When instructed, place your Applicant Number Label here.

Georgia Essay Questions

Do NOT touch this packet or start the exam until you are instructed to do so.

- Once the exam begins, you may work on the four essay questions in any order, but remember to type your answers in the appropriate answer window (or write your answer in the appropriate answer book if you are handwriting).
- For each of the four attached essay questions, there is one blank sheet for your use as scratch paper, and you may take notes on any of the attached pages if you wish.
- On each essay question, remember to demonstrate not merely your memory but also your ability to think and analyze the issues.
- Assume the questions arise under the laws of Georgia unless otherwise indicated.

ESSAY I

Laptop applicants: Answer this question in the **FIRST** answer window.

Handwriting applicants: Answer this question in the **BLUE** answer book.

The workers' compensation and liability insurer for Big Freightliner Co. ("BFC") seeks your advice regarding potential lawsuits arising from a tragic car accident. The accident involved a collision between a BFC truck and a car in Fulton County that resulted in the deaths of both drivers. The police report blames the wreck on speeding by the BFC-employee truck driver, Bill, whose rig was pulling a flatbed carrying a large piece of industrial equipment. As Bill rounded a curve at 15 mph over the posted speed limit, his cab and the entire load flipped when the secured cargo started to topple. Bill died instantly. Cap, who was driving in the next lane, was injured when his car was crushed by the machinery that fell from the truck. He died weeks later after undergoing numerous surgeries and experiencing significant pain as a result of the wreck.

The insurer has provided you with a report from its investigator, who examined the scene and reviewed the police report. The report concludes that, while Bill was speeding, his rig would not have flipped had the load not shifted; and the load shifted because the metal tie downs used to secure it were defective. Although the manufacturer's data rated their strength at a level more than sufficient to hold the weight of the load on a curve at speeds even higher than Bill's, and BFC's employees complied with all the manufacturer's instructions for tying down this type of load, the metal itself failed. Further metallurgical testing of these tie downs showed that the metal was only 50% as strong as represented by Big Iron ("BI"), their manufacturer, due to either a mislabeling on the batch BFC had bought from BI, or to a defect in the metal itself.

Cap had been a partner at a prominent Atlanta law firm and had lost his wife Sally about a year before his own death. He was survived by their twin 14-year-old daughters and by his parents, who also live in Atlanta. Sally's parents are alive, but they reside in Illinois. Cap was not known

to have any other living relatives. Bill was single and had no children; his closest living relative was his sister, Jane.

BFC has received three demand letters: (1) a letter on behalf of the twins from Cap's parents, who have assumed their custody (such custody has not been contested by Sally's parents); (2) a letter on behalf of Tom, a 26-year-old who was Cap's biological son, which explains that Cap met with Tom several times after a positive paternity test but that Cap never told his wife and daughters about Tom; and (3) a letter on behalf of Jane.

The insurance company is concerned about exposure for claims based on Cap's death given his high earnings, relative youth, and period of pain and suffering before his death; it expects less exposure for Bill's death in light of the exclusive remedy provisions of the Workers' Compensation Act. It has told you it would prefer to settle all the claims before trial. It fears that Bill's speeding will result in an adverse jury verdict even though the ultimate responsibility should be on BI for making the defective tie downs. In addition to advice about which claimants are entitled to assert causes of action for wrongful death and/or conscious pain and suffering under Georgia law and how to assure finality in any pre-trial settlement, the insurer is interested in how it can protect and pursue BFC's claim for indemnification or contribution from BI.

Applying Georgia law and assuming any suit could be appropriately pursued in the Superior Court of Fulton County, answer the following:

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

2. Explain who would be entitled to recover for Cap's conscious pain and suffering under the above facts.

3. If Cap's twins are entitled to recover for wrongful death and/or conscious pain and suffering, what, if anything, is needed to achieve finality via a settlement with their paternal grandparents?

4. Assume 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. What can the insurer do before or after reaching such agreements to best protect itself in making a claim against BI to indemnify it?

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ESSAY II

Laptop applicants: Answer this question in the **SECOND** answer window.

Handwriting applicants: Answer this question in the **YELLOW** answer book.

We have been retained by SVR LLC ("SVR") in connection with a contract dispute. SVR is a family-owned healthcare management consulting firm based in Norcross, Georgia. In 2016, SVR and Hospital Corporation of Georgia ("HCorp") entered into a multi-year Professional Services Master Agreement (the "Agreement"). The Agreement required SVR to provide advisory and operational services to HCorp, primarily related to HCorp's patient-billing practices and maintaining patient medical records. The parties amended and extended the Agreement six times. Under the Agreement, HCorp profited millions of dollars. SVR was paid on an hourly rate basis for its patient-records-management work and a commission for the patient-billing work. SVR was paid $2 million in each of 2016 and 2017.

The most recent amendments extended the term of the Agreement through December 2022. The Agreement does not include an early termination provision and provides that it could only be terminated before December 2022 in the event of an uncured material breach.

In February 2018, HCorp signed a letter of intent to merge with Globe Health, Inc. ("Globe"), a large non-profit healthcare system. HCorp, at Globe's urging, hired BC Healthcare, an SVR competitor, to help Globe identify potential cost savings of the merger. Globe concluded that the new Globe-HCorp entity could save millions of dollars if they could terminate the Agreement and replace SVR with Globe-HCorp employees or BC Healthcare consultants.

HCorp retained BC Healthcare to evaluate the Agreement. The purpose of the evaluation, as represented to SVR, was for BC Healthcare to learn about the services SVR provided to HCorp and to assess SVR's capabilities going forward. SVR consented to the evaluation after BC Healthcare indicated that it would send SVR contemporaneous copies of

any and all reports. SVR has since learned that the true purpose of the evaluation was to fabricate alleged breaches of the Agreement so that Globe and HCorp could terminate the Agreement "with cause." Following a site visit in July 2018, BC Healthcare prepared "findings" that it promptly shared with HCorp and Globe; it did not provide a copy to SVR until February 2019, after HCorp had sent its termination letter to SVR.

HCorp and Globe finalized the merger in December 2018. Less than a month later, HCorp sent SVR a letter purporting to provide notice of twenty alleged material breaches of the Agreement. Rather than offer SVR an opportunity to cure any default (as required by the Agreement), the letter stated that HCorp had already "determined that SVR has not been able to provide services that meet the expectations of HCorp." The letter expressed dissatisfaction with the fee structure that HCorp itself negotiated and to which HCorp agreed just a few months earlier. The letter also cited as grounds for termination the merger with Globe and its impact on HCorp's "short-term needs and the long-term objectives of HCorp's patient-billing operations."

SVR wants to sue HCorp for wrongful termination and other breaches of the Agreement. SVR also seeks damages against Globe and BC Healthcare for conspiring to breach the Agreement and for tortious interference with the Agreement. SVR claims it has been damaged more than $5 million. Assume that Georgia law recognizes a cause of action against those who conspire to breach a contract, even when one of the conspirators is a party to the contract.

Please prepare a memorandum of law that discusses whether the above facts state a claim in favor of SVR against any of the other parties involved for:

a. breach of contract

b. interference with contractual or business relations, or

c. other causes of action (for example, conspiracy or fraud).

Separately assess any additional issues that might arise relating to the types of damages that SVR seeks to recover (for example, lost profits and the value of future services).

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ESSAY III

Laptop applicants: Answer this question in the **THIRD** answer window.

Handwriting applicants: Answer this question in the **PINK** answer book.

Mary owned a parcel of real property near Dahlonega, Georgia. The property fronts Elm Street and backs up to Gold Creek, a beautiful stream that is a popular subject for amateur artists. Mary subdivided the property into two separate lots, so that Lot 1 has the frontage on Elm Street, and Lot 2 borders Gold Creek. Lot 2's access to Elm Street was by an easement across Lot 1. In 2018, Mary built a movie theater on Lot 1 and a restaurant on Lot 2.

In 2020, Mary sold Lot 2 (with the restaurant) to her good friend Andy. Mary loves to paint landscapes as a hobby, and so the deed to Andy contained the following language: ". . . reserving to Mary a perpetual right to cross Lot 2 to paint the landscape of Gold Creek."

A few months after the sale, Mary asked Andy if her theater customers could use some of the restaurant's parking spaces. Andy said "yes," and he and Mary memorialized their understanding in a recorded agreement.

In 2021, Gold Creek overflowed, causing damage to the restaurant. Andy hired a contractor (who offered the lowest hourly rate Andy could find) to make repairs, including removing mold that had developed on the walls. The contractor repaired some of the damage and placed new paneling over the mold. In 2022, Andy sold Lot 2 to Bill "as is." After the sale, Bill called Mary and asked for permission to erect a restaurant sign in Lot 1 that would be visible to Elm Street traffic. Mary said "yes," and they ended the call.

Six months after that call, Mary sold Lot 1 to fellow artist Jane, and Jane promptly removed the restaurant sign. When Bill discovered his sign had been removed, he demanded that Jane put it back up. About the same time, Bill discovered mold in the restaurant and hired contractors to remove it.

1. Does Jane have a right to use the restaurant parking lot for movie theater parking? Explain your answer.

2. Does Bill have a right to erect his restaurant sign in Lot 1? Discuss the types of easements that are possible under Georgia law and whether each may have been created.

3. Discuss any rights Bill might assert against Andy because of the mold, and any defenses Andy might have.

4. Does Jane have a right to access Gold Creek across Lot 2 for purposes of painting the landscape? Explain your answer.

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ESSAY IV

Laptop applicants: Answer this question in the **LAST** answer window.

Handwriting applicants: Answer this question in the **TAN** answer book.

The recruitment and retention of police officers has declined, especially among women with less than three years of service. In response to its need to rebuild its police force, assume that the State has passed the State Uniform Program for Police Officer Recruitment, Retention and Training Act ("the SUPPORT Act"), which provides as follows:

State Code § 11-5-524:

In order to recruit and retain police officers in this State, to address declining enrollment at the Police Academy, to avoid wasting training funds on those likely to quit, to restore faith and trust in those employed to provide law and order, and to protect public health and safety, this law is duly enacted.

(1) The State shall require all prospective police officers to participate in a three-week Police Academy. Each participant in the Academy shall be paid $4,000 per week, for a total of $12,000.

(2) Commencing August 1, 2023, the starting salary for a Police Officer shall be $60,000, and, for officers first employed after August 1, 2023, their annual salary shall be increased after each year of service by $5,000 for the first five years of employment.

(3) In light of the fact that most traffic related encounters that involve the discharge of a weapon involve older officers, and in light of the physical challenges of police work, it shall be the law of this State that no person older than 55 years old can serve as a Police Officer. Any officer who reaches that age must retire or be discharged.

(4) No person shall be entitled to apply to the Police Academy unless the person demonstrates that the person can lift (bench press) the person's own weight, plus 25 lbs.

(5) No person shall be entitled to apply to the Police Academy or to continue to serve as a police officer if his or her weight exceeds 200 pounds, with a weigh-in required on the second Monday of each January.

(6) Only citizens of this State or of one of the other 50 states can apply to the Police Academy or remain employed as a Police Officer. Any person who applies must have resided in this State for at least one year.

Immediately upon the enactment of the SUPPORT Act, a group called the Equal Protection Strike Force filed suit in *federal* district court claiming that Sections (3), (4), (5), and (6) of the Act violate the Equal Protection Clause of the United States Constitution. The Strike Force consists of (a) Joe, a 56-year-old officer who weighs 260 lbs., who participates in the strenuous Annual Iron Man Competition and is due to be fired under the Act due to his age and weight; (b) Mary, who weighs 150 pounds and cannot bench press 175 pounds and who claims the weight lifting requirement was adopted to discourage women from applying; (c) Peter, an American citizen, who moved to the State a month ago and applied to become a police officer, but who has been turned down because he has not lived in the State for one year; and (d) Eduardo, who is a documented immigrant from Mexico who has lived in the State for five years but is not a citizen of any state.

Assume that the four plaintiffs have standing to sue, that the court has jurisdiction, and that the only claims made are based on the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Separately identify the equal protection challenges that might be made by each plaintiff and the standard or standards of scrutiny that might apply to decide whether any alleged discriminatory classification violates the Equal Protection Clause. Identify the arguments the State might make on each claim to defend the statute. Finally, briefly apply the applicable standard or standards of scrutiny to each claim and set forth how you expect the claim will be decided — that is, will each challenged section of the statute likely be found constitutional or unconstitutional?

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July 2023
MPT-1
Item

Dobson v. Brooks Real Estate Agency

Dobson v. Brooks Real Estate Agency

FILE

LIBRARY

Burton & Mendel LLP
Attorneys at Law
2024 Kendall Avenue
Bristol, Franklin 33726

MEMORANDUM

To: Examinee
From: Samantha Burton
Date: July 25, 2023
Re: Dobson v. Brooks Real Estate Agency

Our firm is representing Peter Dobson in litigation against Brooks Real Estate Agency. Mr. Dobson slipped and fell on ice that the Brooks Agency failed to remove from the sidewalk in front of its building. He suffered a broken leg, a broken arm, and a concussion as a result of the fall, and ultimately missed three months' work.

The trial is in four weeks. I intend to file a motion *in limine,* that is, a pretrial motion seeking a ruling on the admissibility of certain evidence. As you know, the Franklin Rules of Evidence are identical to the Federal Rules of Evidence.

I need you to prepare the argument section of the brief in support of the motion *in limine*, setting forth our position regarding each of the following items of evidence:

(1) Anticipated trial testimony by Doris Gibbs describing an interaction she had with Mr. Dobson, her neighbor. We need to seek a pretrial ruling that her testimony is inadmissible.

(2) The deposition testimony of the emergency room physician who examined Mr. Dobson after his fall and gave deposition testimony in connection with a separate case arising out of the same injuries. The physician has since died. We need to seek a pretrial ruling that the deposition testimony is inadmissible in our case.

(3) The insurance policy on the property of the Brooks Real Estate Agency. In the course of discovery, Brooks has claimed that it does not control the sidewalk and therefore was not responsible for clearing it of ice. We want to introduce the insurance policy on the property showing that the agency is insured against liability resulting from conduct occurring on the sidewalk.

Be sure to follow the attached guidelines for writing persuasive briefs. Draft only the "legal argument" section; another associate will draft the statement of facts and caption.

Burton & Mendel LLP
Attorneys at Law

OFFICE MEMORANDUM

To: All Associates
From: Samantha Burton
Date: September 5, 2019
Re: Guidelines for Persuasive Briefs in Trial Courts

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

I. Captions [omitted]

II. Statement of Facts [omitted]

III. Legal Argument

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

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

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

Do not assume that we will have an opportunity to submit a reply brief. Be sure to anticipate and respond to opposing arguments in the body of your brief. Structure your argument in such a way as to highlight your case's strengths and minimize its weaknesses.

TRANSCRIPT OF INTERVIEW WITH PETER DOBSON
January 11, 2023

Att'y Burton: Hello, Mr. Dobson. I understand you would like to retain our firm to handle a negligence action for you.

Dobson: Yes, I suffered some pretty bad injuries. I was in the hospital for two days and out of work for three months.

Burton: What happened?

Dobson: I was here in Bristol. It was a snowy day, but the sidewalks looked clear. I must have slipped on some ice, and I fell. I broke my arm and my leg and had a concussion.

Burton: I am so sorry.

Dobson: It has been a long recovery and very painful.

Burton: When did your fall and injuries occur?

Dobson: Last winter, on February 18, 2022.

Burton: Could you give me a few more details?

Dobson: Sure. I was walking from my house on Maple Grove Way and going to the grocery store on Oaklawn. My route took me down Elm Street. There was some snow on the ground but not a lot of it. I was walking on the sidewalk. I was walking carefully since it was winter. All of a sudden, my legs shot out from under me, and I was on the ground. And I hurt—a lot! It turns out there was ice on the sidewalk, and I slipped and fell on it. Luckily another person saw me fall and called 911. The ambulance came and took me to the hospital. Now I am finally recovered and I need your help.

Burton: Before we talk more about your injuries, I understand this is not the only lawsuit you filed related to this incident.

Dobson: That is correct. The City of Bristol is my employer. I sued the City after it denied me more time away from work and other accommodations for my injuries. My lawyer in that case is Robert Chen. I can put you in touch with him.

Burton: Thank you. I assume that I have your permission to speak with attorney Chen.

Dobson: Of course.

Burton: And again, what were your injuries?

Dobson: I had a broken arm, a broken leg, and a concussion.

Burton: Do you know who owns the property adjacent to the sidewalk on which you fell?

Dobson: Yes, it is owned by the Brooks Real Estate Agency.

Burton: So we may be able to file a negligence action, alleging that Brooks Real Estate Agency breached its duty of care by not keeping the sidewalk clear of ice, and that as a result of its negligence, you sustained multiple injuries. We may be able to claim as damages the medical costs you incurred, your lost wages for the time you were off work, and your pain and suffering.

Dobson: That sounds great. Just let me know what you need from me.

Burton: We will be in touch soon.

Burton & Mendel LLP
Attorneys at Law

FILE MEMORANDUM

From: Samantha Burton
Date: January 13, 2023
Re: Dobson v. Brooks Real Estate Agency

Following my initial interview with Peter Dobson, and with his permission, I contacted Robert Chen, the attorney who represents Dobson in his suit against the City of Bristol. Here is what I learned from Attorney Chen: The suit against the City is a disability discrimination claim related to Dobson's employment by the City. After the accident (which is also the basis of our negligence claim against Brooks Real Estate Agency), Dobson believed that the City was not accommodating him appropriately. Dobson hired Chen, and Chen then filed suit on behalf of Dobson alleging discrimination under Franklin's Disability Act. Essentially, Dobson's claims against the City are that he was not given sufficient time away from the office and was not given other accommodations to which he was entitled given the severity of his injuries. The City has defended against the action, claiming that Dobson's injuries did not require the accommodations Dobson sought. The source and causation of Dobson's injuries are not at issue in that case, as they are in Dobson's claims against the Brooks Real Estate Agency. Discovery has been completed, and a trial date has been set.

Attorney Chen suggested I review Dr. Miller's deposition in *Dobson v. City of Bristol.* Dr. Miller treated Dobson when he was admitted to the hospital for his injuries. At the deposition, Dr. Miller testified about the extent of Dobson's injuries and the adequacy of the limited accommodations the City made for him. Chen made the strategic decision not to examine Dr. Miller about her opinion about the extent of the injuries because his focus at the deposition was on the level of accommodations given to Dobson. Chen, in an attempt to attack Dr. Miller's credibility, instead focused his examination of Dr. Miller on prior malpractice lawsuits against her. Dr. Miller died after the deposition but before trial.

Burton & Mendel LLP
Attorneys at Law

FILE MEMORANDUM

From: Roger Cole, Investigator
Date: January 25, 2023
Re: Conversation with Doris Gibbs, information about Dr. Miller, and information about Brooks Real Estate Agency

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At your request, I have investigated certain matters in the Peter Dobson case.

First, I had a conversation with Doris Gibbs. Ms. Gibbs was on the list of potential witnesses supplied by the Brooks Real Estate Agency's lawyer in the Dobson matter, so I wanted to find out what information she might have about the case.

Ms. Gibbs was more than happy to speak with me. She told me that she was a neighbor of Mr. Dobson. She brought food over to the Dobsons' home shortly after Mr. Dobson was released from the hospital. She also visited several times while Mr. Dobson was at home recovering from his injuries.

Soon after Mr. Dobson had regained the use of his arm and leg and was able to leave his home, he and his wife invited Ms. Gibbs and her wife out to dinner to thank Ms. Gibbs for her generosity during Mr. Dobson's recovery. Of course, the question of how Mr. Dobson was injured came up at that dinner.

During dinner, after they had each had a beer, Ms. Gibbs said to Mr. Dobson: "We have all been clumsy before. I bet that you were trying to get to the store quickly. And I would guess, like most of us, you were on your phone at the time." She said that she didn't say this in an accusatory way, but only as a statement of fact and of understanding. She told me that she had fallen several times when not looking where she was going or when distracted. According to Ms. Gibbs, Mr. Dobson failed to respond to the statement she made at the dinner. She said that she thought he was listening—he set his drink down and looked at her while she was speaking. She also said that there was the usual background sound of conversation in the restaurant. After she made the statement, no one said anything for about a minute. After that, the couples chatted about other things. The dinner concluded amicably.

Ms. Gibbs says she knows nothing else about Mr. Dobson's fall. She was not there when the accident occurred and has no personal knowledge about anything related to it.

Second, I confirmed that Dr. Lena Miller died of a heart attack on November 17, 2022. Her obituary was in the Centralia *Herald*, and I found her death certificate in the County Office of Vital Records. I put a copy of the death certificate in the client's file.

I reviewed the deed for the building on Elm Street occupied by Brooks Real Estate Agency and confirmed that it is owned by Brooks Real Estate Agency. And, finally, I reviewed the insurance policy for the building. The property insurance on the building explicitly covers sidewalks adjacent to the property.

DEPOSITION OF DR. LENA MILLER

Taken on September 22, 2022, in the case of PETER DOBSON v. CITY OF BRISTOL

Plaintiff Peter Dobson is represented by attorney Robert Chen. Defendant City of Bristol is represented by city attorney Tanya Lopez.

* * * * *

Att'y Lopez: Dr. Miller, did you examine Mr. Dobson at the hospital on the day of the accident and were you able to review his medical records in preparation for this deposition?

Dr. Miller: Yes. I'm not his regular doctor, but I was on call at the emergency room when he was admitted.

Lopez: What was your diagnosis at the time you examined him?

Miller: Based on the X-rays and MRI imaging, I determined that Mr. Dobson had broken his arm and his leg. But they were both hairline fractures.

Lopez: What does that mean?

Miller: It means that he should not have been incapacitated for very long. He should have been able to walk on the leg after a couple of weeks with a walking cast. His arm might have been in a sling but for no more than six weeks. Depending on his job, he would have needed to be off work for no more than six weeks.

Lopez: What about the concussion?

Miller: It didn't look that serious. He should have been fully recovered in less than a week.

Lopez: What about pain and suffering?

Miller: My observation is that he was not in that much pain. He should have been fine with some ibuprofen and rest.

Lopez: Do you think he is asking for more time away from work than he really needs?

Miller: In my opinion, yes.

[Direct examination on adequacy of accommodations omitted.]

Lopez: I have no further questions. Any cross-examination?

Att'y Chen: Dr. Miller, you have been sued for malpractice on five occasions, is that not true?

Dr. Miller: Yes—I settled all of them only because my insurance company told me to.

[Cross-examination by Att'y Chen on adequacy of accommodations omitted.]

Att'y Chen: Thank you, Dr. Miller. I will ask the rest of my questions at trial.

FRANKLIN RULES OF EVIDENCE

Rule 403: Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 411: Liability Insurance

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

ADVISORY COMMITTEE NOTES TO FRANKLIN RULE OF EVIDENCE 411

The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and absence of liability insurance as proof of lack of fault. At best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse. More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds.

The second sentence points out the limits of the rule, using well established illustrations to the general exclusion. Those are only illustrations. If relevant, evidence of insurance may be admitted to prove any fact other than fault or lack of fault. A court may admit evidence if offered for a permissible purpose. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402 and 403.

Rule 801: Definitions; Exclusions from Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

. . .

(2) ***An Opposing Party's Statement*****.** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

Rule 804: Hearsay Exceptions; Declarant Unavailable

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

. . .

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; . . .

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) ***Former Testimony*****.** Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Reed v. Lakeview Advisers LLC
Franklin Court of Appeal (2015)

Margaret Reed sued her former employer, Lakeview Advisers LLC, alleging age discrimination under the Franklin Age Discrimination Act. Reed prevailed at trial. At that trial, the court had sustained Reed's objection to the admissibility of a purported admission by silence that Lakeview sought to introduce. We hold that the trial court abused its discretion in excluding the testimony.

Reed was 60 years old and had been employed by Lakeview for 20 years as a marketing analyst. On May 1, 2010, she received a notice that her employment was being terminated. She was told to report to the Human Resources Department (HR) to learn the specifics of the termination. Reed went to HR and spoke with its director, Beth Adler. Adler told Reed that she was being fired for failing to meet the requirements of her employment, specifically, that she was often late to work and did not complete projects on time. Adler concluded by saying to Reed: "You know that you weren't doing your job competently." When Adler made these statements to Reed, Reed did not respond.

Franklin Rule of Evidence 801(d)(2) – Hearsay and acquiescence by silence

This case turns on a provision of Franklin Rule of Evidence 801(d)(2), which excludes from the definition of hearsay any statement made by a party and offered by an opposing party. Included within the definition of a statement made by a party is a statement that "the party manifested that it adopted or believed to be true." Courts reviewing this language have included within its ambit statements that were "admitted by silence." In other words if, through silence, a party acquiesces in a statement made by another, that statement may be introduced against the party. For example, in *Hill v. Hill* (Fr. Sup. Ct. 2010), a wife and her husband were having a serious conversation about their marriage. In the course of that conversation, the wife said to the husband: "You are having an affair." The husband failed to respond to that statement. The trial court, as well as our Supreme Court, determined that the husband had acquiesced by silence in the statement. Once a party acquiesces by silence in a statement, that statement can be introduced against that party by any opposing party as if it were a statement made directly by the party.

Four preconditions must be met for a statement to be acquiesced by silence: (1) the party must have heard the statement, (2) the party must have understood the statement, (3) the circumstances must be such that a person in the party's position would

likely have responded if the statement were not true, and (4) the party must not have responded.

Context is exceedingly important in determining whether a party acquiesced to a statement by silence. The court should consider carefully the circumstances surrounding the statement. Thus in *State v. Patel* (Fr. Ct. App. 2010), this court considered whether a statement made to the defendant was acquiesced to by silence. The court ruled that the statement would not be deemed admitted because it was unclear whether the defendant had heard and understood the statement, which was made at a loud party attended by over 100 people. More importantly, at a loud social event with many persons present, someone in the defendant's position would not necessarily be expected to respond.

By contrast, the statements here were made during a serious conversation. Reed heard Adler's statements, and we have every reason to believe that Reed understood them. The statements were made in an office setting, where serious matters were discussed. Indeed, Reed could expect that the reason for her termination would be discussed. One in Reed's situation, who felt that she had been terminated unlawfully, would have responded to the statements made by Adler—that Reed was being terminated for failing to meet the requirements of her employment, that Reed was often late to work and did not complete projects on time, and that Reed knew that she was not performing her job competently. Consequently, we determine that these statements are admissible as non-hearsay. Adler's statements were admissible through silence against Reed. Accordingly, the trial court erred in excluding them from evidence.

Franklin Rule of Evidence 403—Balancing unfair prejudice vs. probative value

In the alternative, Reed argues that the statements should be excluded under Franklin Rule of Evidence 403, which allows a judge to exclude evidence if the danger of unfair prejudice substantially outweighs the probative value of that evidence. Rule 403 applies to every piece of evidence proffered at trial, except those to which some other balancing test applies. "Probative value" is defined as the ability of a piece of evidence to make a relevant disputed point more or less likely to be true. Reed's claim is that the admission by silence will be unfairly prejudicial to her case. Every piece of evidence may be prejudicial to the party against whom it is admitted. Rule 403 allows the judge to prohibit only the use of evidence that is *unfairly* prejudicial, that is, evidence that allows or encourages the jury to reach a verdict based on an impermissible ground or to make an

impermissible inference. The Advisory Committee Note to Rule 403 states: "Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." (In this jurisdiction, courts may rely on the Advisory Committee Notes in analyzing the Rules of Evidence. *Smith v. State* (Fr. Sup. Ct. 2000)). In this case, allowing the admission by silence into evidence had a tendency to weaken Reed's case. But that is not the type of prejudice with which Rule 403 is concerned. Moreover, given the circumstances under which the statement was made, the probative value of the interaction between Reed and the HR director is relatively high. The trial court abused its discretion in excluding the evidence.

Reversed.

Thomas v. WellSpring Pharmaceutical Co.
Franklin Court of Appeal (2017)

In 2011, Lynn Thomas sued WellSpring Pharmaceutical Co., claiming that she had been harmed by an over-the-counter cold remedy it produced called ExitCold. Thomas was one of about 100 persons who used ExitCold, experienced severe side effects, and thereafter sued WellSpring. Several of the "ExitCold cases" have gone to trial. In the case at bar, WellSpring filed a motion *in limine* seeking to admit the testimony of Dr. Todd Shaw from a trial in one of the other ExitCold cases. The plaintiff in that case was Jason Murphy. The trial court granted WellSpring's motion *in limine*. The jury found in WellSpring's favor, and Thomas appealed. We affirm.

To admit former testimony under Franklin Rule of Evidence 804(b)(1), the proponent must satisfy three requirements of the rule: (1) the witness must be currently unavailable; (2) the former testimony was given as a witness at a trial, hearing, or lawful deposition; and (3) the testimony is being offered against a party who had—or in a civil case, whose predecessor in interest had—a similar motive and opportunity to develop the challenged testimony at the earlier proceeding. *State v. Holmes* (Fr. Sup. Ct. 2009). Here, there is no dispute that Dr. Shaw, now deceased, is unavailable. Likewise, there is no dispute that Dr. Shaw's testimony was given at a trial, hearing, or lawful deposition.

Obviously, if the party against whom the evidence is now being admitted is the *same* party against whom the evidence was previously introduced, the only question is whether the party had the same opportunity and motive to develop the testimony.

Here, however, the party against whom the testimony is being introduced (Thomas) is *not* the same party against whom the testimony was previously introduced (Murphy). WellSpring and Thomas vigorously dispute whether Murphy, who is not a participant in the *Thomas v. WellSpring* lawsuit, is properly considered a "predecessor in interest" who had a "similar motive to develop" Dr. Shaw's testimony in the prior proceeding. Thomas argues that Murphy was not a "predecessor in interest" to her and that there was no agency relationship between the two plaintiffs. Thomas also argues that Murphy did not have a similar motive when his case was tried to fully develop facts relating to Thomas's injuries when Dr. Shaw testified.

A. Predecessor in interest

No Franklin court has explicitly taken the position that an agency relationship is a prerequisite to qualifying as a "predecessor in interest" for purposes of Rule 804(b)(1). However, there must be some similarity of interest between the party in the instant case against whom the testimony is sought to be introduced and the party against whom the testimony was introduced in the prior matter. Any other interpretation would nullify the language of Rule 804(b)(1) requiring that there be a "predecessor in interest." *Jacobs v. Klein* (Fr. Sup. Ct. 2002). Franklin courts have not limited the relationship between the parties to the literal meaning of "predecessor in interest" but have required there to be a similarity of interest. Here the parties (Thomas and Murphy) are both suing WellSpring over the side effects caused by ExitCold. The claims for relief are identical. We therefore hold that the introduction of Dr. Shaw's testimony meets the "predecessor in interest" requirement of 804(b)(1).

B. Similar opportunity and motive to develop testimony

Regardless of whether the party against whom the testimony is now being introduced is the same or a different party, the party against whom the evidence was previously introduced must have had "a similar, not necessarily an identical, motive to develop the adverse testimony in the prior proceeding." *Jacobs*. In assessing "similar motive," the court applies a two-part test: "whether the questioner is on the same side of the same issue at both proceedings, and whether the questioner had a substantially similar interest in asserting that side of the issue." *Id.*

As to opportunity, the question is whether the party in the earlier case had the opportunity to develop the testimony—not whether the party did indeed develop the testimony. Indeed, in *State v. Williams* (Fr. Sup. Ct. 2013), a criminal case, the Franklin Supreme Court allowed the admission of the deposition testimony of an unavailable witness from a related civil case. The same counsel represented the defendant in both the criminal and civil cases. The court held that there was no indication that the defendant was denied the opportunity to attempt to undermine the witness or his testimony by asking any questions defense counsel saw fit to ask during the deposition. As to whether the deposition testimony was developed with a similar motive, the court found that, even if the primary motive of a discovery deposition is to obtain a preview of a witness's testimony, this does not exclude the need to understand how the witness's story and credibility might be attacked, that a prudent attorney would explore such avenues, and that the defense

counsel did just that by spending considerable time impeaching the witness and exploring his motive. Further, the defendant did not explain how he was prevented from fully pursuing lines of questioning or how they would have been pursued any differently at trial.

This is a much easier case than *Williams* because the former testimony occurred at a trial, not a deposition. Dr. Shaw's testimony related to the side effects of ExitCold. The testimony was general—it was not directed at the side effects experienced by any particular individual. Murphy, the plaintiff in that proceeding, had the opportunity and similar motive to cross-examine Dr. Shaw, as the issue in the litigation was the same as plaintiff Thomas has here: whether ExitCold caused debilitating side effects. Indeed, in the previous trial, Murphy's attorney engaged in a robust cross-examination of Dr. Shaw on that issue.

C. Rule 403

The plaintiff further argues that, even if the evidence is admissible under Rule 804(b)(1), the trial court should have excluded it under Franklin Rule of Evidence 403 because the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. We believe that the probative value of Dr. Shaw's testimony is extremely high and that there is very little danger of unfair prejudice in this case.

For these reasons we conclude that the trial court did not abuse its discretion in granting the motion *in limine* and allowing the admission of Dr. Shaw's prior testimony.

Affirmed.

MULTISTATE PERFORMANCE TEST DIRECTIONS

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

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

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

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

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

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

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

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

July 2023
MPT-2
Item

Martin v. The Den Breeder

Martin v. The Den Breeder

FILE

LIBRARY

Law Offices of Bradley Wilson
2405 Main Street
Creedence, Franklin 33805

MEMORANDUM

To: Examinee
From: Bradley Wilson
Date: July 25, 2023
Re: Interview with Anthony Martin

I talked with Anthony Martin yesterday. He was asking for advice about a lawsuit he may want to file. As you know, I have a trial starting on Monday and I do not have time to get back to Martin quickly, so I need you to write a letter advising him about his potential claim.

Martin bought an Irish wolfhound puppy from a breeder called "The Den Breeder," a sole proprietorship operated by a man named Simon Shafer. At the time of purchase, Martin signed a contract and paid $2,500. A month later, Martin learned from his veterinarian that the dog showed signs of a "liver shunt," a condition that can be surgically corrected. When Martin talked with Shafer about it, Shafer refused to take responsibility or to pay any of the costs of treating the condition.

Martin wants to keep the dog, whom he has named Ash. At the same time, he is very angry at Shafer and wants to recover what he paid for the dog and to have Shafer cover the cost of corrective surgery. He wants our advice on his legal rights.

Please review the attached materials and prepare an advice letter to Martin. You can assume that Shafer is both a "seller" and a "dealer" under the relevant statutes. Do not include a separate statement of facts in the letter. Instead, incorporate relevant information into the advice that you give. Write in a way that someone unfamiliar with legal concepts will be able to understand. In your discussion, identify both the strengths and potential weaknesses of Martin's prospective claim.

Law Offices of Bradley Wilson
2405 Main Street
Creedence, Franklin 33805

MEMORANDUM

To: Associates
Date: August 5, 2021
Re: Advice letters

The firm follows these guidelines in preparing advice letters to clients:

- Identify each issue separately and state as a question.
- Following each issue, provide a concise one- or two-sentence statement giving a "short answer" to the question.
- Following the short answer, write a more detailed explanation and analysis of each issue.
- Do not write a separate statement of facts but integrate the facts into your analysis.
- Explain how the relevant authorities combined with the facts lead to your conclusions. Make sure to include legal citations.
- Bear in mind that, in most cases, the client is not a lawyer. If you must use technical terms or jargon, make sure to provide a concise definition.
- Pay particular attention to the structure and sequence of your discussion, so that your client can follow your reasoning and the logic of your conclusions.

Transcript of Interview with Anthony Martin, July 24, 2023

Att'y Wilson: Thank you for coming in. I am glad you could meet me after hours.

Anthony Martin: I'm glad you could make the time. I know you're busy.

Wilson: It's no problem. Tell me how I can help you.

Martin: OK. About a month and a half ago, I bought a dog that turned out not to be healthy. I spent a lot of money to buy him. And I learned that he needs surgery, and it's going to cost a lot of money. I am angry at the breeder.

Wilson: Tell me about the dog.

Martin: He is a male Irish wolfhound. I call him Ash. He's about three and a half months old now. And he is a great dog—friendly, happy, easygoing. Just what I wanted.

Wilson: Where did you buy him?

Martin: I had been looking for a wolfhound for a while and got a referral to a breeder who raised both Scottish and Irish wolfhounds. The man's name is Simon Shafer. He calls his business "The Den Breeder." His place is way out on the county line, out in the country.

Wilson: Tell me about the sale.

Martin: I called Shafer up and said I was interested in an Irish wolfhound. He said he had a new litter of eight-week-old puppies. We set up a time for me to see them. When I got there, I could see right off that Ash was the right dog, and he seemed to take to me. We made a connection. So I asked Shafer whether I could buy him. Shafer said yes, of course, and told me the price: $2,500.

Wilson: That sounds like a lot.

Martin: Well, not for an Irish wolfhound. And Ash really seemed like a special dog. I was willing to pay it.

Wilson: Did you ask about his health?

Martin: Yes, I did. Shafer said that his dogs were healthy; and they certainly looked lively and active. I didn't think to ask more.

Wilson: When did you pay him?

Martin: I paid him a few days later when I went back to pick up Ash.

Wilson: Did you sign anything?

Martin: Yes. At that point, Shafer had me sign a contract. He called it a "dog purchase agreement." Here it is. And Shafer had the "AKC Dog Registration Application,"

which would allow me to register Ash with the American Kennel Club. The form looked properly filled out. I gave Shafer the check for $2,500, he gave me the papers, and I left with Ash.

Wilson: Did Shafer say anything else about Ash's condition?

Martin: No, nothing else.

Wilson: What happened next?

Martin: I got Ash home, and we started getting used to each other, including house training and everything. But after about a month, I began to notice that Ash was having some trouble, especially after eating. He seemed confused and disoriented and for hours would just lie down without moving. It seemed like he was . . . depressed, if that's the right word.

Wilson: What did you do?

Martin: I took Ash to my veterinarian and asked her to look him over. That's when I learned what a liver shunt is and what effect it can have. My vet said she should test him for it, and she did. After a few days, she confirmed that Ash had a liver shunt. I brought you a printout of an article she recommended that explains it.

Wilson: Thank you. Who is your vet?

Martin: Dr. Turner. Claire Turner. I asked her what could be done about the liver shunt, and she said there was surgery that could correct the condition. A few days later, she sent me an email confirming the diagnosis and giving me an estimated price for the surgery: over $8,000, if you can believe it.

Wilson: That's . . .

Martin: More than three times what I paid for Ash, yes. I was really angry. I called Shafer the next day and told him what I wanted: to keep Ash, to get a refund, and to have him pay for the surgery. Shafer refused. He said that I should have gotten Ash tested as soon as I bought him and that a test would have shown the disease. Since I waited so long to let him know, he said that he had no legal obligation to pay me.

Wilson: All right. I see why you came in to talk with me. I do know that there are laws in Franklin that protect people who buy pets. Let me look into them and either I or someone in my office will get back to you.

The Den Breeder
Dog Purchase Agreement

Buyer agrees to purchase an Irish Wolfhound puppy from Breeder for the sum of $2,500.

All canines have the potential for genetic or congenital disease. Unfortunately, these diseases cannot always be eliminated. Breeder tries to minimize (not eliminate) these conditions in good faith.

To the best of Breeder's knowledge, the dog is in good health at the time of sale. If the dog shows signs of illness, Buyer agrees to take the dog to a licensed veterinarian to determine whether the dog has any serious illness. Should it be determined that the dog is suffering from a serious disease clearly attributable to Breeder, which would prevent it from being a companion, the dog may be returned to Breeder within 48 hours of purchase, at Breeder's expense, for replacement of the dog. This dog is sold as a companion.

If, before the dog is one year old, the dog is diagnosed with a congenital defect that would prevent the dog from being a companion, Buyer must notify Breeder in writing within 24 hours of the diagnosis and provide a copy of a report from a veterinarian confirming that diagnosis. Breeder may then seek a diagnosis from a veterinarian of Breeder's choice, and Buyer must make the dog available for that purpose.

Dated: June 12, 2023

Simon Shafer
Simon Shafer, Breeder

Anthony Martin
Anthony Martin, Buyer

Email from Dr. Claire Turner
July 18, 2023

From: Claire Turner <cturnervet@franklin.med>
To: Anthony Martin <amartin@franklinres.org>
Subject: Diagnosis and treatment of male Irish wolfhound puppy, Ash

Mr. Martin:

Thank you for bringing in your puppy, Ash, a male Irish wolfhound, for treatment. This email confirms our conversation about his diagnosis and treatment.

I examined Ash on July 16, 2023, at my clinic. He appeared well fed and cared for. You reported that he seemed lethargic and weak at home, that he seemed disoriented and lacked coordination, and that he would spend time pacing and circling. During his overnight stay in our clinic, we were able to confirm these observations.

We performed bile acid testing on Ash, a procedure that requires fasting and blood draws over a period of 12–16 hours. Ash tolerated the test well and without pain. He is a calm dog with a great temperament. The test results indicate liver dysfunction, specifically a portosystemic shunt, a congenital defect of the liver. I've attached a document describing liver shunts in wolfhound puppies.

Based on test results and observation, I believe with some confidence that surgical remedies can correct Ash's condition. Liver shunt is a known condition, and surgical procedures are now well-known and relatively reliable. I must add that no surgical intervention is without risk, but we have diagnosed this condition relatively early and have reason for a positive outlook. The cost will come to at least $8,000, and Ash will require post-surgical treatment as well.

You asked whether earlier testing would have detected this condition, specifically at the time of Ash's purchase. It is my understanding that most reputable Irish wolfhound breeders test puppies before sale and provide the results of the test to purchasers. However, I must add that differences of opinion exist about when to test a puppy. It is possible that testing at roughly eight weeks might not show a liver shunt condition that would emerge later.

I am prepared to sign the form certifying my opinion. Thank you again for introducing us to Ash. I look forward to hearing from you.

Email Attachment: *Liver Shunt Basics for Wolfhound Puppies*

Getting an Irish wolfhound puppy is exciting! There are all sorts of new things to learn, and one of those is what a liver shunt is (also called PSS for portosystemic shunt), and why it is important to test wolfhound puppies for this condition. A simple and inexpensive blood test can tell the breeder and you if the puppy has this deformity before the puppy goes to its new home.

The liver is a highly complex organ with vital functions. It filters blood and removes toxins that are created during the normal digestion of food. During pregnancy, the mother's liver does all the work for the puppies. Blood vessels bypass or "shunt" around the puppy's liver and allow the blood to be detoxified by the mother's liver. Shortly after birth, these vessels close naturally, and a normal puppy's liver takes over the detoxification process.

A liver shunt problem arises when these blood vessels do not close. As a result, the puppy's blood continues to bypass the liver. That prevents the puppy's liver from filtering toxins from the blood, which can create symptoms such as depression, seizures, blindness, and disorientation. These symptoms are worse shortly after a meal when toxins are at their highest level. There are both medical and surgical treatment options for liver shunts with varying degrees of success. Most affected puppies start showing signs within weeks of being in their new home.

Liver shunts that do not close are viewed as congenital defects. The tricky part of a liver shunt condition is that pups may not show signs until they are 8, 10, or 12 weeks old or even older. There are also different ways the shunts can form, which create varying levels of clinical signs. No one can tell just by looking at a puppy whether it has a liver shunt condition or not.

Veterinary science disagrees over when to test for a liver shunt. Most specialists recommend delaying a test until 16 weeks of age. Moreover, occasional false positives and negatives occur. Even so, you should ask your puppy's breeder whether the breeder has performed a liver shunt test and, if so, what the results show.

Excerpts from the Franklin Uniform Commercial Code

§ 2-314 Implied Warranty: Merchantability; Usage of Trade

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind . . . .

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

. . .

(c) are fit for the ordinary purposes for which such goods are used; . . . .

§ 2-316 Exclusion or Modification of Warranties

. . .

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it, the language must mention merchantability and in case of a writing must be conspicuous . . . .

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him . . . .

§ 2-714 Buyer's Damages for Breach in Regard to Accepted Goods

(1) Where the buyer has accepted goods and given notification . . ., he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted . . . .

Excerpts from the Franklin Pet Purchaser Protection Act

§ 753 Sale of animal

(a) A purchaser has a remedy under this section if

(1) within 14 business days following the sale of an animal subject to this article, a licensed veterinarian certifies such animal to be unfit for purchase due to illness or the presence of symptoms of a contagious or infectious disease; or

(2) within 180 calendar days following the sale of an animal subject to this article, a licensed veterinarian certifies such animal to be unfit for purchase due to a congenital malformation that adversely affects the health of the animal.

(b) In the circumstances stated in subsection (a) of this section, the pet dealer shall afford the purchaser the right to choose one of the following options:

(1) return the animal and receive a refund of the purchase price including sales tax and reasonable veterinary costs directly related to the veterinarian's certification that the animal is unfit for purchase pursuant to this section;

(2) return the animal and receive an exchange animal of the purchaser's choice of equivalent value and reasonable veterinary costs directly related to the veterinarian's certification that the original animal is unfit for purchase pursuant to this section; or

(3) retain the animal and receive reimbursement from the pet dealer for veterinary services from a licensed veterinarian of the purchaser's choosing, for the purpose of curing or attempting to cure the animal.

(c) If a pet dealer wishes to contest a demand for refund, exchange, or reimbursement pursuant to this section, such dealer may require the purchaser to produce the animal for examination by a licensed veterinarian designated by such dealer.

(d) Nothing in this section shall in any way limit the rights or remedies that are otherwise available to a purchaser under any other law.

Cohen v. Dent
Franklin Court of Appeal (2020)

On September 3, 2018, Marla Cohen purchased a three-month-old bulldog, which she named Buddy, for $7,000 from Larry Dent, a dog breeder doing business as Dent Bulldogs. Four months later, in January 2019, the bulldog began limping and was incapable of bearing weight on his left rear leg. After an examination and tests, Cohen's veterinarian diagnosed Buddy with hip dysplasia. The veterinarian suggested surgery to correct the hip dysplasia, at a cost of roughly $4,000. To date, that surgery has not occurred.

The veterinarian signed a "Certification of Unfitness of Dog or Cat for Purchase" using a state-approved form. Cohen sent a copy of that certification to Dent and informed Dent that her puppy was suffering from hip dysplasia. Dent sent back a copy of the inartfully drafted contract, which states:

> There is a one-year guarantee on the following congenital problems. Severe Hip Dysplasia, Bad Heart, Liver and Kidneys. For this guarantee to be valid a customer cannot euthanize a dog if expecting a seller to replace a dog as most breeders want their dogs back. Also the customer must submit, when needed, X-rays or blood tests, etc. to be conclusive of a congenital problem.

Relying on this language, Dent refused to pay for the surgery and suggested that Cohen return Buddy to him in exchange for a new puppy. Cohen refused to return Buddy because she and her family had become attached to the dog.

Cohen then sued Dent, claiming that Dent had breached their contract by selling her a bulldog with a congenital disorder. She sought damages for the surgery necessary to correct the hip dysplasia. In addition, she alleged that, had she known of Buddy's condition, she would not have purchased him, and sought to recover the entire purchase price of $7,000.

At trial, relying on the Franklin Pet Purchaser Protection Act (FPPPA), Dent asserted that Cohen's remedies were limited by their contract. The trial court ruled in Dent's favor, finding that the contract limited Cohen to returning the dog and requesting a replacement. Cohen appealed.

When interpreting a written contract, we first review the language in the document itself. If the terms of the contract are unambiguous, we apply those terms to the dispute

at hand unless they conflict with relevant statutes. If the terms of the contract are ambiguous, we resolve those ambiguities in part in reliance on those same statutes. Accordingly, we review the contract in this case and then turn to the impact of the FPPPA and the Franklin Uniform Commercial Code.

Ambiguity of the Contract

Dent concedes that he drafted the contract between Cohen and Dent and did not ask a lawyer to review it. In fairness to Dent, the contract does suggest what a buyer may do after purchasing a dog with a congenital condition and provides some detail about which conditions are eligible for that remedy.

That said, the contract contains ambiguities that directly affect the resolution of this dispute. It appears to state a one-year remedy when a pet has a congenital condition but fails to specify the start date for that year. It appears to require the buyer to make a choice between several remedies but does not address refunds or other monetary damages. It appears to require the buyer of the animal to provide test results verifying a congenital condition but only requires them "if needed" and states no time limit within which the buyer must make a claim.

In short, this contract does not answer most of the key issues in this case. When a contract contains ambiguous terms, a court must construe it most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language. *O'day v. Schmidt* (Fr. Sup. Ct. 1947). Thus, we reject Dent's claim that the contract bars any recovery by Cohen. We next consider the impact of the relevant statutes.

Franklin Pet Purchaser Protection Act

The Franklin Pet Purchaser Protection Act (FPPPA), codified as § 753 of the Franklin Animal Welfare Code, governs the sale of household pets, including dogs. Sometimes referred to as the "Pet Lemon Law," the FPPPA provides purchasers with a remedy if they provide a certification by a licensed veterinarian about the animal's condition. The purchaser must provide this certification within certain time limits: 14 business days for an illness or symptoms of an infectious disease, or 180 calendar days for a congenital defect. In this case, both parties agree that Buddy's hip dysplasia is a congenital defect and that Cohen acted within the statutory period.

The FPPPA describes three remedies available to a purchaser:

— the right to return the animal and receive a refund;

— the right to return the animal and receive a replacement animal; or

— the right to retain the animal and be reimbursed veterinary costs incurred for the purpose of curing or attempting to cure the animal.

At the very least, these provisions give Cohen the right to keep Buddy and to request that Dent pay the cost of surgery necessary to correct the hip dysplasia. We do not decide today whether a purchaser can waive these rights in a contract that unambiguously provides otherwise. However, where the contract contains significant ambiguity, as it does here, we find no waiver. Cohen may assert her rights under the FPPPA.

Dent now asserts that the FPPPA constitutes Cohen's only remedy and that the options for relief it identifies foreclose any other remedies. But the explicit language of § 753(d) of the Pet Lemon Law undercuts that assertion: "Nothing in this section shall in any way limit the rights or remedies that are otherwise available to a purchaser under any other law." We thus turn to the provisions of the Uniform Commercial Code.

Uniform Commercial Code

Article 2 of the UCC also governs the sale of animals. Our cases have uniformly held that dogs are "goods" and that pet stores and breeders are "merchants" as defined in Article 2, § 2-104. Further, a buyer of nonconforming goods may "recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable." UCC § 2-714. Buddy must be considered a "nonconforming good" because Cohen did not get what she bargained for: a healthy dog. *See Jackson v. Mistover Kennels* (Fr. Ct. App. 2005) ("Bo-Peep," a Maltese, held to be a nonconforming good where the buyer paid a premium for a "teacup" Maltese and received a standard Maltese).

Further, the sale of an animal creates an implied warranty of merchantability. Goods are merchantable if they "pass without objection in the trade under the contract description" and "are fit for the ordinary purposes for which such goods are used." UCC § 2-314(2)(a) and (c). The certification by the veterinarian that Buddy was "unfit for purchase" establishes that Buddy could not "pass without objection." Moreover, Buddy is not fit for the ordinary purpose for which he was purchased. Cohen testified that her dog cannot walk, run, or jump without pain. *See Dalton v. Jackson* (Fr. Ct. App. 1997) (A parrot who died two weeks after purchase deemed unfit for ordinary purpose: "At least one purpose is to stay around as a live bird.")

Finally, Dent relies on this court's decision in *Tarly v. Paradise* (Fr. Ct. App. 1995). In *Tarly*, a buyer sued for breach of the warranty of merchantability when he bought a Ragdoll cat with a congenital heart defect, hypertrophic cardiomyopathy. The parties' contract explicitly required an examination by a veterinarian within two days of purchase. The buyer did not obtain an examination but later sued after the heart condition became apparent four months later. On appeal, the court noted unrebutted testimony that showed that an examination would have disclosed the heart condition at the time of sale. The court ruled against the buyer, holding that no implied warranty existed "with regard to defects which an examination ought in the circumstances to have revealed to him." UCC § 2-316(3)(b). By contrast, in the case at hand, the contract has no explicit requirement of inspection within a limited time frame. Dent's reliance on *Tarly* is misplaced.

Under UCC § 2-714(2), the measure of damages is the difference at the time of sale between the dog as warranted and the actual dog. And in other cases involving the sale of animals, our courts have repeatedly refunded the whole of the purchase price for the animal, on the assumption that "no buyer would agree to purchase an animal it knew to have a congenital defect that might lead to death or might require expensive surgery to correct." *Dalton*.

Dent argues that an award of the full purchase price under UCC § 2-714(2) is "unreasonable" under § 2-714(1), which provides that a court may award damages for "nonconformity of tender . . . in any manner which is reasonable." *Id*. This argument misconstrues the relationship between the sections. Section 2-714(1) is a general rule governing awards of damages for nonconformity of tender. By contrast, § 2-714(2) is a more specific rule that applies to those cases in which damages may be awarded for a breach of warranty. Because this is a case involving breach of warranty, the trial court should apply the more specific standard under § 2-714(2) and not the more general standard under § 2-714(1).

In conclusion, Cohen is entitled to receive remedies under both the FPPPA and the Uniform Commercial Code. Reversed and remanded.

MULTISTATE PERFORMANCE TEST DIRECTIONS

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

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

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

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

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

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

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

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