. Note that the selection of this option does not necessarily prevent you from recovering the purchase price of Ash, which will be discussed in the next section below.

2. Can Martin Recover what he paid for Ash from The Den Breeder or Mr Shafer?

Short answer: Likely Yes. Under Cohen, a Pet Owner is able to recover damages under both the FPPPA and the Uniform Commercial Code (UCC) when there has been a breach of the

warranty of marketability under UCC 2-714, and thus damages for the purchase price of Ash are likely recoverable in addition to the cost of his surgery.

Remedies under FPPPA are not limited to just the FPPPA's stated remedies, and other areas of law can be consulted to determine the available remedies. (Cohen). The Uniform Commercial Code (UCC) provides the law on how people who buy and sell goods can establish remedies against one another. Article 2 of the UCC governs the sale of animals (COhen). Dogs are considered "goods" under the UCC, and pet stores and breeders are "merchants" as defined in Article 2. Therefore, the UCC covers your purchase of Ash.

Under the UCC, a buyer of nonconforming goods may "recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the sellers breach as determined in any manner which is reasonable. (Cohen). A dog is a nonconforming good when the person does not receive what they bargained for: a healthy dog. (cohen, citing Jackson). Here, you purchased Ash because you were looking for a dog of his specific type and because the puppies looked healthy and lively and active. SInce Ash is not actually healthy, Ash woudl be considered a nonconforming good under the UCC due to his congenital defect.

The sale of an animal creates an implied warranty of merchantability. (Cohen). Goods are merchantable if they "pass without objection in the trade under the contract description" and are "fit for their ordinary purpose'. This means that they fall within what is to be reasonably expected for the type of good that they are, so here, in the sale of a dog, you would expect that the dog is capable of being a companion animal and a pet. A veterinarian's certification that the dog is unfit for purpose can establish that the dog cannot pass without objection. (Cohen). A dog is not fit for its ordinary purpose when it cannot walk, run, or jump without pain. (COhen, citing Dalton). Here, Ash's diagnosis from Dr. Turner is that, despite being well fed and cared for, he is lethargic and weak, especially after eating, which you noticed about Ash. The diagnosis of a liver shunt confirmed that this is typical of this diagnosis. In addition, earlier testing may not have diagnosed this issue - 8 weeks may not have diagnosed it. So following the contract provisions may not have been enough to discover this congenital defect.

Under UCC 2-316, a contract can exclude or modify warranties in the following circumstances. To exclude the warranty of merchantability, the language must mention merchantability and must be conspicuous. Here, the Dog Purchase agreement does not mention the warranty of merchantability. In addition, the UCC 2-316(3)(a) provides that unless circumstances indicate otherwise, all implied warranties are excluded by saying as is, with all faults. However, the Dog Purchase agreement does not indicate that the dog is purchased as-is. In addition, under UCC 2-316(3b) there is no implied warranty when teh buyer before entering into the contract ahs examined the goods or the sample or model as fully as he desired or has refused to examine the goods, in which an examination ought in the circumstances to have revealed to the buyer. Shafer said that the dogs were healthy in his discussion with Martin. (Interview Transcript). the Dog Purchase Agreement also states that the dog si sold as a companion. These statements likely created an express warranty that Ash was fit for ordinary purpose being a companion dog. In addition, Shafer did not say anything about Ash's condition. (Interview Transcript). Here, you not an expert with regard to dogs and you are not merchant that regularly deals with the purchase and sale of dogs. In the circumstance of Ash's purchase, it does not appear that you should have inquired further about the dog's potential congenital

defect, especially in the situation where Shafer indicated that his dogs are healthy and your visual observation that the dogs were lively and active (Interview Transcript). THerefore, the warranty of merchantability has likely not been waived in this case.

Mr. Shafer may raise that the warranty of merchantability should nto apply here due to a case called Tarly v. Paradise, where the buyer sued for breach of warranty of merchantability when he bought a ragdoll cat with a congenital heart defect when their contract explicitly required an examination by a vet within 2 days of purchase. However, your purchase agreement does not require such an examination, it appears only to require notification of diagnosis. But since the contract is ambiguous, ti will likely be interpreted in your favor. Further, even if your contract did so require, an examination may not have revealed the defect. Puppies\s may not show signs of congenital defects until 8, 10, 12 weeks old, and vets reccomend delaying testing till 16 weeks. (Liver SHunt Basics) Therefore, the examination would not have disclosed the heart condition at the tie of sale. (Liver Shunt Basics)

UCC 2-714 discusses the types of monetary damages that a purchaser of a good can get from a seller. There are two different options for damages for breach of contract when the goods have been accepted, as they have been here because you are in possession of Ash. (1) Where the buyer has accepted goods and given notification, he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach, meaning that if the dog does not meet the standards set forth in the contract. THe second option provides the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. This means that the difference in value of the dog when purchased, ($2500) and its value had the defects been known, can be recovered if there is a breach of warranty, such as the warranty of merchantability. Under UCC 2-714, the measure of damages is the difference at the time of sale between the dog as warranted and the actual dog. Courts repeatedly refund the whole of the purchase price for the animal because no buyer would agree to purchase an animal it knew to have a congentital defect that might lead to death or might require expensive surgery. (Cohen, citing Dalton). Therefore, here, an award of the full purchase price is reasonable because there has been a breach of the warranty of merchantability. Therefore, you are likely able to recover not only the veterinary bills to repair Ash's liver defect, but also to recover the purchase price of $2,500 that you paid for him.

We hope that this assists you as you choose whether to bring a claim against Mr. Shafer.

Thank you,
Examinee

Sample 2

To: Mr. Anthony Martin

From: Applicant (Law Offices of Bradley Wilson)

Date: July 25, 2023

Dear Mr. Martin:

Thank you for seeking the legal services of the Law Offices of Bradley Wilson regarding your potential suit against Simon Shafer doing business as "The Den Breeder" (hereafter referred to as "Shafer") stemming from the congenital defect you discovered in your dog, Ash. The following letter seeks to answer your various questions about your rights under the contract and relevant Franklin law and raises potential issues we might have in bringing your case.

Did your contract (Dog Purchase Agreement) with The Den Breeder limit your recovery?

The Dog Purchase Agreement that you signed with The Den Breeder likely does not limit your recovery to the terms of the contract because the contract itself is not unambiguous. Since the contract is not unambiguous, a court will likely be willing to turn to other relevant Franklin laws to provide you additional sources of damages resulting from The Den Breeder's breach.

When interpreting a contract, the court will first review the language of the document itself and, if the contract terms are unambiguous, the court will apply the terms of the contract to the dispute provided they do not conflict with relevant statutes. *Cohen v. Dent* (Franklin Court of Appeal, 2020). The facts of *Cohen* are very similar to your case. In *Cohen*, a purchaser bought a bulldog from a breeder that was later discovered to have hip displaysia, a congenital defect. The purchaser sued the breeder for the cost of surgery and the value of the entire purchase price of the dog but wanted to keep possession of the dog. The contract between the purchaser and breeder purported to limit the purchaser's rights to exchange of the dog for a healthy dog.

In *Cohen*, the Franklin Court of Appeal found that a contract between a breeder and a purchaser was ambiguous where the contract provided what a buyer could do after purchasing a dog with a congenital condition and provided some detail about which conditions were eligible, but failed to specify a start date for the period in which the buyer could return the dog, failed to address refunds or other monetary damages, and required tests verifying the congenital condition "if needed" but did not define the term and stated no time limit in which the buyer needed to make their claim.

The Pet Purchase Agreement (PPA) you signed with The Den Breeder contains similar ambiguities as the contract in *Cohen*. The PPA states that if a dog is suffering from "serious disease clearly attributable to Breeder, which would prevent it from being a companion" the dog can be returned within 48 hours of the purchase for a replacement dog. However, the contract

fails to define "serious disease" or what constitutes the dog serving as a "companion," which are vital terms necessary to interpreting a purchaser's remedies under the contract. Further, the contract states that if a dog is diagnosed with a congenital defect that would "prevent the dog from being a companion" before the dog is one year old, the buyer must notify the breeder within 24 hours and provide a report from a veterinarian. However, the contract states no remedies in the event that this occurs and, again, does not define what constitutes a condition that would "prevent the dog from being a companion."

Moreover, the Franklin Supreme Court has stated in *O'day v. Schmidt* (Fr. Sup. Ct. 1947) that when a contract contains ambiguous terms, a court must construe it most strongly against the party who prepared it, and favorable to a party who had no void in the selection of its language.

Given that the language in the PPA is clearly ambiguous under the precedent, or prior legal holdings, in *Cohen* and *O'day*, we have a strong argument that your remedies are not limited to those provided in the FPPPA. As such, a court will likely look to other relevant statutes, including the Franklin Pet Purchase Protection Act and the Franklin Uniform Commercial Code, to provide you with additional remedies.

What remedies are available to you under the Franklin Pet Purchase Protection Act (FPPPA)?

Under the FPPPA, you have the right to keep possession of Ash and recover from The Den Breeder the roughly $8,000 cost of the liver shunt surgery.

The FPPPA provides remedies for purchasers where, within 180 calendar days of the sale of an animal, a licensed veterinarian certifies the animal unfit for purchase due to a congenital malformation that adversely affects the health of the animal. Here, within one month of bringing Ash home, you took Ash to Dr. Clare Turner, who soon afterwards discovered that Ash had liver dysfunction, specifically a portosystemic shunt, which she described as a congenital defect. You also noted that Ash was sluggish and inactive due to the condition, and "Liver Shunt Basics for Wolfhound Puppies" noted that liver shunts are viewed as congenital defects as well. Thus, it is clear that Ash suffers from a congenital defect and you took Ash to the veterinarian within the 180-day period. If Dr. Turner certifies that Ash is unfit for purchase, which is likely given the side effects and the necessity of repairing the condition, then you will meet the requirements for a remedy under FPPPA.

The FPPPA provides several remedies, which include the right to return the animal for a refund, the right to return the animal and receive a replacement animal, and the right to keep the animal and be reimbursed for veterinary costs incurred for the purpose of curing or attempting to cure the animal. The court in *Cohen* concluded that under the FPPPA, the purchaser had the right to keep the bulldog puppy and recover their costs of fixing the dog's defects.

What remedies are available to you under the Franklin Uniform Commercial Code (UCC)?

Under the Uniform Commercial Code, you have the right to recover from the Den Breeder the $2,500 purchase price for Ash pursuant to breach of implied warranty of merchantability.

The FPPPA provides and the court in *Cohen* confirmed that, where a contract is ambiguous, the remedies provided in the FPPPA do not foreclose other remedies. Therefore, you can also likely seek to recover the $2,000 purchase price of Ash under the Franklin Uniform Commercial Code. Article 2 of the UCC governs the sale of animals, and courts in Franklin have previously held that dogs are considered "goods" under the UCC and breeders are considered "merchants." (*See Cohen*). The UCC provides that a buyer of nonconforming goods may "recover as damages for any nonconformity of tender the loss resulting int eh ordinary course of events from the seller's breach as determined in any manner which is reasonable." This essentially means that where the goods are not as expected, buyer can recover the costs of those goods as reasonable. The court in *Cohen* noted that the purchaser did not get what she bargained for--a healthy dog--and as such she could recover for nonconforming goods. Similarly, since you did not receive a healthy dog, which is what you bargained for, you can recover for nonconforming goods stemming from Ash's congenital defect.

The sale of animals also creates an implied warranty of merchantability, which is met if goods are "fit for the ordinary purposes for which such goods are used." UCC Section 2-314(2)(c). In *Cohen*, the court found that where the bulldog could not run or walk or jump without pain, it was not fit for the ordinary purposes in which a dog is used. In *Dalton v. Jackson* (Fr. Ct. App. 1997), a court also found that where a parrot died two weeks after its purchase, it was not fit for ordinary purposes, which included the purpose of staying around and living. Here, we can argue that Ash's lethargy and other symptoms resulting from his congenital defect make him unfit for the purposes in which he is intended, that of companionship. Moreover, if Ash's condition is eventually deadly, he would be unfit for ordinary purposes if he perished as a result of his condition.

The Den Breeder may seek to argue that the contract limits your rights to recover under the UCC for a congenital defect because you did not bring the congenital defect to his attention soon enough. In *Tarly v. Paradise* (Fr. Ct. App. 1995), the court rejected a buyer's claim for breach of implied warranty because the contract expressly contained a requirement that the buyer have the animal examined within two days of purchase and the buyer failed to do so. The vet in *Tarly* testified that had the buyer had the animal inspected within two days of purchase, they likely would have discovered the defect at hand which became apparent four months later.

The situation here is different from *Tarly* because there is no express requirement in the PPA that buyers need get the dogs inspected within a specific time period. Moreover, as noted by Dr. Turner and the "Liver Shunt Basics for Wolfhound Puppies" pamphlet, there is no agreed upon time period for having dogs examined for liver shunt issues and the issues are not discoverable on visual inspection and sometimes do not manifest until the puppies grow older. Thus, it is possible that even despite getting Ash checked sooner or directly after you purchased him, you still would not have been able to reasonably discover his issue when he was younger.

Because the Den Breeder can likely be held liable for breach of the implied warranty of merchantability, you should be able to recover damages under the specific standard set forth in UCC Section 2-714, which provides for "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted." The court in *Cohen* noted that Franklin courts repeatedly find this value to be the full purchase price for the sale of animals who have a defect because buyers would not have

bought the animal had they known about the defect. Thus, you should be able to recover the full purchase price of Ash, $2,500.

In conclusion, it appears at this stage that you have a strong case against The Den Breeder. Provided that a court finds that the PPA between you and The Den Breeder is ambiguous, you can likely keep Ash and recover for the cost of the surgery under the FPPPA and the cost of the purchase of Ash under the UCC. Please contact us for further discussions or if you have any questions after reading this letter.

Best,
Applicant (Law Offices of Bradley Wilson)

Sample 3

Memorandum

TO: Bradley Wilson

FROM: Examinee

DATE: July 25, 2023

RE: Martin v. The Den Breeder

Dear Mr. Martin,

I am sorry to hear about the news regarding Ash's liver shunt. I hope she is able to get the care he needs, and I am happy to provide advice regarding the available remedies you may seek against The Den Breeder. Below are some questions pertaining to your claims along with a short answer before I provide further analysis.

I. Is the contract ambiguous?

Yes the contract is ambiguous because there are conflicts within the contract regarding the Mr. Martin's obligation to inspect his new dog and what remedies exist if a congenital defect exists in the dog.

When interpreting a written contract, courts will first review the language in the document itself to determine if there are any ambiguities that may affect one's understanding of the terms in the agreement. A contract will be considered ambiguous when there are uncertainties in the terms which directly affect the resolution of the dispute. Cohen v. Dent. Furthermore, when a contract is found to be ambiguous, the court will construe the contract most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language. O'day v. Schmidt.

Upon Mr. Martin purchasing Ash, he was required to sigh the "Dog Purchase Agreement" which was prepared by The Den Breeder. This is evidenced by the fact that the company's name is at the top of the agreement. Mr. Martin did not participate in the drafting of this agreement, nor did he seek independent counsel before signing this agreement. The contract is ambiguous because it does not clearly state the buyer's obligations after purchasing a dog, and the contract is not clear with respect to the available remedies.

The agreement states that the Buyer will take the dog to a veterinarian if the dog shows signs of illness to determine if the dog has any serious illness. However, the proceeding sentence then states that the Buyer must provide notice of a serious illness to the breeder within 48 hours of purchase. It is unclear what the Buyer's obligation is because one sentence only requires the Buyer to seek a veterinarian upon signs of illness, but notice of serious illness must be made within 48 hours of purchase. There are two different timelines that are presented in this

paragraph. One does not require the Buyer to do anything until a condition precedent occurs, but the other implies the Buyer should seek a veterinarian immediately since it only has 48 hours to notify the breeder. Not to mention, the contract does not define what constitutes a serious illness, so this creates further confusion when attempting to understand the buyer's obligations.

The second paragraph then states what the Buyer must do when the dog is diagnosed with a congenital defect before the dog turns one year old. It is worth noting that it is unclear whether congenital defect and serious illness are different conditions, but if that is the case then the entire preceding paragraph should not apply to Mr. Martin's current case with Ash. This paragraph is also ambiguous because it does not state the available remedy to the Buyer in the case of a congenital defect. The contract requires the Buyer to notify the Breeder in writing within 24 hours of diagnosis and provide a copy of a veterinarian report confirming the diagnosis. However, the contract is silent as to the available remedy in this event. The preceding paragraph stated the Buyer may return the dog for a replacement dog, but this remedy was only available if the dog had a serious illness. No such remedy exists if the dog is diagnosed with a congenital defect.

Since the contract will likely be considered ambiguous by a court, it will construe the contract favorably to Mr. Martin since he was the party who had no voice in the selection of the contractual language. The Den Breeder's claim that it has no legal obligation to pay Mr. Martin will likely fail because the contract does not address the available remedies in the event the dog is diagnosed with a congenital defect. Since the contract is silent on this issue, the remedies available at law under the Franklin Pet Purchase Act and the Uniform Commercial Code will be assist Mr. Martin.

II. Did The Den Breeder breach the Franklin Pet Purchase Act?

Yes The Den Breeder did breach the FPPPA because Ash has been diagnosed with a congenital defect within 180 days of purchase, provided Mr. Martin supplies the appropriate veterinarian certification.

The FPPPA governs the sale of household pets, including dogs, and the law provides purchasers with a remedy if they are able to provide a certification by a licensed veterinarian about the animal's condition. Assuming the certification is given, the purchase has three potential remedies available to them if the certification is provided within 180 days of purchase. Mr. Martin will be able to assert a claim under the FPPPA once the veterinarian certifies Ash's congenital defect. Mr. Martin took Ash to a licensed veterinarian, Dr. Claire Turner, and she responded with an email on July 18 that Ash has been diagnosed with a liver shunt which is deemed a congenital defect. She further stated at the end of the email confirming Ash's diagnosis that she is prepared to sign the form certifying her opinion. Therefore, Mr. Martin should be afforded the remedies available to him under the FPPPA assuming he has obtained the certification from Dr. Turner.

The Den Breeder will likely argue that such remedies are cut off since Mr. Martin did not satisfy the notice requirement in the Dog Purchase Agreement. The agreement stated that the Buyer must notify the Breeder in writing within 24 hours of the diagnosis and provide a copy of the veterinarian report. Mr. Martin stated he called The Den Breeder the next day after he received Dr. Turner's diagnosis, but he did not provide written notice. While this is in violation of the contract, it is unclear whether a purchaser can even waive their rights under the FPPPA if the

contract provides otherwise. Regardless, this defense should fail because the contract has significant ambiguity regarding the available remedies. Had the notice requirements been met, there was still no available remedy. Therefore, the court will likely find that no waiver existed, and all rights under the FPPPA may be asserted.

Upon providing the notice within 180 days with Dr. Turner's certification, there are three available remedies. Mr. Martin may seek (i) the right to return the animal and receive a refund, (ii) the right to return the animal and receive a replacement, or (iii) the right to retain the animal and be reimbursed for veterinary costs incurred for the purpose of curing or attempting to cure the animal. Mr. Martin has expressed his affection for Ash and how he has grown deeply attached to the dog, so the third option will likely be the best option. He can still keep Ash, and he can seek the cost of surgery from The Den Breeder. Furthermore, the FPPPA states that nothing in the law will limit any other remedies available to a purchaser at law, so Mr. Martin may also seek damages under the Uniform Commercial Code.

III. Did The Den Breeder sell nonconforming goods and breach the implied warrant of merchantability under the Uniform Commercial Code?

Yes, The Den Breeder sold Mr. Martin a nonconforming dog since it was not healthy, and this nonconformance made the dog not fit for its ordinary use which breached the implied warranty of merchantability.

Article 2 of the UCC governs the sale of goods, and the case law in Franklin has routinely stated that this includes the sale of animals such as dogs. Furthermore, Franklin case law states that breeders are deemed "merchants" for UCC purposes which means they may be subject to certain laws within the code pertaining to the sale of nonconforming goods or warranties.

Mr. Martin can argue Ash was a nonconforming good because he did not get what he bargained for, which was a healthy dog. This has been upheld as an example of a nonconforming good in the Cohen case where the buyer's dog had hip displaysia which did not allow the dog to live a healthy life. Furthermore, the sale of Ash created an implied warranty of merchantability since The Den Breeder is considered a merchant. Under UCC 2-314(a) and (c), goods are "merchantable" if they pass without objection and are fit for their ordinary purpose for which the good is used. In the Cohen case, the Court held the veterinarian certification was evidence that the purchased dog was "unfit for purchase" and established that the dog could not "pass without objection." It is likely the case that the certification offered by Dr. Turner will attest to similar facts since both dog purchases deal with a dog with a congenital defect requiring this certification for FPPPA purposes.

The Den Breeder will likely argue that the sale of Ash is similar to the case in Tarly v. Paradise, where the court held that no such implied warranty existed since an examination should have revealed it. In that case, a cat with a congenital heart defect was sold, but the court found no implied warranty because the contract required the buyer to consult a veterinarian within two days of purchase. The case against The Den Breeder is different because the Dog Purchase Agreement never explicitly required a veterinarian consult, and any required consult has already been shown to be ambiguous based on the contract terms. Furthermore, it is not clear that an examination would have even revealed Ash's condition. Dr. Turner stated that most reputable Irish wolfhound breeders test puppies before sale, and often include in the sale some

form of verification of this test. However, Dr. Turner also stated it is unclear when the best time to test the puppies even is because the test might be wrong if the puppy is too young.

Dr. Turner also attached a useful liver shunt basics form which likely strengthens the argument that no such waiver of implied warranty existed. Liver shunts are not detectable just by looking at a puppy. It requires a bile acid testing which Mr. Martin could not have done just by looking at Ash before purchasing him. Furthermore, there is a difference of opinions as to the best time to even test a puppy for liver shunts. The condition may not show until the puppy is 8, 10, or even 12 weeks old, and most specialists believe testing should be delayed until 16 weeks of age. This further shows that Mr. Martin never had the opportunity to fully examine Ash prior to purchase. Therefore, Mr. Martin never waived the implied warranty via inspection, so The Den Breeder breached this warranty by providing an unhealthy dog.

The Den Breeder may also argue the Dog Purchase Agreement waived the implied warranty of merchantability. Under UCC 2-316(2), the implied warranty may be disclaimed in the contract when it is written conspicuously and explicitly mentions the implied warranty, or uses language such as "as is". Neither argument is applicable to this agreement because the contract does not explicitly mention the implied warranty of merchantability in a conspicuous nature. It simply states that all dogs have a potential for congenital diseases, and the Breeder has tried to minimize these in good faith. Such language is likely insufficient to bring to the attention of the buyer that the dog was sold as is and without faults, so a court is unlikely to find a waiver.

III. What remedies are available to Mr. Martin?

Mr. Martin may seek all remedies he is currently seeking which includes retaining Ash, recoupment of the cost of surgery, and he may sue for the purchase price of Ash.

As previously stated, a breach under the FPPPA afford the purchaser one of three available remedies. The best available remedy for Mr. Martin based on his request was the third option which enables him to retain Ash and seek recovery of the cost of surgery. Mr. Martin can also seek the purchase price of Ash under contract remedy due to the sale of a nonconforming good and breach if implied warranty of merchantability.

Under UCC 2-714(2), the measure of damages is the difference at the time of sale between the dogs as warranted and the actual dog. The Court in Cohen stated that courts in other cases involving the sale of dogs have repeatedly refunded the whole purchase price of the animal on the assumption that no buyer would agree to purchase an animal with a congenital defect that might lead to death or require an expensive surgery. The Den Breeder cannot rely on UCC 2-714(1) and state this remedy is unreasonable because the Court in Cohen stated the specific rule relating to breach of warranty will overrule a general standard for sale of nonconforming goods. Therefore, Mr. Martin may seek all three available remedies since The Den Breeder will be liable under the FPPPA and for breach of the implied warranty of merchantability.