February 2023

Ohio Bar Examination

Multistate Essay Examination
Questions & Selected Answers

Multistate Performance Test
Summaries & Selected Answers

Published June 2023

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THE SUPREME COURT OF THE STATE OF OHIO

OHIO BAR EXAMINATION

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

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

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

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

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


THE SUPREME COURT OF THE STATE OF OHIO

Question 1

QUESTION

One year ago, Joan executed a will in which she left her entire estate to her only daughter. At that time, Joan's daughter, Joan's granddaughter (the only child of Joan's daughter), Joan's only son, and Joan's three grandsons (children of her son) were living. Joan's son and her three grandsons had extensive criminal records for theft and burglary.

Joan was not close to her children and grandchildren. She rarely saw any of them, even on holidays, although she regularly sent them birthday cards and inexpensive presents.

Three years ago, Joan's doctor had prescribed her a drug that was known to produce hallucinations in some patients. Joan had difficulties with the drug and began to experience frequent hallucinations leading to her delusion that the male line of her family was "cursed" by Martians. Nonetheless, she continued taking the drug because it was the only medication available to control her medical condition.

When she went to her lawyer to draft her will, she told her lawyer that she wanted to leave all her property to her daughter and nothing to her male line. She explained, "Leaving the males in my family anything valuable would be a complete waste on burglars and thieves."

For the last five years, Joan had regularly had lunch with several friends. All of them were much wealthier than Joan. At these lunches, she often told her friends that she was a "multimillionaire" and owned both a "luxurious" home and a "very expensive" car. They had no reason to doubt Joan's claims because she had never invited them to her home and she took cabs to their lunches. In fact, Joan was never a millionaire, and she never owned either a luxurious home or an expensive automobile. She lived in a modest apartment, and her primary source of income was her Social Security benefits. She monitored her bank account regularly and reconciled her bank statement every month.

One month ago, Joan died, survived by her daughter, her granddaughter, her son, and her three grandsons. At her death, Joan owned no significant assets other than her bank account containing $100,000.

1. Under the insane-delusion rule, is Joan's will invalid? Explain.
2. Do these facts establish that Joan's will is invalid because she lacked the general mental capacity to execute a will? Explain.
3. Which, if any, of Joan's surviving relatives has standing to contest Joan's will? Explain.

ANSWER

Issues 1 and 2: Joan's "Insane Delusions" regarding her belief that the male line of her family was "cursed" by Martians did not render her will invalid, nor did she lack mental capacity to execute a will, because she had capacity to execute a will and leaving her "male line" out of her will was due to a specified reason not connected to her insane delusion, namely criminal activity.

For a will to be valid, amongst other things, a testator must have the capacity to execute a will. This capacity requirement is a more lenient standard than the typical capacity requirements found in criminal and tort law. For a testator to have capacity to execute a will, the testator must be of legal age (18), be able to readily identify her property, be able to identify the beneficiaries of her will, and understand the ramifications of the distributions of her will. Any "insane delusions" a party may suffer may render a will invalid if the contestant of the will was left out or their share was decreased due to those delusions.

Here, Joan will be bound by the testamentary requirements for capacity, rather than the typical requirements of criminal and tort law. Though her age is unknown, it is presumed Joan was of age given her having children and grandchildren, meeting the first requirement. With regards to Joan's ability to identify her property, the facts show that Joan "monitored her bank account regularly," and further that she "reconciled her bank statement every month." Joan apparently did not own much, but one who is able to monitor their bank account regularly, and reconcile their bank statement monthly when all they apparently own is $100,000 in a bank account is more likely than not capable of identifying all of her property. As for the beneficiaries of her will, Joan was able to identify that she wanted all of her property to go to her "female line" consisting of her daughter and granddaughter, and to leave her "male line" consisting of her son and three grandsons out of her will. Furthermore, Joan knew the ramifications of her testamentary gift, as she intended to leave her "male line" out of her will, stating, "Leaving the males in my family anything valuable would be a complete waste on burglars and thieves," as her reasoning for doing so.

In terms of whether her insane delusion would invalidate the will, it would seem that she believed Martians had placed a curse on her male line. While it may be another reason that she left them out of the will, it is more likely that her claim about them being criminals, which is factual, is why she left them out, given her statement above about it being a "complete waste" to leave them anything. The male line may argue that her insane delusions may have caused her to leave them out completely, as she claimed she was a millionaire to her friends. However, she had been doing that for only five years, while only on medication for the last three. Her claims about being wealthy were more likely due to embarrassment or trying to oversell herself to her wealthy friends, rather than as part of another delusion.

Therefore, the will should be found to be valid, as Joan had capacity and her insane delusions were not responsible for her leaving her "male line" out of her will.

Issue 3: Joan's son and daughter have standing to contest Joan's will, as they are immediate relatives/descendants of Joan, who would take intestate.

When a testator executes a will, those who may take had she not had a will in intestacy have standing to challenge the validity of the will.

Here, Joan's son is her immediate relative/descendant, who happens to be left out of the will, and would be able to take it if the will were invalid. Joan's daughter would also be able to take, but would most likely not contest the will, given she is receiving everything (though she can contest). The granddaughter and grandsons would not take in intestacy, as Joan's son and daughter are alive, and therefore they have no standing, absent an intestacy law that allows them to receive in intestacy, regardless of their parents being alive.

Therefore, Joan's son and daughter have standing to contest the will due to their right to recover under intestacy, if a will were found to be invalid.

Question 2

QUESTION

Homeowner ordered a pizza to be delivered to his house for lunch. When the pizza delivery driver (Driver) arrived, Homeowner invited him to step inside while Homeowner retrieved his wallet.

A minute later, two police officers arrived at Homeowner's house to execute a valid warrant to search the house for counterfeit $100 bills. Although the warrant did not explicitly authorize a "no-knock" entry, the officers kicked open Homeowner's front door and entered the house without knocking and without announcing their identity and purpose.

One officer detained Homeowner and Driver in the hall near the front door while the second officer began to search the house. The first officer saw a lump in the back pocket of Driver's pants, which she thought could be a handgun. Concerned that Driver might harm her if he had access to a handgun, the officer decided to pat him down. While patting him down, the officer discovered that the lump was not a weapon but a soft object. She could not determine what the object was by patting the outside of Driver's pants, so she reached into his pants pocket and retrieved a plastic bag containing marijuana. Possession of marijuana is a crime in the state. The officer seized the bag of marijuana.

Meanwhile, the second officer, who was searching the house, noticed a desktop computer sitting on Homeowner's kitchen counter. The officer saw a serial number visible on the top of the computer, and she discovered, through a quick search using a law-enforcement app on her cell phone, that the serial number appeared on a list of serial numbers of recently stolen computer equipment. She seized the computer.

In Homeowner's bedroom, on a nightstand next to the bed, the second officer found a two-inch-tall, unlabeled, transparent medicine bottle that contained several pills with no markings on them. She seized the bottle and the pills. Later testing by the police crime lab showed that the pills were illegal narcotics. The second officer completed her search of the house without finding any counterfeit money.

The officers arrested Homeowner and Driver, and the state prosecuted them based upon the items seized in the search. Homeowner and Driver challenged the admission of evidence based only on rights protected by the United States Constitution. Neither Homeowner nor Driver has raised any constitutional objections to their brief detention during the search.

1. Should the officers' entry into the house result in the exclusion of evidence? Explain.
2. Assuming that the officers' entry into the house does not result in the exclusion of evidence, should the following conduct result in the exclusion of evidence?

   a. The officer's seizure of the marijuana from Driver;

   b. The officer's seizure of the computer from Homeowner; and

   c. The officer's seizure of the narcotics from Homeowner.

   Explain.

ANSWER

1. The officer's entry into the house should not result in the exclusion of evidence. At issue is whether the no-knock should result in the exclusion of evidence obtained from the execution of an otherwise valid search warrant. The Fourth Amendment provides against unreasonable search and seizures in areas constitutionally protected as having a reasonable expectation of privacy. The dwelling is one of the most highly protected areas of privacy. Thus, a valid warrant would be needed for entry, absent some exception to the warrant requirement such as emergency, hot pursuit, exigent circumstances, or consent by someone authorized. The exclusionary rule has been developed by the Court as a remedy to protect citizens against searches which violate the Fourth Amendment.

The facts provide that the search warrant here was valid. This means that the warrant was obtained upon probable cause presented by an officer in a sworn affidavit to a detached and neutral magistrate. Probable cause contemplates the totality of the circumstances. Warrants must also state with particularity the items and areas to be searched. The idea behind the Fourth Amendment is a result of the not-so-distant tyranny imposed by England in the colonies, in particular general warrants. Search warrants are typically to be conducted by a knock and announce method unless there is some reason not to such as fear for officer safety by alerting the occupants. Here there was no such fear, so the no-knock was inappropriate. However, failing to knock will not invalidate the otherwise valid warrant, and the resulting evidence should not be excluded on the basis of failing to knock.

Standing is also required to try to exclude evidence. To have standing you must have a reasonable expectation of privacy in the place. The homeowner would have a reasonable expectation of privacy here throughout the whole house. The driver would not have standing to any search related objections to the home generally, but a search related objection related to his body pat down would.

2. a. The marijuana evidence against the driver should be excluded. As mentioned, the driver has standing for this portion of the objections but not the whole house. At issue here is whether this was a valid *Terry* frisk. While full seizure of a person requires either an arrest warrant or probable cause, the police are authorized to conduct a brief "*Terry*" stop and pat down if there are reasonable articulable facts to do so. The scope of the pat down allows them to check for weapons for the safety of the officers and bystanders and also allows them to retrieve contraband that is immediately apparent. Here, the initial pat down was authorized for safety reasons as the officer feared Driver had a handgun in his pocket. However, the officer then determined the object was not a handgun but rather a soft object, which the officer could not determine. Here, had the officer, through their skill and experience with narcotics as a result of being an officer, immediately recognized the soft object as contraband, this would have likely resulted in an appropriate seizure under *Terry*. However, once the officer knew it wasn't a weapon, and didn't know what the object was, the scope of the *Terry* frisk should have ended. Therefore, the marijuana should be excluded.

b. The officer's seizure of the computer is valid under the plain view doctrine. At issue, is whether the plain view doctrine would make this a valid seizure, despite the warrant being for counterfeit bills. While warrants must be limited in scope to particular items and areas as discussed above, an officer is not required to shield their eyes or ears from evidence in "plain view." To be valid the officers must lawfully be in the area where the plain view evidence was discovered. Here, the computer was sitting out and the officer was able to read the serial number right off the top. Had the officer manipulated the machine by turning it over, opening it up, or turning it on, the search would have been beyond the scope of the plain view doctrine. However, the facts provide that the computer was out on the kitchen counter with the serial number visible. The officers would be authorized to be in that area of the house as a result of the warrant. The scope of area provided by the warrant will be essentially anywhere, as dollar bills could be hidden in even a tiny hiding spot. The warrant will allow them to search anywhere the bills might reasonably be found. Here, the computer on top of the counter was clearly within an acceptable area to be searched, the serial numbers were able to be read without manipulating the object, so the search is valid under plain view.

c. The seizure of the narcotics is not likely valid and will be excluded. The issue here is whether the search of the pill bottle exceeded the scope of acceptable areas to be searched provided by the search warrant. As mentioned in part b., searching for counterfeit bills would certainly give the officers authority to search even in tiny hiding spots. A pill bottle, if not for it being transparent, would likely even be acceptable as bills could be rolled up in a pill bottle. However, the big catch here is that the pill bottle was transparent. The officer would immediately be able to see in the bottle that the target of their investigation, the bills, were not in the pill bottles. That should have been immediately apparent, and the search of the pill bottle contents should have gone no further. If the search warrant was for illegal pills, the search and entry into evidence would likely be fine and on point to the warrant. However, this search violates the reasoning behind the particularity requirement of the warrant requirement. That said, the possible counter argument is that the officer was able to recognize the pills as being contraband without further investigating. This would go back to the plain view exception, if the officer was in the area validly, which they were, and could recognize through the container that the pills were contraband then the pills may be admissible. However, it would seem that further investigation would be needed before determining they were contraband, such as actually removing the pills to check for markings and possibly lab testing. For all the officer knows they could have been sugar tablets. As such, the pills should be excluded.

Question 3

QUESTION

Big City, in State A, and Small Town, in State B, are located 10 miles apart.

A woman and a man were driving in State B when their cars collided with each other. The collision seriously injured the man. Shortly after the collision, the man sued the woman in the federal district court for the District of State B, properly invoking the court's diversity jurisdiction. The woman is a citizen of State A; the man is a citizen of State B. The man's complaint sought damages of $250,000 and alleged that the woman's negligent driving had caused the accident and his injuries.

The woman immediately contacted her automobile insurance company to notify it about the lawsuit and to ask the company to provide an attorney to represent her in the action and to indemnify her against any liability, as required by the terms of the insurance policy. The insurance company, however, refused to provide an attorney. The insurance company also told the woman that because she had not paid her premiums for several months before the accident, her policy had lapsed and therefore did not cover the accident. The woman insisted that she was current on her payments and that the policy should still be in effect.

The woman then went to the clerk's office for the federal district court for the District of State B, which is located in Small Town. She timely filed an answer to the man's complaint. She simultaneously timely filed a complaint against the insurance company, naming it as a "third-party defendant" in the action pending against her in that court and alleging that the insurance company was obligated under the insurance policy to defend her in the man's suit and to indemnify her if she was found liable to the man. She also obtained from the clerk of court a summons to the insurance company requiring the company to file an answer to the woman's complaint or be subject to a default judgment. She then returned to State A, where she hired a process server. Ten days later, the process server personally delivered the summons and complaint to the president of the insurance company at its headquarters in Big City, State A.

The insurance company does no business in State B and has no facilities in State B.

The insurance company moved to dismiss the complaint against it. The district court granted the motion, ruling that (a) the insurance company "cannot be joined to the suit as a third-party defendant because its presence is unnecessary to resolve the dispute" between the man and the woman and (b) "the court lacks personal jurisdiction over the insurance company because the company lacks sufficient contacts with State B."

1. Do the Federal Rules of Civil Procedure permit the woman to bring the company into the action as a third-party defendant? Explain.
2. Assuming that the Federal Rules of Civil Procedure permit the woman to bring the company into the action, does the court have personal jurisdiction over the company, despite the company's lack of contacts with State B? Explain.
3. Under the Federal Rules of Civil Procedure, what actions, if any, could be taken by the district court to allow the woman to immediately appeal the court's dismissal of her complaint against the insurance company? Should the court take those actions? Explain.

ANSWER

1. The FRCP allow the woman to join the insurance company into the action as the claim arises out of the same nucleus of operative facts as that of the man's claim.

Under the FRCP, a defendant may implead a third party where that third party may be liable to the defendant should the defendant be liable to the plaintiff, as long as the claim arises out of the same common nucleus of operative facts. Here, the woman is claiming that the insurance company is liable to her if she ends up being liable to the plaintiff. Though there is an issue with whether she has paid her premiums, there is no doubt the claim arises under the same common nucleus of operative facts such that it amounts to the same case or controversy. Here, if the woman has, in fact paid her premiums, the company would indeed be liable to pay out on the claim that results from the woman's accident with the man. There is a close nexus between the claims.

Therefore, the FRCP permit the woman to bring the company into the action as a third-party defendant.

2. The court has personal jurisdiction over the company under the 100-mile bulge doctrine and can exercise personal jurisdiction over the company, as it would not offend traditional notions of fair play and substantial justice.

Under the FRCP, a court has personal jurisdiction over a party where that party joined by one of the joinder rules, under the 100-mile bulge allowance under the rules. Here, the corporation's headquarters are located in "Big City" in state A, which is only 10 miles from where the court in State B is located. As such, the court may exercise personal jurisdiction over the company, so long as it does not offend traditional notions of fair play and substantial justice.

Here, the company is only a few miles from the courthouse. Additionally, the woman properly served the company with a summons and complaint at the company's headquarters. Therefore, the company is on notice as to the complaint. The company would have to submit a compelling reason why fighting a case 10 miles from their headquarters would not comport with substantial justice and fair play, which it is extremely unlikely to be able to do.

Therefore, the court, under the 100-mile bulge doctrine, can exercise personal jurisdiction over the company, as it would not offend traditional notions of fair play and substantial justice.

3. The district court could certify that case to the appeals court, indicating it is a final judgment and that there is no reason for delay, allowing for an immediate appeal, which the appeals court should grant.

Under the FRCP, where a district court has ruled on a motion, the court may certify to the appeals court that the issue is final and that there is no reason for delay in appealing the decision. Here, the court has ruled on a motion that is a collateral matter. The claim could move forward without the company, so there is no reason to delay sending this motion up on appeal. Additionally, the woman's rights on the collateral matter would be substantially impaired, as she would have to bring a separate suit against the company, wasting the court's time and resources, and costing the woman undue hardship and delay.

Therefore, the district court could certify that the judgment on the motion is final and there is no reason for delay, and that it be sent to the appeals court for review. Given the nexus between the cases, the need for efficiency and the hardship the woman might face if the appeal is not taken, the appeals court should take the appeal.

Question 4

QUESTION

Shortly after passing the State X bar examination and being admitted to the bar, a lawyer decided to open her own practice as a sole proprietorship in State X, which is her principal residence. The lawyer wanted a couch for her new office's waiting room and went to a furniture store in State X where she found a couch that she liked. She asked if she could buy the couch on credit, saying, "This is for the waiting room of my new law office." The salesperson responded that the store would sell the couch to her on credit if her obligation to pay was secured by the couch. The lawyer agreed and bought the couch on those terms.

As part of the sale, both the lawyer and the salesperson (who had authority to sign on behalf of the store) signed a "Credit Sales Agreement" that stated that the lawyer granted the store a security interest in the couch (described in the agreement by manufacturer and model number) to secure the lawyer's obligation to pay the purchase price.

On her way out of the store, the lawyer saw a table that she thought would be ideal for her home. She asked the salesperson if she could buy the table on credit, saying, "This would look great in my dining room." This time, the salesperson said, "This is a popular model, so we have a special financing deal. You can get the table on credit and have it delivered tomorrow, but we retain title to the table until you finish paying for it. Does that work for you?" The lawyer said that it worked for her and bought the table on the terms outlined by the salesperson. She signed an agreement that described the table by manufacturer and model number and that stated that the store would retain title to the table until she finished paying for it.

The next day, the store delivered the couch to the lawyer's office and delivered the table to the lawyer's home.

The furniture store in State X did not file a financing statement with respect to either the couch transaction or the table transaction.

Six months later, the lawyer passed the bar examination in State Y, where her parents had a home at which she stayed for a few weeks each year. After being admitted to the State Y bar, the lawyer decided that she wanted to be able to represent clients in State Y while she was staying at her parents' home. The lawyer decided to furnish a room in her parents' home as an office and to buy a desk for the office.

She went to a furniture store in State Y and agreed to buy a desk on credit, with her payment obligation secured by a security interest in the desk. She signed an agreement granting the store a security interest in the desk (described in the agreement by manufacturer and model number). The store immediately filed a financing statement in the State Y central filing office for financing statements. The financing statement listed the lawyer as the debtor, named the furniture store as the secured party, and indicated the desk (described by manufacturer and model number) as the collateral.

The store delivered the desk to the lawyer's State Y office the next day. The desk was used by the lawyer only in conjunction with her law practice.

At all relevant times, the lawyer's principal residence was in State X.

1. Does the State X furniture store have an enforceable and perfected security interest in the couch used by the lawyer in her office waiting room in State X? Explain.
2. Does the State X furniture store have an enforceable and perfected security interest in the table used by the lawyer in her dining room in State X? Explain.
3. Does the State Y furniture store have an enforceable and perfected security interest in the desk used by the lawyer in her office in State Y? Explain.

ANSWER

1. The issue is whether the State X furniture store has an enforceable and perfected security interest in the couch used by the lawyer in her office waiting room in State X.

Attachment:

Agreements that pledge collateral as securing a debt to a secured party are governed by Article 9 of the UCC. Any agreement that in substance is an agreement to grant a security interest will be governed by Article 9 of the UCC as well as its rules as to perfection, attachment, and priority, no matter how the agreement is styled. A security interest will arise in collateral when the secured party extends value to the debtor, the debtor grants a security agreement/possession/control of the collateral to the secured party, and the debtor presently has rights in the collateral she can grant to the third party. Article 9 of the UCC governs security interests in goods, tangible intangibles, intangible intangibles, and investment property. Under the term "goods," the UCC includes consumer goods, equipment, inventory, farm products, and fixtures. Consumer goods are a type of collateral which are purchased by a consumer for primary use in the home, for personal use, or by the family. Equipment is used by the debtor primarily in the course of the debtor's trade, but not as salable inventory, that is the type generally sold and surveyed by the debtor. Attachment is generally achieved by the grant of value to the debtor by the secured party, the debtor's present rights in the collateral thus that it may grant a security interest in those rights, and the grant of a security agreement to the secured party. Once attached, a security interest is enforceable against the debtor by secured party.

Security Agreement:

A valid security agreement must be authenticated by the debtor, must have a granting clause that shows the intent to create a security interest, and adequately describe the collateral. Any description that reasonably identifies the collateral will suffice as long as it is not supergeneric (it cannot state "all of debtor's property"). It is adequate to utilize the UCC category of collateral to describe the collateral. Once the agreement is validly made, the debtor has rights in the collateral and the secured party issues value to debtor, the security interest attaches to the collateral.

Perfection:

Whether the goods are consumer goods or equipment governs how the security interest may be perfected. Generally, perfection is achieved by filing a financing statement in the proper public office in the state where the debtor is domiciled. Perfection informs all potential third parties to the security agreement to be on notice of the secured party's interest and is necessary for priority in the collateral. A financing statement must identify the debtor, the secured party, and the collateral that secures the security interest. A supergeneric description will suffice. A financing statement for equipment must generally be filed in the secretary of state's office where debtor is domiciled.

State X furniture store attachment:

The State X furniture store sold Lawyer a couch to be used by Lawyer in her office waiting room. While usually a couch would be a consumer good, in this context it is equipment, because it will be used in Lawyer's trade for the purpose of her business. Lawyer authenticated a "Credit Sales Agreement." This agreement had a granting clause wherein Lawyer agreed to grant the store a security interest in the couch in exchange for the credit extended by Store to buy the couch. The couch was specifically identified in the agreement. This agreement therefore met all of the requirements of attachment. Lawyer authenticated the agreement which in substance was an exchange of a security interest in the couch for the credit extended (value) by the secured party to Lawyer to buy the couch. All of the requirements for attachment occurred: value was extended, the debtor obtained possession and ownership rights in the couch, and the agreement was authenticated which met the necessities to be a security agreement.

Perfection:

The State X furniture store did not file a financing statement in the proper public records office in State X (where Lawyer is domiciled) to perfect its security interest in the couch. A security interest in equipment must be perfected, usually, by filing a financing statement. Because the furniture store did not do so, it is not perfected in the couch.

The furniture store has an attached security interest in the couch but is not perfected in the couch.

2. The issue is whether the State X furniture store has an enforceable and perfected security interest in the table used by Lawyer in her dining room in State X.

As stated above, Article 9 of the UCC governs all exchanges that, in substance, create a security interest even if titled otherwise by the parties. If a seller portends to "keep title" to a good that is then given to the buyer on a basis where the buyer makes payments on the goods and at the end of the arrangement owes no more or a nominal amount in order to obtain "title" to the goods, the parties have effectively created a security interest.

Consumer Goods:

Consumer goods are used by a debtor in their home or primarily for personal or family use. Perfection in consumer goods is automatic; no filing statement must be filed in order to perfect the interest. A security interest in a consumer goods generally arises by a security agreement authenticated by debtor to secured party and describing the collateral; it will only cover consumers goods generally described if obtained by debtor within 10 days of the grant of the security agreement.

Attachment of State X's Interest in Table:

The State X store purported to Lawyer that it would keep title to the table until Lawyer finished paying for the table, and the parties executed an agreement that Lawyer would pay on the table and when payment was complete the title would pass to Lawyer. The table was delivered the next day after the agreement was executed. Although not titled as such, this is a security agreement between the parties because it is in substance a security interest in the table as collateral to ensure debtor Lawyer's payment for the credit extended to buy table. Therefore, Article 9 of the UCC governs attachment

and perfection in the table under this agreement. Because the agreement was authenticated, described the table, and granted what was actually a security interest in the table, the security agreement prong of attachment was satisfied. Further, Lawyer took delivery of the table and Store granted credit to Lawyer for its purchase.

Perfection in Table:

Lawyer plans to use the table in her personal home, and has it delivered to her home. Therefore, the table is a consumer good; it will be used for Lawyer's personal use. Security interests in consumer goods automatically perfects without further action by the secured party.

State X furniture store has an attached and perfected security interest in the table.

3. The issue is whether the State Y furniture store has an enforceable and perfected security interest in the desk used by Lawyer in her office in State Y.

Perfection:

As stated above, the general method of perfection is usually the proper filing of a financing statement in the proper state office (usually the Office of the Secretary of State) in the state where debtor is domiciled. The debtor is domiciled where debtor resides and intends to remain indefinitely. An unincorporated sole proprietorship takes on the domicile of the sole proprietor, and perfection as to goods owned by the sole proprietorship will also be in the same state where the proprietor resides and intends to remain indefinitely. The State Y furniture store granted credit to Lawyer for the desk used by Lawyer in her office, and Lawyer authenticated a security agreement to the State Y furniture store. Lawyer further took delivery of the desk, and therefore all the necessary elements of attachment occurred: value was extended by the furniture store, the debtor had rights in the desk collateral, and debtor-Lawyer authenticated a security agreement that described the desk. The desk was equipment to be used in Lawyer's trade and the interest in it must be perfected by filing a financing statement. Thus, the furniture store then filed a financing statement in the State Y office for financing statements. However, debtor-Lawyer was only staying temporarily with her parents in State Y, despite opening an office there. Lawyer now has two offices, but only one state of domicile. Lawyer remains domiciled in State X because she primarily resides there and intends to do so indefinitely. The state of domicile of Lawyer is the operative state to file an effective financing statement, despite her office in State Y. Because State Y furniture store filed a financing statement in State Y, and not State X where debtor is domiciled, it is not perfected in the desk.

State Y furniture store has an attached and enforceable security interest in the desk but is not perfected as to its security interest in the desk because it did not file a financing statement where debtor-Lawyer is domiciled.

Question 5

QUESTION

In 1901, Smith owned a three-acre undeveloped parcel of land in State A. He validly subdivided the parcel into two lots. Both undeveloped lots remained in the Smith family until 2005, when John purchased the lot that comprised the western two acres and Beth purchased the lot that comprised the eastern one acre. Both John and Beth promptly recorded their valid deeds.

In 2009, one of Smith's descendants purported to convey to Wendy by quitclaim deed the entire three-acre parcel that had originally belonged to Smith. The quitclaim deed accurately described the three-acre parcel.

On Jan. 1, 2010, Wendy began to occupy one acre of the three-acre parcel purportedly conveyed to her in 2009, specifically, one acre of John's two-acre lot.

In 2016, John died, survived by Mary, his 12-year-old daughter and sole heir.

On March 1, 2022, Wendy brought a quiet-title action against Mary and Beth, alleging ownership of all three acres by adverse possession.

For the purpose of the action, and to avoid confusion, the trial court labeled each acre of the original three-acre parcel as follows:

> The "Western Acre" (which is the western half of the land described in John's deed);
>
> The "Central Acre" (which is the other half of the land described in John's deed and which Wendy occupied); and
>
> The "Eastern Acre" (which is the land described in Beth's deed).

The facts at trial established that (1) the quitclaim deed from Smith's descendant gave Wendy colorable title to the three-acre parcel described in that deed; (2) from 2010 until the end of 2021, Wendy possessed the Central Acre in a manner that was actual, open and notorious, continuous, exclusive, and hostile and under claim of right; (3) Wendy ceased her actual possession of the Central Acre on Jan. 1, 2022; and (4) neither the Western Acre nor the Eastern Acre had ever been possessed by any of its owners or by Wendy.

The state's adverse-possession law provides:
An action to recover title to or possession of real property shall be brought within 10 years after the cause of action accrues. However, if at the time the cause of action accrues, the person entitled to bring that action is under 18 years of age, such person, after the expiration of 10 years from the time the cause of action accrues, may bring the action to recover title or possession within five years after reaching the age of 18.

1. In 2020, did Wendy acquire title by adverse possession to the Central Acre? Explain.
2. Assuming that Wendy acquired title by adverse possession to the Central Acre in 2020,
    a. Did she also acquire title to the Western Acre in that year? Explain.
    b. Did she also acquire title to the Eastern Acre in that year? Explain.

ANSWER

1. In 2020, was Wendy able to claim her property under adverse possession, or does she have to wait until 5 years after John's heir's 18th birthday?

Under property law, a prospective landowner may acquire title to real property via adverse possession if they actually occupy the territory in question openly and notoriously, continuously, exclusively, and under claim of right for the statutory period. Here, the facts at trial have established that the nature of Wendy's possession from 2010 until the end of 2021 met the first requirements of adverse possession: the court found that, during this time, Wendy possessed the Central Acre in a manner that was actual, open and notorious, continuous, exclusive, and hostile and under claim of right.

Here, the statutory period is 10 years after the cause of action accrues, or, if at the time of action accrues, the person entitled to bring that action is under 18 years of age, that person may bring the action within five years after reaching that age. Here, the cause of action accrued the moment that Wendy began to openly occupy the territory owned by John, which was on Jan. 1, 2010. The person who would have been able to quiet title at that time would be John, who was (presumably) an adult with a 6-year-old child. The fact that John died 6 years after the cause of action accrued, leaving his 12-year-old in his place, is irrelevant to determine the statutory period because the rule for minors only applies at the time the cause of action accrues. Therefore, the statutory period at issue here is 10 years. In 2020, Wendy had been occupying the Central Acre for 10 years; therefore, Wendy acquired title to the land by adverse possession at that time.

2a. Did Wendy acquire title in Western Acre, John's remaining property, under color of title, although she did not possess it?

Under property law, adverse possession generally only occurs on the portion of the land which is actually occupied by the adverse possessor. However, if part of a landowner's land is occupied under color of title of the owner's land, then the ownership interest the adverse possessor gains is in the entire portion of land owned by the previous landowner which was given to the adverse possessor under color of title. Here, Wendy is the adverse possessor, as she has gained the ownership right in the Central Acre. The previous landowner of Central Acre is John, as the owner of Western's two acres of the undeveloped land. Further, Wendy was granted all of the three-acre parcel under color of title, which includes all of John's interest in the land, namely Western Acre. Therefore, Wendy acquired title in Western Acre in that year.

2b. Did Wendy acquire title in Eastern Acre, Beth's property, although she did not possess it?

Under property law concerning color of title, if part of an owner's land is occupied under color of title of the owner's land, then the ownership interest the adverse possessor gains is in the entire portion of land owned by the previous landowner which was given to the adverse possessor under color of title. Here, the court has established that Wendy did receive colorable title to Wendy's portion of land, Eastern Acre. However, at no point did Wendy possess any part of Beth's land; therefore, she did not establish any right to Eastern Acre through adverse possession. Since Wendy did not acquire adverse possession of Beth's land, then, the colorable title could not extend Wendy's interest in Beth's land. Therefore, Wendy did not also acquire title to Eastern Acre in that year.


THE SUPREME COURT OF THE STATE OF OHIO

Question 6

QUESTION

A woman (Plaintiff) has filed a civil action in the federal district court for State A against her former landlord (Defendant) seeking damages under State A law for invasion of privacy, which in State A requires a finding of intent. The federal court has diversity jurisdiction over the suit and personal jurisdiction over Defendant.

Plaintiff 's complaint alleges the following facts:

1. While Plaintiff was a college student, she rented an apartment in a building owned and managed by Defendant.
2. One day, as Plaintiff dressed after showering, she saw a gleam of light through a small hole in a wall of her bathroom. Then she saw an eye looking through the small hole from the other side. She put on her bathrobe and ran from her apartment into the hall of her apartment building, where she saw Defendant leaving a utility closet that shared a wall with her bathroom. Plaintiff accused Defendant of peeking at her from inside the closet.
3. Defendant first told Plaintiff that he had been in the closet "just to put things away" and then said that he would evict her from her apartment if she told anyone "what happened."

Defendant's answer admits the allegations in paragraph 1 but denies the allegations in paragraphs 2 and 3. Defendant's answer alleges that he was inside the closet inspecting a water heater and that, at the time of the incident, he had not known that the hole in the wall existed or looked through it.

The parties have filed pretrial motions to exclude evidence.

Defendant seeks to exclude from evidence statements that he made in court when pleading guilty to a criminal voyeurism charge that was based on the same facts alleged in Plaintiff 's complaint. Under questioning by the judge, Defendant admitted that he knew about the hole in the closet and that he had repeatedly used it to spy on Plaintiff while she was dressing. Although Defendant initially pled guilty to the criminal voyeurism charges, he later withdrew his guilty plea. The criminal case against Defendant is still pending.

Defendant also seeks to exclude from evidence deposition testimony of a man who previously rented the same apartment as Plaintiff. The man stated in a deposition taken by Plaintiff that he once confronted Defendant "about the utility closet and his perversion" when he caught Defendant watching him under circumstances nearly identical to those described in Plaintiff 's complaint. Defendant and his attorney were present at the man's deposition and had an opportunity to examine him. The man currently lives and works in a jurisdiction hundreds of miles from State A, and he has refused to attend the trial and testify in person despite extensive efforts by Plaintiff to convince him to do so.

Plaintiff plans to testify at the trial. She is now in graduate school. She seeks to exclude any evidence, including testimony, that she plagiarized her college senior thesis and lied about the plagiarism on her recent graduate school application.

How should the court rule on the motion to exclude each of the following?

1. The admissions of Defendant made in connection with the guilty plea he later withdrew. Explain.
2. The deposition testimony of the man who stated that Defendant watched him under similar circumstances to those alleged by Plaintiff. Explain.
3. Evidence that Plaintiff plagiarized her senior thesis in college and lied about it on her graduate school application. Explain.

ANSWER

1. Withdrawn guilty plea. The court should sustain the motion to exclude the withdrawn guilty plea. The key issue is whether a public policy exclusion should prevent the admission of the withdrawn guilty plea.

Relevant evidence is generally admissible. Evidence is relevant where it tends to make a fact more or less probable. However, certain categories of evidence are inadmissible, though relevant, on grounds of public policy. One of these is evidence of a guilty plea withdrawn. Generally, evidence of a guilty plea is considered admissible non-hearsay because it is a statement by an opposing party, offered against the opposing party. However, where a party withdraws their guilty plea, a court will not allow statements of admission of that guilty plea into evidence.

Here, the defendant pled guilty to a criminal voyeurism charge based on similar facts. He then withdrew his guilty plea, and the case is still pending. Although defendant's admissions would usually be relevant non-hearsay, the public policy exception applies, and the court should sustain the motion to exclude the evidence of the withdrawn guilty plea.

2. Deposition testimony. The court should likely deny the motion to exclude testimony if used to prove a lack of mistake, and as hearsay to prove its truth. The key issues are its purpose and whether the former testimony exception applies.

Hearsay statements are out-of-court statements admitted to prove the truth of the matter asserted. A statement is made out-of-court if it is not made at the current trial or hearing. It is a statement if it intends to communicate an idea. Hearsay is generally inadmissible unless an exception applies.

Deposition testimony of Man is hearsay. It is a statement communicating that Man confronted Defendant "about the utility closet and perversion" when he caught Defendant under similar circumstances. It was made in a deposition, which is not a current trial or hearing.

Former Testimony

If Defendant wants to use this as proof that Man did in fact confront Defendant about a similar event, it will be hearsay. However, the former testimony exception will likely apply.

The former testimony exception applies to a statement made; (1) by an unavailable party; (2) while under oath at a former trial, hearing, or deposition; and (3) the parties had a similar motive and opportunity to cross-examine. A party is unavailable if despite good faith efforts, they are beyond the court's reach. In a criminal proceeding, former testimony against Defendant is only allowed if it was actually Defendant with the opportunity to cross-examine. In a civil proceeding, as here, as long as the parties had a similar motive it is sufficient.

There is a question whether Man is unavailable. The facts indicate that he lives hundreds of miles away and has refused to attend despite extensive efforts by Plaintiff to reach him. However, a person will generally not be unavailable unless they are beyond the court's reach, not just beyond the reach of the Plaintiff. If the court has no subpoena power, or efforts by the court to force an appearance has failed, then Man will be deemed unavailable.

Assuming Man is unavailable, the second prong is satisfied. The testimony was at a deposition and Man was under oath. Further, the third prong is satisfied. The facts indicate that Defendant and his attorney were present and had an opportunity to examine him.

If he is deemed unavailable, the former testimony exception will apply, and the court should not grant the motion to exclude.

Other Purposes

Further, the statement may also be admissible if it is used for a non-hearsay purpose. Plaintiff must prove that Man intended to invade her privacy in order to succeed. If Plaintiff is offering Man's statement instead for the purpose of proving that Defendant's conduct was not a mistake, it will be admissible non-hearsay. Showing that Defendant knew on a previous occasion about the hole will invalidate Defendant's defense that he "had not known" about the hole previously. The court should not grant the motion to exclude for the purpose of showing a lack of mistake.

3. Plagiarism evidence. The court should grant the motion to exclude only on the basis of extrinsic evidence but should allow cross-examination asking about these specific acts.

Impeachment evidence is evidence that tends to reduce the credibility of a witness or party. One type of impeachment evidence is evidence of specific acts that go to dishonesty. These are admissible where they (1) tend to show dishonesty and are (2) intrinsic evidence of a specific act.

Evidence of Plaintiff's plagiarism on her college senior thesis and her recent grad school application would tend to show that Plaintiff is dishonest. If the evidence is in the form of questioning Plaintiff about these events, a court should allow it. However, Defendant will not be allowed to introduce extrinsic evidence of these bad acts, including the plagiarized documents.

The evidence is relevant because it tends to make it less probable that Plaintiff is telling the truth.

The court should deny the motion with regard to testimonial evidence of these specific acts for the purpose of impeachment but should allow the motion with respect to any extrinsic evidence.


THE SUPREME COURT OF THE STATE OF OHIO

MPT 1

IN RE HILL (FEBRUARY 2023, MPT-1)

In this performance test, the client, Jasmine Hill, purchased a motor boat from Reliant Boating, a local boat dealer, with the understanding that although the boat was used, it was in perfect working condition. After purchasing the boat, Hill discovered that the boat's motor had a cracked engine block and needed to be replaced because the damage was not repairable. She has now replaced the motor and would like to know what legal remedies she has against Reliant. The examinee's task is to draft an objective memorandum analyzing and evaluating whether Hill has one or more viable claims under the Franklin Deceptive Trade Practices Act (DTPA) and what specific relief she would be entitled to if she were to succeed in a DTPA action. The File contains the instructional memorandum from the supervising attorney, a client interview transcript, email correspondence between Hill and Reliant's owner, the boat's bill of sale, and a repair invoice. The Library consists of excerpts from the Franklin Business Code and two Franklin appellate cases.

ANSWER

To: Zoe Foss

From: Applicant

Date: February 21, 2023

Re: Jasmine Hill's potential claims and remedies against Reliant

Memo

This memo will analyze whether the client, Jasmine Hill, has claims under the Franklin Deceptive Trade Practices Act (DTPA). The purpose of the DTPA is to protect consumers against false, misleading and deceptive business practices. Hill bought a boat from Reliant Boating, with the understanding that it was used, but that it was in perfect working condition. The boat was not in such condition, and because of this Hill had to replace the engine block. This memorandum will analyze whether under the DTPA, Hill has a claim or claims against Reliant Boating because they made misrepresentations about the quality of the boat which would violate the DTPA. Further, the memo will analyze if Hill has any claims, and if so, what damages or form of relief she would be entitled to under the Act.

DTPA Analysis

In order to prove a DTPA claim: 1. the plaintiff must be a consumer; 2. the defendant engaged in one or more of the false misleading acts enumerated in section 204; 3. the acts constituted a producing cause of the plaintiff's damages; and (4) the plaintiff relied on the defendant's conduct to his or her detriment. *Gordon v. Valley* citing *Diaz*. A consumer is any individual who seeks or acquires any goods or services. Section 203. A producing cause is a substantial factor that brings about the injury, without which the injury would not have occurred. *Diaz* cited by *Gordan v. Valley Auto Repair Inc.* The burden of proof is on the plaintiff to meet each element of the DTPA claim. *Diaz* cited by *Gordan v. Valley Auto Repair Inc.*

Here, Hill is a consumer, because she bought the boat for her enjoyment and the enjoyment of her family. Additionally, she sought out the goods, this being the boat. The next sections will analyze the two claims Hill will have under section 204 of the DTPA Act.

Reliant violated the DTPA when it represented that the boat possessed qualities or was of a certain condition when it was not of such condition.

As stated above, Hill is a consumer. However, to prove a DTPA claim, the plaintiff must prove that the individual engaged in one of the enumerated acts in section 204 and the act constituted a producing cause of the plaintiff's damages and the plaintiff relied in detriment. The act of the defendant is considered a deceptive trade practice if the individual represents the goods or services to have characteristics or uses they do not have or are of a particular standard quality or grade if they are of another.

Here, there was a representation made via email and in conversation with salesman to Hill that the boat she was purchasing was a 2017 Perth, which Stevens stated was a real gem and in great condition. He further assured her via email of its quality. In an email exchange, Hill stated her concerns about the age of the boat and its condition. Stevens stated that it was a few years

old but that it was in excellent condition and ran like new. Here, Stevens represented that the boat was like new, meaning that it had the characteristic of a new boat and that there was no issues with it. However, Stevens may argue that these claims about the boat were puffery.

The court stated three factors for determining whether a statement was mere puffing and was therefore, exaggerated sales speak for promotional purposes and not subject to the DTPA. The factors are as follows: 1. the specificity of the alleged misrepresentation was vague or indefinite, these statements that compared one product to another and claimed superiority and mere opinions are not actionable; 2. the comparative knowledge of the consumer and seller; if the representations are made by a service provider with greater knowledge and experience, the more likely the statement is to be actionable; and 3. if the statement relates to a past or current condition as opposed to a future event or condition, because statements about past or current conditions are more likely to be actionable than statements in regards to the future.

In *Gordon v. Valley Auto Repair Inc.*, Franklin Court of Appeal, 2009, Gordon sued Valley Auto Repair under the DTPA alleging violations from repairs to his truck. He brought the truck in twice for repairs, took approximately two weeks each time, paid approximately $4,000 and the truck continued to leak oil. He eventually had to take the truck to another mechanic which was an additional $2,000.

An issue within the case was a representation about standard, quality, or grade of services. Gordon alleges that they made him feel it would be completed fairly quickly (in approximately one to three days), that they would have him in and out, but in reality each repair actually took one to two weeks. Here, Valley contends that these representations were merely puffing. This is similar to the claim Hill will be making based on the representations of the boat being like new. In the *Gordon* case the court found there was no precise time frame offered and it was acknowledged that sometimes repairs took longer. These statements could be found to be too indefinite to be actionable. The court compared this to the *Salas v. Carworld* case where the description of the vehicle was noted as luxurious and rugged and therefore, was mere opinion or puffery. However, in the *Chapman v. Acme* case, DTPA recovery was awarded where the defendant guaranteed he would finish a construction project no matter what within a set time period at a set price and that the quality would be great. In Hill's case, the statement, “it is a gem” is likely considered to be vague or indefinite. However, when looking at the statement that the boat was like new and based on the comparative knowledge of an experienced boat salesman as compared to the experience of Hill, which is the second prong, the court could find that the statements in conjunction go beyond mere puffery based upon power and related to the present condition of the boat. It is worth noting that Hill relied on the knowledge of the salesman. He was at an advantage because Hill is not an experienced boat owner, she had never owned a boat previously, and the experiences she did have with a boat were a couple of rentals for family outings. She bought the boat based upon rentals they had used on previous expeditions at Lake Franklin. In conjunction, when looking at all three elements it is likely that Reliant's arguments that the salesman’s statements were mere puffery would fail. Therefore, the second and third element of a DTPA claim would be met.

Reliant violated the DTPA when it failed to disclose information concerning the boat's engine, which resulted in Hill purchasing the boat.

An individual has violated the DTPA when they engage in false, misleading, or deceptive acts or practices in the conduct of any trade or commerce in which they failed to disclose information concerning goods or services that was known at the time of the transaction if such failure was intended to induce the consumer to enter into a transaction into which the consumer would not have entered had the information been disclosed.

In *Abrams*, a young woman enrolled in a college, CBC, because she believes they had qualified teachers, modern equipment, and a low student-to-teacher ratio. It stated that the teachers were subject matter experts in the field, there was state-of-the-art equipment, and a low student-to-teacher ratio, which was about ten students to one teacher.

CBC argued that it could not be held liable for failing to disclose information because Abrams had notice of the information. A plaintiff must show the defendant failed to disclose information about goods or service known at the time by the defendant at the time of the transaction and intended to induce the consumer to enter into a transaction the consumer would not have entered into if the information had been disclosed. Here, it was found that they were aware of the misrepresentations which Abrams relied upon. However, a seller cannot be held liable for failing to disclose information about which the buyer had actual notice of and therefore, it could not be a producing cause of the plaintiff's loss.

Here, Hill likely has a claim similar to that of *Abrams* because the salesman failed to disclose the condition of the block and was aware of it as shown by the glue in the block. Further, Hill was similar to that of the *Abrams* case: she would also not have had notice of the condition because when the engine was tested it ran fine. She came to the store and the salesman recommended the 2017 Perth, and he turned the engine on and it sounded fine to Hill. Additionally, when the issues arose, Hill took the boat to a mechanic, who stated that it is not uncommon for boats with a cracked motor to run for a few minutes in test condition. The entire engine would have to be replaced and when he inspected the engine, he found glue which had been recently applied, which showed it was likely damaged when Hill made the purchase. She had to replace the engine. This shows that the salesman likely knew of the condition of the boat but failed to disclose it to Hill. Additionally, the bill of sale stated there were no defects known to the seller. However, as indicated by the glue there were clearly defects.

Relief Sought

Under section 205, a consumer may bring an action against any person who engages in any one of the false, misleading, or deceptive acts which are enumerated in section 204 if that false, misleading, or deceptive act was the cause of the consumer's harm.

The individual/consumer suing can recover the amount of economic damages found by the trier of fact, or if the trier of fact finds that the conduct was knowingly committed, three times the amount of economic damages can be awarded or damages for mental anguish. Additionally, under the statute, the consumer who prevails, shall be awarded court costs and reasonable and necessary attorney's fees.

Under *Gordon v. Valley Auto Repair, Inc*, the court found that even if the plaintiff did not prevail upon all their claims, if they prevail upon one claim, they are entitled to recover reasonable and necessary attorney's fees incurred.

In *Abrams*, the court noted that the act should be liberally construed so as to promote the purposes of protecting consumers against false, misleading, or deceptive business practices. An award for damages of mental anguish implies a relatively high degree of pain and distress beyond mere worry or anxiety, and includes pain resulting from grief, severe disappointment, indignation, and wounded pride along with similar emotions. They found that Abrams testified she felt several of these emotions and therefore, was entitled to such damages.

Economic damages is the total sustained by the consumer as a result of the deceptive trade practice, including related and necessary expenses. The court here found that repair costs incurred were reasonable along with the lost net profits resulting from the interruption in Gordon's business for the truck being in the repair shop for extended periods of time.

The court examined what it means to knowingly make a misrepresentation which would result in increased damages. It is not enough that a person knows what he is doing but, rather he must know that what he is doing is false, deceptive, or unfair. They must know what they are doing is unfair and seek to do it anyway. *Diaz*. Court found here that was not so because Valley believed on both occasions that they fixed the problem and Gordon was unable to rebut this. Here, in our case it is clear that the salesman knew of the condition of the boat and sought to sell it anyway because of the glue. Therefore, there could be a claim for triple the amount of damages awarded for the repair of the boat.

Hill specified to the owner that she was looking for a good quality used boat. In response, he recommended a pontoon style boat, and he had two types in stock. She came to the store and he recommended the 2017 Perth. He turned the engine on and it sounded fine to Hill. The boat he encouraged her to purchase, the 2017 Perth, was significantly cheaper than the 2019 Enoy. Hill paid $7,500 for the boat, which is about half the price of a new boat. This included the boat, motor, and trailer. Hill paid approximately $3,000 to replace the motor in its entirety. She would like to be compensated for the replacement of the engine. Here, it is likely that at the very least Hill could be compensated for the new engine because it is the total sustained by a consumer as a result of the deceptive remarks made by the reliant salesman. She relied on these statements and bought a boat with a faulty engine which had to be replaced.

It is unlikely that, like in the *Abrams* case, damages will be awarded for anguish. Because while it was disappointing the Hills' trip was cut short, they suffered no more emotional damage. Abrams testified to clear stress, anguish, etc. Here, the Hills had to cut short a family trip, which they stated was disappointing but not to the emotional level of the *Abrams* case.

Finally, if one claim is successful, the Hills will be entitled to retain attorney fees from Reliant in addition to the three thousand for the motor.

MPT 2

B&B INC. V. HAPPY FROCKS INC. (FEBRUARY 2023, MPT-2)

The examinee's law firm has represented Happy Frocks Inc., a maker of children's clothing, in a lawsuit brought by B&B Inc. for trademark infringement. At a post-trial hearing, the court orally informed the parties of its conclusion that Happy Frocks was liable for trademark infringement and required the submission of briefs on the remedies plaintiff B&B was seeking. Those remedies include a permanent injunction, actual damages, and that portion of Happy Frocks's profits attributable to the trademark infringement. The examinee is tasked with preparing a persuasive brief arguing that no award of profits is justified in this case. The File contains the instructional memorandum, the firm's guidelines for persuasive briefs, excerpts from the trial transcript, and the transcript of the post-trial hearing in which the court orally announced its conclusion that Happy Frocks was liable for trademark infringement and asked for briefing on B&B's requested remedies. The Library contains excerpts from the United States Supreme Court decision in *Romag Fasteners, Inc. v. Fossil Group, Inc.*, holding that willfulness is not a prerequisite to an award of profits, and a Franklin federal district court decision in *Spindrift Automotive Accessories, Inc. v. Holt Enterprises, Ltd.*, setting forth the factors to be analyzed in determining if an award of profits is justified as a remedy for trademark infringement.

ANSWER

To: Hamid Aziz

From: Examinee

Date: February 21, 2023

Re: B&B Inc. v. Happy Frocks Inc.

I. Caption [omitted]

II. Statement of Facts [omitted]

III. Legal Argument

a. Introduction

B&B is seeking damages of various types, including an award of profits (earned from the sale of the infringing goods that was attributable to the trademark infringement). Courts weigh various factors in determining whether an award of profits is appropriate. But, as detailed in the analysis, none of these factors are met. Accordingly, the Court should not find for an award of profits.

b. Analysis

For the reasons below, an award of profits is unjustified. The United States Supreme Court has noted that under the Lanham Act (the federal trademark statute), a district court may award a winning plaintiff with defendant's "ill-gotten profits." *Romag Fasteners, Inc. v. Fossil Group, Inc.* (S.Ct., 2020). An important consideration in awarding profits under the Lanham Act is whether the Defendant acted willfully, although this is merely a factor instead of a requisite. *Id.* (concurring). The United States District Court for the District of Franklin holds that three rationales justify an award of profits: (1) deterring a wrongdoer from doing so again; (2) preventing wrongdoer's unjust enrichment; and (3) compensating plaintiff for their harms. *Spindrift Automotive Accessories, Inc. v. Holt Enterprises, Ltd.* (D.C. Franklin, 2021). Courts in this district have transferred these three rationales into a multi-factor analysis that attaches varying weights to these factors on a case-by-case basis. *Id.* The factors are as follows: (1) the infringer's mental state; (2) the connection between the infringer's profits and the infringement; (3) the adequacy of other remedies; (4) equitable defenses; and (5) the public interest. *Id.* Given the analysis below, no factors are satisfied, meaning an award of profits would be unjustifiable.

1. An award of profits is unjustified because Happy Frocks was merely negligent, as they were unaware of the infringement, and they immediately discontinued the relationship with the manufacturer who was selling them the infringing buttons.

The first factor, the infringer's mental state, does not justify an award of profits. The infringer's mental state is an important consideration. *Spendthrift.* That is, the higher the mental culpability, the more likely a defendant is subjected to an award of profits. *Id.* Courts account for willfulness, recklessness, callous disregard for the plaintiff's rights, willful blindness, and specific intent to deceive. *Id.* Negligence or innocent nature, however, weigh against the receipt of an award of profits. *Id.* In *Spendthrift*, the defendant was held culpable, and this factor weighed in favor of an award of profits

when they knowingly and deliberately sold automotive parts not made by the plaintiff but with the plaintiff's trademark, when they continued doing so after plaintiff notified them of this. *Id.*

Here, unlike in *Spendthrift*, Happy Frocks lacked the requisite mental state to justify an award of profits. That is, Happy Frocks simply missed the fact that the buttons in its clothing were infringed. See Cross Examination of Harris. Happy Frocks was merely negligent, as its quality control team had to process an extraordinary amount of clothing due to accelerated demands, which led to the quality control team not noticing the infringed buttons. *Id.* This is far from the deliberate infringement in *Spendthrift*. Moreover, unlike the defendant in *Spendthrift*, Happy Frocks discontinued infringing when they discovered the infringement. *Id.* Specifically, upon being informed by B&B of the infringement, Happy Frocks immediately investigated their product. Upon recognizing that they were fake buttons, Happy Frocks immediately contacted the manufacturer, told them to stop immediately, and terminated the relationship. Accordingly, Happy Frocks responded immediately and lacked the culpability to justify an award of profits.

2. An award of profits is unjustified because, among other factors, Happy Frocks was actually harmed by the infringement, and B&B's sales increased during the period of the infringement.

The second factor, the connection between the infringer's profits and the infringement, also weighs against an award of profits. Issues to consider when determining the connection between infringer's profits and the infringement are as follows: whether the trademark owner was harmed by lost or diverted sales due to the infringement, beyond sales lost by the infringement itself; whether the infringer's profits flowed directly from or were caused by the infringement; whether consumers were confused by the infringement in thinking that the trademark owner authorized the infringing act; and whether there is a certainty that the infringer benefited from the infringement. *Spendthrift*. Answering these questions in the affirmative will favor an award of profits. *Id.* In *Spendthrift*, this factor favored an award of profits because an economic benefit was present when the defendant obtained the infringing parts for 25% less than what it would cost to obtain the genuine parts, but it still sold the parts at the same price as the authentic parts are sold for. *Id.*

Here, B&B was not harmed by and did not lose sales because of the infringement; in fact, their sales increased during the period that the infringement occurred. See Cross Examination of Garcia. The only lost profit that they suffered was some lost revenue of the sales of their buttons to Happy Frocks' manufacturer. *Id.* This weighs against an award of profits. Moreover, the survey of over 839 consumers who purchased infringing products from Happy Frocks identified that only 3% of the respondents noticed the logo and thought that it added desirability to the clothes. See Direct Examination of Chen. A general survey of 997 consumers of children's clothes revealed that only 6% of respondents' purchasing decisions considered whether the brand name was on a button, and less than 1% purchased an item of clothing over other items for the sole reason of its brand name on a button. *Id.* These facts all indicate that the infringement did not catalyze Happy Frocks' sales. Moreover, unlike in *Spendthrift*, where the infringement cut down profit margins for the defendant, Happy Frocks was unaware of the infringement and was still paying full value for the clothing as if they were authentic materials. See Direct Examination of Harris. In fact, the infringement forced

Happy Frocks to discontinue sales of significant inventory, which they may not be able to recover and will likely cost them significant capital. *Id.* Harris, Happy Frocks' CEO, stated that he was unsure the company could recover from these losses, indicating that the infringement was detrimental, not beneficial to Happy Frocks. *Id.* Accordingly, the lack of connection between Happy Frocks' profits and the infringement renders an award of profits unjustified.

3. An award of profits is unjustified because other adequate remedies exist, and nothing on the record indicates that the infringement negatively affected B&B's business relationships due to reduced confidence in their products.

The third factor, the adequacy of other remedies, also weighs against an award of profits. This factor asks whether the trademark owner will be made whole by other available remedies, such as actual damages and injunctive relief. *Spendthrift.* If this is answered affirmatively, there is less of a basis for an award of profits. In *Spendthrift*, this factor weighed against an award of profits when nothing in the record supported the plaintiff's claim that consumers buying the infringing parts would lose confidence in the plaintiff's products since the infringing products are inferior. *Id.*

The record indicates that Happy Frocks' infringement did not harm consumer confidence because no manufacturers stopped using B&B's buttons after Happy Frocks had sold clothes with infringing buttons. See Cross Examination of Garcia. And there is no direct evidence on the record that customers know the difference between the high-quality buttons and the inferior quality ones that were sold, as Garcia, the CEO of B&B, indicated that she merely "hope[d] they do." *Id.* However, just as the quality of the buttons evaded Happy Frocks' quality control teams, it will likely evade consumers, and no evidence indicates otherwise. Thus, an award of profits is not an adequate remedy, and other adequate remedies exist, such as actual damages and injunctive relief. Accordingly, an award of profits is unjustified.

4. An award of profits is unjustified because Happy Frocks may be entitled to various equitable defenses, as B&B may have intentionally delayed bringing this action in an attempt to severely harm Happy Frocks' Black Friday sales, which are a major source of their profits.

The following equitable defenses would lean towards an award of profits: whether the defendant has a claim of laches (unreasonable delay in pursuing a legal remedy); failure to timely act on the part of the plaintiff; acquiescence by the plaintiff in the infringement; or unclean hands. *Spendthrift.* In *Spendthrift*, this factor justified an award of profits when the plaintiff, upon learning of the infringing sales, took immediate action to stop the sale by filing the lawsuit and seeking and obtaining a preliminary injunction, meaning the defendant had no claim of an equitable defense. *Id.*

Here, unlike in *Spendthrift*, B&B only sent Happy Frocks a cease and desist. See Cross Examination of Garcia. They waited nine months after the fact to then seek an injunction, which was right before Black Friday. *Id.* This indicates a potential laches claim for an unreasonable delay in pursuit of a legal remedy, as the circumstances indicate a motive to delay the seeking of injunctive relief until doing so would severely harm Happy Frocks' profitability. Accordingly, Happy Frocks may have potential equitable defenses, which indicates that an award of profits is unjustified.

5. An award of profits is unjustified because it does not promote public policy, as the infringement was neither dangerous, nor is it likely to reoccur.

A compelling public interest will favor an award of profits. *Spendthrift*. The Court will consider interests such as preserving public safety or deterring other infringement. An example of a public safety interest includes an infringing medicine containing an ingredient that would harm the consumer. *Id.* But in *Spendthrift*, the injunction, which was made permanent by the Court in the decision, as well as a lack of evidence of the infringing parts causing a danger to the public, could not justify an award of profits. *Id.*

Neither public interest concerns are present here. First, Happy Frocks did not intend to infringe, and they immediately terminated their relationship with the infringing party. See Direct Examination of Harris. Therefore, an award of profits would not deter other infringement. Moreover, the infringing buttons are harmless as they are not poisonous, nor could children swallow them if they came loose. See Cross Examination of Garcia. Therefore, the infringement does not bring forth a public safety concern. Accordingly, it would not be in the public interest to provide B&B with an award of profits.

6. An award of profits is unjustified because every factor weighs against an award of profits.

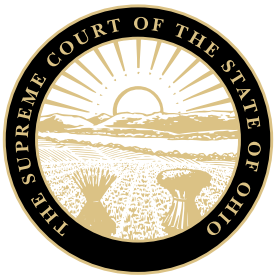
In *Spendthrift*, the Court found that, in the aggregate, the factors justified an award of profits. *Spendthrift*. Therefore, the Court awarded the plaintiff with the recovery of profits regarding the portion of the defendant's profits that were attributable to the infringement of the plaintiff's trademark. *Id.* Here, however, none of the factors weigh in favor of an award of profits. Therefore, it would be unjustified to provide B&B an award of profits.

c. Conclusion

For the reasons above, all of the factors weigh against an award of profits. That is, the Happy Frocks was merely negligent, did not recover profits from the infringement, and has potential equitable defenses. Likewise, B&B has other adequate remedies, and an award of profits would not promote public interest. Accordingly, the Court should not find for an award of profits.

On the cover:

Detail from the Thomas J. Moyer Ohio Judicial Center Law Library Reading Room Mural 7, depicting the availability of knowledge in printed books.



PUBLISHED BY
The Supreme Court *of* Ohio
Office of Bar Admissions
614. 387. 9340
sc.ohio.gov