February 2023
MEE
Questions

MEE Question 1

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.

MEE Question 2

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

   (c) the officer's seizure of the narcotics from Homeowner

   Explain.

MEE Question 3

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.

MEE Question 4

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.

MEE Question 5

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 January 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 January 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.

MEE Question 6

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.

February 2023
MPT-1
Item

In re Hill

In re Hill

FILE

LIBRARY

FILE

Foss & Associates LLP
Attorneys at Law
3200 Lakefront Dr., Suite 700
Franklin City, Franklin 33012

MEMORANDUM

To: Examinee
From: Zoe Foss
Date: February 21, 2023
Re: Jasmine Hill matter

We represent Jasmine Hill in connection with her purchase of a boat with serious mechanical issues. Ms. Hill purchased the boat from Reliant Boating, a local boat shop, with the understanding that although the boat was used, it was in perfect working condition. After purchasing the boat, Ms. Hill discovered that the boat's motor had a cracked engine block and needed to be replaced. She has now replaced the motor and would like to know what legal remedies she has against Reliant.

I need you to draft a memorandum to me analyzing whether Ms. Hill has one or more claims against Reliant under the Franklin Deceptive Trade Practices Act (DTPA) (Fr. Bus. Code §§ 200 *et seq.*). Be sure to discuss what specific relief Ms. Hill would be entitled to if she were to succeed in a DTPA action.

Do not include a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis. Focus only on Ms. Hill's potential DTPA claim or claims. Another associate will research other potential claims Ms. Hill may have against Reliant, including any claims based on breach of express or implied warranty.

Transcript of Interview with Jasmine Hill
February 20, 2023

Attorney: Jasmine, it's good to meet you. What can we help you with?

Hill: Thanks for meeting with me. I bought a boat from Reliant Boating, and now I feel like I've been taken advantage of.

Attorney: Why don't you tell me what happened.

Hill: It all started when I decided to buy a boat last year.

Attorney: Have you ever owned a boat before?

Hill: No. This is my first time. My family and I enjoy the outdoors. We like to go camping, hiking, and fishing at Lake Franklin. Over the summer, we rented a boat a few times and had a ball, which got me thinking about getting my own boat.

Attorney: How did you come to buy a boat from Reliant?

Hill: After researching new and used boats, I decided to buy a used boat because I didn't have enough money saved up for a new one. I did an internet search, and Reliant's name popped up. It's one of only a few boat stores in town that sells used boats. I called Reliant in August and spoke with the store's owner, Greg Stevens. I told him I was looking for a good-quality used boat.

Attorney: What did Mr. Stevens say?

Hill: He recommended that I consider buying a pontoon-style boat. You know, the kind that's flat and boxy, with a built-in sunshade over the top and comfortable seating along the sides. He said he had two used pontoon boats in stock: a 2017 18-foot Perth Envoy and a 2019 21-foot Wellington Mariner. He suggested I come down to the shop and take a look at them.

Attorney: And did you do that?

Hill: Yes, I went to the store, and Mr. Stevens showed me both boats. He encouraged me to buy the Envoy. He turned the engine on, and it sounded fine. I told him I needed to think about it and would get back to him. He gave me his email address and cell-phone number and told me to let him know if

I had any questions. That evening, I talked to my family, and we all agreed that the Envoy was our best option because it was significantly less expensive than the Mariner but still roomy enough to comfortably seat six to eight people. I was really excited about the Envoy but had some concerns, so I emailed Mr. Stevens. Here's a copy of my email exchange with him.

Attorney: Thanks! When did you buy the boat, and what did you pay for it?

Hill: I returned to the shop a few days after my initial visit. I paid $7,500 for the boat, which is less than half of what a new 18-foot pontoon boat typically costs. The price included the boat, motor, and trailer. At the time, I thought I was getting a great deal. Mr. Stevens told me that the boat was a real gem and that it was in great condition. The bill of sale said that there were no defects. Here's a copy of it.

Attorney: Thank you. What happened after you bought the Envoy? Were you able to use it?

Hill: We trailered the boat to Lake Franklin, intending to stay the weekend and spend most of our time boating. About 15 minutes after we got out on the water, the motor died. I called Reliant immediately and told Mr. Stevens about the problem with the motor.

Attorney: What did he say?

Hill: He said there was no warranty on the boat, so I was responsible for any repairs. He started asking me questions about how I had operated the boat and suggested that I had done something wrong that caused the motor to die, which was infuriating. I was disappointed—our weekend getaway was ruined! The whole point of the trip was to spend as much time as possible on the lake enjoying our new boat. We didn't bring our hiking boots or our trail bikes. When the boat stopped working, there was no point in staying for the weekend, so we packed up our camping equipment and left.

Attorney: Were you able to find out what was wrong with the motor?

Hill: A boat mechanic inspected it and found that the engine block was cracked. The mechanic said that the motor couldn't be repaired and would have to

be replaced. I told him that before I bought the boat, Mr. Stevens ran the motor briefly and it seemed to work fine. The mechanic said that it's not uncommon for a motor with a cracked engine block to run for a few minutes under test conditions. But then when you try to use it in the water for an extended period, the motor starts leaking oil, overheats, and seizes up. He said he found epoxy glue in the cracks on the engine block, and he could tell that the glue had been recently applied. This told him that the engine block was damaged when I bought it.

Attorney: Did you have the motor replaced?

Hill: Yes, I did. And it cost me an arm and a leg! I brought a copy of the receipt. Having to replace the motor was stressful because it set me back financially. I think Reliant took advantage of me. The boat runs fine now, but I never would have bought it if I'd known it would need a new motor. I want to keep the boat now that it works, but I think Reliant should reimburse me for the replacement motor and all the hassle I've been put through.

Attorney: That's very understandable. I think you have some legal options against Reliant. I'll review the documents you provided and research a few issues and then get back to you early next week.

Hill: That sounds great. Thanks for helping me with this!

Jasmine Hill/Greg Stevens Email Correspondence [in chronological order]
August 10, 2022

From: Jasmine Hill<jhill@cmail.com>
To: Greg Stevens<gStevens@reliant-boat.com>
Subject: Pontoon Boat

Hi, Greg. Thanks so much for taking the time to show me the Perth Envoy and Wellington Mariner pontoon boats. I'm leaning toward the Envoy because it's the one you recommended and it's in my price range.

From: Greg Stevens<gStevens@reliant-boat.com>
To: Jasmine Hill<jhill@cmail.com>
Subject: Pontoon Boat

Jasmine, I think the Envoy is a real gem and would be a perfect fit for you because it has plenty of room for you and your family!

From: Jasmine Hill<jhill@cmail.com>
To: Greg Stevens<gStevens@reliant-boat.com>
Subject: Pontoon Boat

You mentioned that the Envoy is five years old. I'm a little concerned about its age. This is a big purchase for me. I don't want to buy a boat that's going to need repairs.

From: Greg Stevens<gStevens@reliant-boat.com>
To: Jasmine Hill<jhill@cmail.com>
Subject: Pontoon Boat

The Envoy is a few years old, but it's in excellent condition and runs just like new.

From: Jasmine Hill<jhill@cmail.com>
To: Greg Stevens<gStevens@reliant-boat.com>
Subject: Pontoon Boat

OK, let's do this! Can I come by the shop this weekend to complete the paperwork?

From: Greg Stevens<gStevens@reliant-boat.com>
To: Jasmine Hill<jhill@cmail.com>
Subject: Pontoon Boat

Sure! See you then!

Boat Bill of Sale

BE IT KNOWN that for payment in the sum of $7,500, the full receipt of which is acknowledged, the undersigned Greg Stevens d/b/a Reliant Boating (Seller) hereby sells and transfers to Jasmine Hill (Buyer) the following boat, motor, and trailer (Boat):

Make: Perth

Model or series: Envoy

Year: 2017

Color: White

Hull ID No.: SSR 77070 173 06

Style: 18-foot pontoon

Odometer Reading (# hours): 275 hours

Title #: [omitted]

Motor: 9.9-horsepower Jupiter

Trailer: 20-foot standard boat trailer

The sale is subject to the following conditions and representations:
Seller acknowledges receipt of $7,500 as full payment for the Boat, with title transfer to take place immediately.

* * *

Seller has no knowledge of any defects in and to the Boat.

Seller: Greg Stevens **Date:** August 13, 2022

Buyer: Jasmine Hill **Date:** August 13, 2022

In the presence of (Witness): Graham Tailor **Date:** August 13, 2022

INVOICE NO. 3017
DATE: September 20, 2022

JB Boat Repairs
Proudly Serving Franklin Boaters Since 2012
1200 Marina Blvd.
Franklin City, FR 33015

TO:
Jasmine Hill
9361 Castle Lane
Franklin City, FR 33015

Diagnosis:

Examined broken Jupiter 9.9-horsepower motor in 2017 Perth Envoy pontoon boat and found that engine block was cracked. Found remnants of epoxy glue in cracked engine block, indicating engine block had been previously damaged.

Motor is not fixable and needs complete replacement.

Work Performed	**Cost**
Remove broken motor and install refurbished 9.9-horsepower Jupiter replacement motor. Fill oil tank. Test motor. Test propeller.	$3,000

Total Cost $3,000

THANK YOU FOR YOUR BUSINESS!

LIBRARY

Excerpts from Franklin Business Code, Chapter 200

§ 201. Short Title

This chapter may be cited as the Deceptive Trade Practices Act.

§ 202. Construction and Application

This chapter shall be liberally construed and applied to promote its underlying purpose, which is to protect consumers against false, misleading, and deceptive business practices.

§ 203. Definitions

As used in this chapter:

(a) "Goods" means tangible items or real property purchased or leased for use.

(b) "Services" means work, labor, or service purchased or leased for use . . . .

(c) "Person" means an individual, partnership, corporation, association, or other group, however organized.

(d) "Consumer" means an individual . . . who seeks or acquires any goods or services . . . .

(e) "Trade" and "commerce" mean the . . . sale . . . of any good or service . . . .

(f) "Economic damages" means compensatory damages for actual pecuniary loss, including costs of repair and replacement. The term does not include exemplary damages or damages for physical pain and mental anguish.

. . .

(k) "Knowingly" means actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

§ 204. Deceptive Trade Practices Unlawful

False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful, including but not limited to the following acts:

. . .

(d) representing that goods or services

i. have characteristics or uses they do not have, or

ii. are of a particular standard, quality, or grade if they are of another;

. . .

(f) representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced;

(g) failing 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; . . . .

§ 205. Relief

(a) A consumer may maintain an action against any person who engages in any one or more of the false, misleading, or deceptive acts or practices enumerated in Section 204 of this chapter, if such act or practice is a producing cause of the consumer's damages and the consumer relied upon such act or practice to the consumer's detriment.

(b) In a suit filed under this section, a consumer who prevails may obtain

(1) the amount of economic damages found by the trier of fact; or

(2) if the trier of fact finds that the conduct of the defendant was committed knowingly:

(i) exemplary damages of three times (treble) the amount of economic damages, and

(ii) damages for mental anguish.

(c) Each consumer who prevails shall be awarded court costs and reasonable and necessary attorney's fees.

Gordon v. Valley Auto Repair, Inc.
Franklin Court of Appeal (2009)

Jack Gordon sued Valley Auto Repair (Valley) alleging Deceptive Trade Practices Act (DTPA) violations arising from repairs made to his truck by Valley. A jury awarded Gordon economic damages, exemplary damages, and attorney fees under the DTPA, Fr. Bus. Code § 201 *et seq.* Valley appeals. We affirm in part and reverse in part.

FACTS

Gordon purchased a used diesel pickup truck in Franklin in April 2007. Gordon bought the truck to use for his business hauling goods to locations in three states, including Franklin. The truck had few problems until October 2007, when Gordon noticed that the truck was using too much oil. He took the truck to Valley for repair. A Valley mechanic took two weeks to repair the engine, but the truck continued to leak oil. Gordon returned to Valley once more in November. Again, it took Valley two weeks to perform repairs; and after the second repair, the truck continued to leak oil and run poorly. Gordon had to pay Valley a total of $4,000—$2,000 for each of the two unsuccessful repairs. At that point, Gordon was "fed up" with Valley and had the truck repaired by another mechanic at a cost of $2,000.

DTPA ANALYSIS

The DTPA prohibits "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce." Fr. Bus. Code § 204. Section 204 contains a list of prohibited acts, including the specific acts alleged in Gordon's complaint (i.e., §§ 204(d) and (f)). Actionable representations may be oral or written. *Diaz v. Ellis* (Fr. Sup. Ct. 1998).

The elements of a DTPA claim are (1) the plaintiff is a consumer; (2) the defendant engaged in one or more of the false, misleading, or deceptive acts enumerated in § 204; (3) the act(s) constituted a producing cause of the plaintiff's damage; and (4) the plaintiff relied on the defendant's conduct to his or her detriment. *Diaz;* Fr. Bus. Code § 205(a). A "producing cause" is a substantial factor that brings about the injury, without which the injury would not have occurred. *Diaz*. The plaintiff consumer has the burden of proof as to each element. *Id.* If a violation is committed "knowingly," the plaintiff is entitled to receive three times his or her actual economic damages (treble damages), as well as damages for mental anguish. Fr. Bus. Code § 205(b)(2).

Gordon asked Valley's service department to perform repairs on his truck. This qualifies him as a "consumer" under the DTPA. His allegations focus on Valley's failure to

repair the truck on a timely basis and on misrepresentations by Valley employees about that work. Specifically, Gordon alleged that Valley's conduct violated the DTPA by (1) representing that goods and services are of a particular standard, quality, or grade when they are of another, Fr. Bus. Code § 204(d)(ii)); and (2) representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced, Fr. Bus. Code § 204(f).

A. DTPA Violations

Valley contends that there is no evidence that it committed the alleged DTPA violations. We review each alleged violation in turn.

(1) representations about standard, quality, or grade of services—§ 204(d)(ii)

Gordon testified that when he first took the truck to Valley, he stressed the need for quick repairs to ensure the success of his business. In response, Valley employees made several representations to him. Specifically, a mechanic assured Gordon personally, "We'll get it done, we'll get it fixed, we'll get it right back out on the road." When Gordon asked how long repairs usually took, he was told, "It depends on the problem, but normally one to three days" but that "you might have some problems that would take a little longer." Gordon testified that, based on these representations, he was led to believe that "Valley would get it in and get it out." Gordon contends that these were actionable misrepresentations because each repair effort took one to two weeks.

Valley contends that these representations were merely puffing and thus not actionable under the DTPA. Valley is correct that "mere puffing," that is, exaggerated "sales-speak" for promotional purposes, is not actionable under the DTPA. *Diaz.* Three factors determine whether a representation is "mere puffing":

(1) the specificity of the alleged misrepresentation: vague or indefinite representations, statements that compare one product to another and claim superiority, and mere opinions are not actionable misrepresentations under the DTPA;

(2) the comparative knowledge of the consumer and the seller or service provider: representations made by a service provider with greater knowledge and experience than the consumer are more likely to be actionable; and

(3) whether the representation relates to a past or current condition as opposed to a future event or condition: statements about past or current conditions are more likely to be actionable than statements about the future. *Id*.

Valley's representations about repair time were too general and indefinite to be actionable. None of the statements guaranteed a precise time frame for completion of repairs. Indeed, the last statement acknowledged that some repairs would take longer

than the "one to three days" "normally" required. This rendered the statements too indefinite to be actionable. *See Salas v. Carworld* (Fr. Ct. App. 2003) (dealership's description of vehicle as "luxurious" and "rugged" was mere opinion or puffery). *But cf. Chapman v. Acme Construction* (Fr. Ct. App. 2006) (affirming DTPA recovery where defendant "guaranteed" he would finish a construction project "no matter what" for a set price within a certain time period and the quality of the construction would be "great").

(2) representations that services were performed—§ 204(f)

Gordon contends that Valley completed alleged repairs twice but failed to repair the leak each time. The evidence shows that Valley's manager stated after the second unsuccessful repair, "We've got it fixed now." The evidence also shows that the truck leaked oil after each attempted repair. This evidence is sufficient to support a finding that Valley's representations about the performance of the repairs violated the DTPA.

B. Damages

A plaintiff may recover "economic damages" where the defendant's misconduct was a producing cause. Fr. Bus. Code § 205. The term "economic damages" has been construed to include "the total loss sustained by the consumer as a result of the deceptive trade practice," which includes related and reasonably necessary expenses. *Diaz.* The trial court found that Gordon's economic damages included (1) the repair costs he incurred ($4,000 to Valley) and (2) lost net profits resulting from interruption in his business due to the truck's being in the shop for extended periods of time ($1,500). Section 203(f) expressly includes "repair or replacement" costs in the definition of "economic damages." Gordon's evidence at trial supports the award of these amounts as economic damages.

C. Knowing Conduct as a Basis for Exemplary Damages

Valley contends that there is no evidence that it acted knowingly in its representations about its repairs. The DTPA defines "knowingly" to include "actual awareness" of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim. Fr. Bus. Code § 203(k). Knowledge may be inferred where objective manifestations indicate that a person acted with actual awareness. *Id.* As the court explained in Diaz, "actual awareness" does not mean merely that a person knows what he is doing. Rather, it means that a person knows that what he is doing is false, deceptive, or unfair. The person must think at some point, "Yes, I know this is false, deceptive, or unfair, but I'm going to do it anyway." *Diaz.*

Gordon claims that Valley acted knowingly because Valley "did not even attempt to fix the oil leak" on two separate occasions. But the record does not support this

characterization. Valley offered proof that its service department believed that the oil leak had been fixed each time it worked on the truck. Gordon offered no direct evidence to rebut this proof.

Accordingly, we conclude that the evidence supports only a finding that Valley represented that it had repaired the oil leak when in fact it had not. The evidence does not support a finding that Valley made a "knowing" misrepresentation. *Compare Berg v. RMS Roofing* (Fr. Ct. App. 2001) (knowing conduct found where contractor admitted work was not done properly but did not fix it despite continuing to bill plaintiff for balance owed). For this reason, we reverse the award of treble damages with instructions to the trial court to enter judgment in the amount of the actual economic damages without the multiplier.

D. Attorney's Fees

Valley also contests the award of Gordon's attorney's fees. "Each consumer who prevails *shall* be awarded court costs and reasonable and necessary attorney's fees." Fr. Bus. Code § 205(c) (emphasis added). The award of reasonable and necessary attorney's fees is mandatory for a prevailing DTPA plaintiff.

We have determined that Gordon is entitled to prevail on one of his DTPA allegations against Valley. His attorney testified to the amount of reasonable and necessary attorney's fees incurred. Accordingly, we affirm the attorney fee award.

Affirmed in part, reversed in part, and remanded for further proceedings.

Abrams v. Chesapeake Business College
Franklin Court of Appeal (2012)

Danielle Abrams brought this action against Chesapeake Business College (CBC) under the Deceptive Trade Practices Act (DTPA), Fr. Bus. Code §§ 201 *et seq.* The trial court entered judgment for Abrams and awarded $22,000 in exemplary damages and damages for mental anguish, plus attorney's fees. We affirm.

Abrams enrolled in CBC seeking a business administration degree after seeing a newspaper ad and several television commercials and visiting CBC's campus. In August 2010, Abrams visited CBC's campus, signed an enrollment agreement, and made a deposit of $1,000 toward the $12,000 tuition. That evening she read the school catalogue aloud to her mother and became enthusiastic about her decision to pursue a business degree from CBC. Two weeks later, she started classes and paid an additional $4,000 toward her outstanding tuition balance. However, she soon became disappointed in CBC and concluded that she had been misled by the catalogue. She eventually stopped attending CBC, did not pay the remainder of her tuition, and filed this action.

Abrams's claims under the DTPA focus on statements contained in CBC's catalogue and on information that CBC failed to disclose to her before she enrolled. The catalogue promised qualified teachers ("Our teachers are thoroughly trained subject-matter experts in their field"), modern equipment ("state of the art"), and a low student-teacher ratio ("No more than 10 students per teacher/classroom"). At trial, Abrams and several other witnesses testified that CBC in fact provided one unqualified teacher in a room with 42 students, all taking different courses, with only two 10-key adding machines. The evidence established the poor training of CBC's teachers, a high student-teacher ratio, outdated computers, and antiquated office equipment that frequently broke down. The jury found that CBC had violated DTPA §§ 204(d) (misrepresenting the characteristics, standard, or quality of services) and 204(g) (failing to disclose information). It awarded $15,000, or three times the economic damages of $5,000, in exemplary damages plus $7,000 as damages for mental anguish. CBC appealed.

On appeal, CBC makes three arguments. First, it argues that the statements in its catalogue could not have been a producing cause of Abrams's damages because Abrams read the catalogue after she signed the contract. We disagree. The unrebutted proof shows that the catalogue contained representations that substantially contributed to Abrams's decision to enroll. Even though she read the catalogue after she signed the agreement, that agreement gave her a 72-hour period to cancel the agreement for a full

refund. Abrams proved that CBC's representations in its catalogue were false and misleading and that she relied upon these representations in deciding not to cancel the agreement and instead to pay additional tuition. The evidence is sufficient to support a finding that the representations in the catalogue were a producing cause of Abrams's loss.

Second, CBC argues that it cannot be held liable for a failure to disclose information when Abrams had actual notice of the same information. We disagree. Under the DTPA, the plaintiff must show that (1) the defendant failed to disclose information about goods or services (2) known by the defendant at the time of the transaction and (3) intended to induce the consumer to enter into a transaction (4) into which the consumer would not have entered had the information been disclosed. Fr. Bus. Code § 204(g). To be sure, a seller cannot be held liable for failing to disclose information about which the buyer has actual notice; such information could not be a producing cause of the buyer's loss. *Ling v. Thompson* (Fr. Ct. App. 2008). In this case, however, ample evidence shows that CBC knew that its catalogue contained misrepresentations and that Abrams relied on those statements when she enrolled and paid tuition. This is not a situation where statements were made without knowledge of their falsity or where information was withheld innocently. The evidence supports a finding of liability for a failure to disclose under § 204(g).

Finally, CBC also challenges the award of treble damages and damages for mental anguish. To justify an award of these categories of damages, the plaintiff must prove that the defendant's actions were taken "knowingly." Fr. Bus. Code § 205(b)(2). We note that the Act provides that it is to be liberally construed so as to promote the purpose of protecting consumers against false, misleading, or deceptive business practices. *Id.* § 202. Here the record establishes that CBC knew that its representations in the catalogue were false.

In particular, CBC claims that no evidence supported the award of damages for mental anguish. Again, we disagree. An award of damages for 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, wounded pride" and similar emotions. *Oliver v. Elite Systems* (Fr. Sup. Ct. 1997). The proof at trial met this high standard. Abrams testified that she felt severe disappointment with CBC's academic program, indignation at its poor instruction, wounded pride at being "had," and such severe despair that she dropped out of CBC. This evidence is sufficient to support the award of damages for mental anguish under the Act.

Affirmed.

February 2023
MPT-2
Item

B&B Inc. v. Happy Frocks Inc.

B & B Inc. v. Happy Frocks Inc.

FILE

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AZIZ & SHAPIRO LLP
Attorneys-at-Law
100 Austin Street
Franklin City, Franklin 33705

MEMORANDUM

To: Examinee
From: Hamid Aziz
Date: February 21, 2023
Re: B&B Inc. v. Happy Frocks Inc.

Our client, Happy Frocks Inc., was sued in the United States District Court by B&B Inc. for trademark infringement. At a post-trial hearing after a bench trial, the court announced its conclusion that our client was liable for trademark infringement in that it sold goods with an infringing mark, asked each party to brief its position on the remedies to be awarded, and stated that a full written opinion on both liability and remedies would be forthcoming after briefing.

Plaintiff B&B is seeking, among other things, actual damages, an injunction, and an award of that portion of the profits earned by our client from the sale of the infringing goods that was attributable to the infringement of the trademark. We believe that, whatever its liability for other remedies, our client is not liable for an award of profits.

Please draft the portion of our brief arguing that our client is not liable for an award of profits. (I have asked others in the firm to draft those portions of the brief dealing with other remedies or measures of damages, including their computation.) I am attaching the following materials:

- excerpts from the trial transcript, which provides the relevant factual record
- the transcript of the post-trial hearing, in which the court announced its conclusion as to liability only and requested briefs on remedies
- brief excerpts from the Supreme Court's decision in *Romag Fasteners, Inc. v. Fossil Group, Inc.,* on liability for profits in cases of trademark infringement
- the Franklin federal District Court's decision in *Spindrift Automotive v. Holt Enterprises,* setting forth the factors to consider in awarding profits in such cases

I am also attaching our firm's memorandum on the proper structure and content of a persuasive brief. Do not prepare a statement of facts, but be sure to incorporate relevant facts into your argument.

AZIZ & SHAPIRO LLP

MEMORANDUM

To: All Attorneys
Re: Guidelines for Persuasive Briefs in Trial Courts
Date: September 5, 2021

The following guidelines apply to persuasive briefs filed in trial courts.

I. Caption [omitted]

II. Statement of Facts (if applicable) [omitted]

III. Legal Argument

The body of each argument should analyze applicable legal authority and persuasively argue that both the facts and the law support our position. Supporting authority and facts should be emphasized, but contrary authority and facts should also be cited, addressed in the argument, and explained or distinguished. Courts are not persuaded by exaggerated, unsupported arguments.

We follow the practice of breaking the argument into its major components and writing carefully crafted subject headings that summarize the arguments they cover. A brief should not contain broad argument headings. Rather, the argument headings should be complete sentences that succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. Examples:

Improper: Setback requirements and removal of non-complying property

Proper: Because Defendant's garage sits only 15 feet from the curb, it fails to comply with the setback requirements of the homeowners' association and should be removed.

You need not prepare a table of contents, a table of cases, a summary of argument, or an index; these will be prepared, as required, after the draft is approved.

B&B Inc. v. Happy Frocks Inc.
United States District Court for the District of Franklin
EXCERPTS FROM THE TRIAL TRANSCRIPT, DECEMBER 16, 2022

Direct Examination of Vera Garcia, CEO of Plaintiff B&B Inc.

Plaintiff's Att'y Diane Berg: Please state your name and position for the record.

Garcia: Vera Garcia. I am Chief Executive Officer of B&B, Incorporated.

Berg: What is your firm's business?

Garcia: B&B makes buttons and other accessories for the fashion industry. Our buttons are well known in the trade, because they are uniquely styled and unlike any others in appearance. They are also made from high-quality materials, not just cheap plastic. Each button is stamped with our trademarked logo.

Berg: What was your firm's relationship with Happy Frocks?

Garcia: About nine years ago, we entered into a contract with Happy Frocks to supply them with our buttons, for their use in their high-end children's clothing. The contract provided that Happy Frocks would use our buttons exclusively and required that they instruct their authorized clothing manufacturers to purchase buttons directly from us.

Berg: How many manufacturers did Happy Frocks have that used your buttons?

Garcia: Four—they're all located overseas.

Berg: And how many buttons did Happy Frocks buy from you?

Garcia: On an annual basis, each manufacturer bought tens of thousands of our buttons. Our relationship with Happy Frocks was mutually beneficial for many years.

Berg: Then what happened?

Garcia: About two years ago, one of our employees was in a store and found some Happy Frocks children's clothes with buttons that looked like ours, contained our trademarked logo, but were made of cheap plastic and were clearly infringing. We knew that Quality Clothes, one of the overseas manufacturers they used, manufactured this line of clothing for Happy Frocks. We checked our records and found that, for the prior year, Quality Clothes had purchased only a few hundred of our buttons. We concluded that, for at least one year prior,

virtually all the clothing made by Quality Clothes that Happy Frocks was selling contained infringing buttons that looked exactly like ours, including our B&B logo, but were of inferior quality.

Berg: What did you do?

Garcia: We contacted you as our lawyer, and you sent Happy Frocks a letter telling them to cease and desist using the infringing buttons and demanding compensation.

Berg: What was the response from Happy Frocks?

Garcia: One of their managers called us and said they would look into it, but we didn't hear anything further from them, so we instructed you to bring this lawsuit.

Berg: What are you seeking by bringing this action?

Garcia: We want to be made whole for what we've lost, we want Happy Frocks to stop using the infringing buttons, and we want whatever profits they made that resulted from their use.

[Further direct testimony omitted.]

Cross-Examination of Vera Garcia, CEO of Plaintiff B&B Inc.

Defendant's Att'y Hamid Aziz: Ms. Garcia, are the allegedly infringing buttons dangerous?

Garcia: I'm not sure what you mean.

Aziz: Are they poisonous, for example?

Garcia: No, they're just cheap plastic.

Aziz: As these clothes are made for children, is it more likely that a child could swallow one of those buttons if it came loose than would be the case for one of your buttons if it came loose?

Garcia: No.

Aziz: Did any other clothing manufacturers besides Quality Clothes stop using your buttons because Happy Frocks sold the clothes manufactured by Quality Clothes?

Garcia: Not that I know of.

Aziz: To your knowledge, is Happy Frocks still selling clothes with the non-B&B buttons?

Garcia: No, they apparently made Quality Clothes stop doing so, but we want to make sure they don't start using them again.

Aziz: Did your overall sales decline during the period these buttons were used?

Garcia: No, our overall sales increased, but of course we lost the revenue from the sales of our buttons to Quality Clothes for the time that they used the infringing buttons until they stopped.

Aziz: To your knowledge, do customers who buy Happy Frocks clothing know who makes the buttons on the clothes?

Garcia: I hope they do from seeing B&B's logo on the buttons. I do think that customers know the difference between our high-quality buttons and the inferior-quality ones that were used.

Aziz: How long was it between the time you discovered the use of the non-B&B buttons and when you asked your lawyer to send the cease-and-desist letter?

Garcia: We did it almost immediately—maybe a week or two.

Aziz: And you say you got no response from Happy Frocks. The record will show that you did not file the complaint in this action, seeking an immediate injunction, until some nine months later, about a week before the so-called "Black Friday" sales in November. To your knowledge, is that the day with the largest sales of most retail goods like clothing?

Garcia: Yes, I believe it is.

Aziz: So would it be fair to say that you waited nine months to bring this lawsuit, until you could do so at a time when Happy Frocks would suffer the most damage from an injunction, and you could then put the most pressure on Happy Frocks to settle the case on your terms?

Garcia: I wouldn't put it that way.

Aziz: But with the belief that your trademark was being infringed, you still waited nine months from the date you learned of the allegedly infringing use until you brought suit to stop it, correct?

Garcia: That was the timeline, yes.

[Further cross-examination omitted.]

Direct Examination of Samuel Harris, CEO of Defendant Happy Frocks Inc.

Defendant's Att'y Aziz: Would you state your name and position for the record?

Harris: Samuel Harris. I am Chief Executive Officer of Happy Frocks Inc.

Aziz: Did you receive a so-called cease-and-desist letter from B&B's attorney about 22 months ago?

Harris: Yes, it said that some of our children's clothes contained infringing buttons, rather than buttons made by B&B. They demanded that we immediately stop the manufacture and sale of these clothes and said that we owed them a considerable amount of money.

Aziz: What did you do?

Harris: Well, their letter didn't specify which clothes from which of our overseas manufacturers contained these allegedly infringing buttons, so we had to investigate. It took us several weeks to get current samples from all our overseas manufacturers. When we finally did, we learned that Quality Clothes was indeed using buttons that didn't come from B&B. So we contacted Quality Clothes, told them to stop immediately, and, pursuant to the terms of our contract with them, terminated the relationship with them. We stopped selling our inventory of clothing that Quality Clothes had manufactured.

Aziz: Did you inform B&B of that fact?

Harris: No, we figured that stopping it was enough.

Aziz: Did Happy Frocks suffer any monetary loss as a result of all this?

Harris: Yes. You see, Quality Clothes, like all our manufacturers, was supposed to purchase the buttons directly from B&B and then bill us for the cost of the buttons. We found that, although they were using cheaper buttons, they were still billing us and we were still paying them for the cost of buttons from B&B. And we lost the value of our on-hand inventory. That all cost us a lot of money—I don't know if we'll be able to recover it from them, given their overseas location.

[Further direct testimony omitted.]

Cross-Examination of Samuel Harris, CEO of Defendant Happy Frocks Inc.

Plaintiff's Att'y Berg: Mr. Harris, what quality controls does Happy Frocks have over its overseas manufacturers regarding the clothing that they make for you?

Harris: We specify the quality levels of all the aspects of our clothing in our contracts with our manufacturers.

Berg: And what do you do to make sure that those levels of quality are adhered to?

Harris: We sample the goods that are manufactured to see if they are up to the quality standards we require.

Berg: How often are those samples examined?

Harris: Every time we get a new shipment from a manufacturer.

Berg: Referring to the time period beginning one year before you terminated your relationship with them, how many shipments of clothes did you receive from Quality Clothes?

Harris: Four.

Berg: And given your prior testimony, is it correct to say that you didn't notice the use of non-B&B buttons until the last—that is, the fourth—of those shipments?

Harris: Yes.

Berg: Have you since gone back and checked to see if the previous three shipments also contained buttons that were not made by B&B?

Harris: Yes, and they did.

Berg: So, despite your alleged application of quality controls for each shipment of clothing from each manufacturer, you didn't notice that the quality of at least those three previous shipments did not meet your standards, in that they contained these non-B&B buttons?

Harris: Yes. Simply put, we missed it.

Berg: You were negligent in maintaining that quality control, weren't you?

Aziz (Defendant's att'y): Objection—the question calls for a legal conclusion by the witness.

The Court: Sustained.

Berg: Let me put it another way—don't you think that you were lax, to say the least, in maintaining that quality control in this case?

Harris: In hindsight, of course I wish we had noticed the problem sooner, but we did our best.

Berg: Now let's address the question of why you missed it, as you put it. During the year when the non-B&B buttons were used, did you see an increase in the demand for the line of clothes made by Quality Clothes?

Harris: Yes, the retailers were clamoring for these designs—they were flying off the shelves.

Berg: And what did you do to meet that demand?

Harris: We accelerated our processing of the shipments we received from Quality Clothes so we could get them out the door faster.

Berg: How did that "acceleration" come about?

Harris: We instructed our employees to get their jobs done as quickly as possible to meet the demand.

Berg: And did that instruction extend to your quality control officer?

Harris: The instruction went to all our employees.

Berg: Wouldn't that have put pressure on the quality control officer to cut corners, and so lead to missing the use of the infringing buttons?

Harris: We would never do anything to cut corners on quality control. Your speculation is flatly wrong.

Berg: You say you stopped selling the inventory you had of goods manufactured by Quality Clothes. Did you recall any of those clothes that were out in the marketplace?

Harris: No, that would have been an impossible task, as we sell to over 900 retailers.

Berg: Have you ever recalled clothing from your retailers?

Harris: Yes, a few years ago we had a problem with some children's pajamas that had been made by one of our manufacturers with defective fabric.

Berg: How did that recall work?

Harris: We contacted the retailers and had them return the shipments with the defective fabric.

Berg: So you could have recalled the clothing with the infringing buttons, couldn't you?

Harris: That was a very different situation—the pajamas with the defective fabric had been shipped to about 600 of our retailers, and so the recall was manageable, unlike the situation with the buttons, where they had been shipped to over 900 retailers.

Berg: A recall from 900 retailers as opposed to 600 is actually quite possible, isn't it?

Harris: Well . . . I don't think it is.

Berg: Let's move on. What is your total cost per piece for the infringing clothing manufactured by Quality Clothes, and how many did you sell to your retailers?

Harris: Including everything, about $50 per piece. We sold about 18,000.

Berg: And how much did you charge your retailers per piece?

Harris: $75.

Berg: So you made a profit of $25 on each piece sold, or a total profit of $450,000 on the clothes with the non-B&B buttons?

Harris: Yes.

[Further cross-examination omitted.]

Direct Examination of Tiffany Chen, Defendant Happy Frocks's Expert Witness

Defendant's Att'y Aziz: Please state your name and position.

Chen: I am Tiffany Chen, Chief Executive Officer of TM Surveys, Ltd.

Aziz: I note for the record that Ms. Chen has previously been qualified as an expert witness on the construction and conduct of trademark surveys. Ms. Chen, were you commissioned by Happy Frocks to conduct a consumer survey of customers in relation to the use of B&B Inc.'s buttons on Happy Frocks clothing?

Chen: Yes. We conducted such a survey using standard scientific survey procedures.

Aziz: Please summarize the findings of your survey.

Chen: We conducted a survey of 839 consumers of Happy Frocks clothes manufactured by Quality Clothes. We found that the use of B&B's logo on the buttons played a minimal role in the clothing purchase: 3% of the respondents said that they noticed the logo and thought it added to the desirability of the clothes. We conducted another survey of 997 consumers of children's clothes

generally. We found that only 6% stated that whether there was a brand name printed on the buttons of clothes was one reason, among others, for purchasing one item of clothing instead of another, and less than 1% said that the appearance of a brand name on a button was the only reason for purchasing a particular item of clothing over another.

[Further direct examination and cross-examination omitted.]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF FRANKLIN

B&B, INC.	)	
Plaintiff,	)	
v.	)	Post-Trial Hearing Transcript
HAPPY FROCKS, INC.	)	Case No. 22 CV 1658
Defendant.	)	

February 17, 2023

Post-Trial Hearing Before Hon. Patricia James, U.S.D.J.

Present: Diane Berg, attorney for Plaintiff B&B, Inc., and Hamid Aziz, attorney for Defendant Happy Frocks, Inc.

The Court: Good afternoon. As you know, after the bench trial in this matter I asked both sides for post-trial briefs on the question of liability only. I did so because, if I found no liability, there would be no point in wasting the court's and the parties' time in addressing remedies. I have now read those briefs on liability and reviewed the trial transcript. As is my practice in cases of this sort, I am having this hearing to let counsel know my conclusion as to defendant's liability. I have concluded that defendant is liable for trademark infringement, as defendant sold goods that infringed plaintiff's trademark. I realize that defendant did not initiate the infringement, but the fact is that it sold infringing goods, and that is enough to establish liability.

I now require briefing from both sides on the question of remedies. Specifically, plaintiff has demanded a permanent injunction against sale of goods that infringed its mark, damages caused by defendant's sale of such goods, and an accounting of that portion of the defendant's profits attributable to the sale of such goods. Please submit your briefs two weeks from today. I will in due course render my decision on those points and issue a written opinion. Are there any questions? No? Then thank you, and this hearing is adjourned.

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Excerpts from Romag Fasteners, Inc. v. Fossil Group, Inc.,

140 S.Ct. 1492 (2020)

JUSTICE GORSUCH delivered the opinion of the Court [joined by four other Justices].

When it comes to remedies for trademark infringement, the Lanham Act [the federal trademark statute] authorizes many. A district court may award a winning plaintiff injunctive relief, damages, or the defendant's ill-gotten profits. Without question, a defendant's state of mind may have a bearing on what relief a plaintiff should receive. An innocent trademark violator often stands in very different shoes than an intentional one. But some circuits have gone further. These courts hold a plaintiff can win a profits remedy, in particular, only after showing the defendant *willfully* infringed its trademark. The question before us is whether that categorical rule can be reconciled with the statute's plain language [regarding the false or misleading use of trademarks].

[The Court reviewed the specific statutory language and structure, the argument that "principles of equity" include a willfulness requirement, and the history of trademark case law regarding the award of profits.]

. . . [W]e do not doubt that a trademark defendant's mental state is a highly important consideration in determining whether an award of profits is appropriate. But acknowledging that much is a far cry from insisting on the inflexible precondition to recovery Fossil advances. . . . The judgment of the court of appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE ALITO [joined by two other Justices] concurring.

We took this case to decide whether willful infringement is a prerequisite to an award of profits under [the Lanham Act]. The decision below held that willfulness is such a prerequisite. [Citation omitted.] That is incorrect. The relevant authorities, particularly pre-Lanham Act case law, show that willfulness is a highly important consideration in awarding profits under [the Lanham Act], but not an absolute precondition. I would so hold and concur on that ground.

[JUSTICE SOTOMAYOR issued a separate concurrence, omitted.]

Spindrift Automotive Accessories, Inc. v. Holt Enterprises, Ltd.

United States District Court for the District of Franklin (2021)

In this trademark infringement action, defendant Holt Enterprises has been found liable to plaintiff Spindrift Automotive Accessories. The question before the court is the determination of damages for that infringement. There are generally three remedies for trademark infringement: (1) the actual damages suffered by the plaintiff (for example, due to lost sales); (2) injunctive relief, barring future infringements; and (3) that portion of the defendant's profits that are attributable to the infringement. As to the latter, the court must determine, as best it can, what portion of the defendant's profits are attributable to the infringement, and what portion are attributable to non-infringing aspects.

One of Spindrift's demands here is that Holt disgorge its profits gained from the infringement. Spindrift argues that the Lanham Act allows for an award of profits based on the facts of the case. Holt counters that, based on those very facts, no award of profits is merited because it has been proven that the infringement was not "willful."

Willfulness Need Not Be Found to Justify an Award of Profits

Before reviewing the legal standard for making an award of profits in cases such as this, the court must consider the effect of the Supreme Court's recent decision in *Romag Fasteners, Inc. v. Fossil Group, Inc.,*140 S.Ct. 1492 (2020). There, the Supreme Court concluded that, in cases brought under the relevant provisions of the Lanham Act at issue here, proving willfulness was *not* a prerequisite to an award of profits. Rather, the Supreme Court explained that willfulness is not "an inflexible precondition to recovery" of a defendant’s profits under the Act. Instead, "a defendant’s mental state is a highly important *consideration* in determining whether an award of profits is appropriate." *Id.* (emphasis added). Hence, in light of the Supreme Court's holding, in this case Holt cannot avoid an award of profits solely because its actions were not willful. Accordingly, the court will now proceed to a discussion of the factors that justify an award of profits to determine whether an award of profits is justified here.

Analysis of Factors That Determine Whether an Award of Profits Is Justified

As a general matter, an award of profits is justified by three rationales: (1) to deter a wrongdoer from doing so again, (2) to prevent the defendant's unjust enrichment, and

(3) to compensate the plaintiff for harms caused by the infringement. In determining whether to award an infringer's profits as part of a recovery, a court must balance many factors. Certainly the defendant infringer's mental state—whether willful or otherwise—must be considered in this analysis. It is important to note that these various factors are not assigned equal weight, as the district court's discretion lies in assessing the relative importance of these factors in a particular factual situation and determining whether, on the whole, the equities weigh in favor of an accounting for profits. Thus, the court should consider the following:

1. The infringer's mental state. The court must consider the infringer's mental state in light of the harm to the trademark owner and to consumers, for particularly culpable defendants should be more likely to be subjected to an award of profits. On the one hand, in addition to willfulness, factors such as recklessness, callous disregard for the plaintiff 's rights, willful blindness, and a specific intent to deceive should be taken into account; on the other, mere negligence, or an innocent nature to the infringement, would argue against an award of profits. Here, defendant Holt knowingly and deliberately sold automotive parts not made by Spindrift but containing Spindrift's trademark, and it continued to do so when Spindrift so notified it. This conduct by Holt was hardly innocent. This factor justifies an award of profits.

2. The connection between the infringer's profits and the infringement. Was the trademark owner harmed by lost or diverted sales due to the infringement (beyond those sales lost by the infringement itself, which would be accounted for by actual damages)? Do the infringer's profits flow directly from, or were they caused by, the infringement? If so, an award of profits would be justified. Were consumers confused by the infringement, in thinking that the trademark owner authorized the infringing acts? Again, this would argue for an award of profits. What is the certainty that the infringer benefited from the infringement? A certain benefit would also argue for an award of profits. Here, Holt sold infringing parts that cost it but 25% of the cost it would have paid for the genuine Spindrift parts. Holt then charged the public the full amount that the genuine parts would have cost. Holt obviously benefited economically from the infringement. Hence, this factor favors an award of profits.

3. The adequacy of other remedies. Will the trademark owner be made whole by other available remedies, such as actual damages and injunctive relief? If so, there would be no basis for an award of profits. Spindrift alleges that the infringing parts are inferior to its genuine parts, and that consumers buying the infringing parts will lose confidence in its products. There is nothing in the factual record to support plaintiff's claim, and so this factor does not justify an award of profits.

4. Equitable defenses. Does the defendant have a claim of equitable defenses such as laches (i.e., unreasonable delay in pursuing a legal remedy) or failure to timely act on the part of the plaintiff, acquiescence by the plaintiff in the infringement, or unclean hands? Such defenses would argue against an award of profits. Here, as soon as Spindrift learned of the sale of the infringing parts, it took action to stop their sale, including filing this lawsuit and seeking and obtaining a preliminary injunction. The defendant has no claim of an equitable defense. Accordingly, this factor justifies an award of profits.

5. The public interest. Is there a public interest in making an award of profits, such as preserving public safety or deterring other infringements? For example, an infringing medicine containing an ingredient that would cause harm to the consumer would raise significant concerns for the public interest. Such a compelling public interest would argue for an award of profits. Such is not the case here. Given the existence of the injunction (which the attached order will make permanent) and the lack of evidence that the infringing parts cause a danger to the public, an award of profits cannot be justified based on this factor.

Having considered all five factors, the court concludes that, while some would not justify an award of profits, on balance, those factors that do justify an award of profits are more significant in this case, and so an award of that portion of the defendant's profits attributable to the infringement of Spindrift's trademark will be made.

[Court's determination of the amount of damages and profits to be awarded omitted.]

February 2023

New York State
Bar Examination

Sample Essay Answers

February 2023 NEW YORK STATE BAR EXAMINATION

SAMPLE ESSAY ANSWERS

The following are sample candidate answers that received scores superior to the average scale score awarded for the relevant essay. They have been reprinted without change, except for minor editing. These essays should not be viewed as "model" answers, and they do not, in all respects, accurately reflect New York State law and/or its application to the facts. These answers are intended to demonstrate the general length and quality of responses that earned above average scores on the indicated administration of the bar examination. These answers are not intended to be used as a means of learning the law tested on the examination, and their use for such a purpose is strongly discouraged.

ANSWER TO MEE 1

1. The issue is whether but-for Joan's hallucinations caused by her medication, she would have executed the same will.

Under the insane-delusion rule, a will is invalid if, at the time of execution, the testator's mental delusions are the cause of her executing a will that, but for her mental state, she would not have executed.

Three years ago, Joan's doctor prescribed a drug that is known to produce hallucinations in some patients. Joan began to experience frequent hallucinations that led to her having a delusion that the male line of her family was "cursed" by Martians. However, she continued to take the medication. Joan left everything to her daughter and nothing to her male line.

However, nothing about the facts suggests that Joan's decision to leave nothing to her male line was caused by her delusions, or that but-for the delusions, she would actually have left anything to her male line. She told her lawyer that she wanted to leave nothing to her male line because they were "burglars and thieves"-she said nothing about Martians or a curse. In fact, the reality does actually reflect that her male line have extensive criminal records, while her female line does not. Therefore, the facts do not suggest that but for her insane delusions, Joan would not have enacted the same will. Her will should not be struck down under the insane-delusion rule.

2. The issue is whether Joan has the capacity to understand the nature and consequences of executing a will, the natural recipients of her bounty, and the nature and extent of her property.

A testator has the mental capacity to execute a will if she has the ability to know, generally, the extent of her real and personal property, the natural recipients of the fruits of her bounty (in other words, she has the ability to know who her close relatives are), and the nature and consequences of the act of executing a will.

Here, Joan frequently made false claims to her friends that she was a "multimillionaire" and owned a "luxurious" home and "very expensive" cars. In fact, she lived in a modest apartment and her primary source of income was her Social Security benefits. These false statements do not necessarily lead to an inference that Joan lacked the capacity to understand the extent of her assets-it is equally plausible that Joan did not want her (all much wealthier) friends to know her real economic state. (This is supported by the fact that Joan also made regular arrangements to take cabs to all her lunches.) The facts also indicate that Joan regularly monitored her bank account and reconciled her statement every month. Therefore, Joan had the ability to understand what assets she possessed and would be devising in a will.

Joan also decided to leave all of her assets to her daughter and nothing to her male line, explaining that "leaving the males in [her] family anything valuable would be a complete waste on burglars and thieves." This statement to her lawyer reflects that Joan possesses an accurate understanding of the members comprising her family-she has one daughter (and one granddaughter from that daughter), neither of whom have a criminal record, and then one son and his three sons-all of whom have extensive criminal records for theft and burglary. Further, Joan allegedly regularly sends her children and grandchildren birthday cards and presents. These facts indicate that Joan has the capacity to understand "the natural recipients of the fruits of her bounty." Joan's statement to her lawyer also indicates that she understands the consequences of executing a will-she will be leaving her property to her female line, but not the male line. Therefore, Joan has the general mental capacity to execute a will.

3. The issue is which of Joan's surviving relatives have standing to contest the will because they received less under the will than they would have under the rules of intestate succession.

A family member of a testator has standing to contest the testator's will when he or she receives less under the will than he or she would have under intestate succession. A grandchild with a living parent (who is the child of the decedent) typically does not have standing to contest a will because under the rules of intestate succession, the parent would receive from the decedent but not the grandchild (and the parent's assets would pass to the grandchild upon the parent's death).

Here, Joan is survived by one daughter (and one granddaughter from that daughter), and one son (and three grandsons from that son). None of the four grandchildren have standing to contest the will, because Joan's daughter and son are still alive. Joan's will left her entire estate to her daughter, who would have received only part of the estate under the rules of intestate succession. Therefore, Joan's daughter does not have standing to contest the will. Joan's son received nothing under the will, but would have received at least half of the estate under the default rules of intestate succession. Accordingly, Joan's son has standing to contest the will.

ANSWER TO MEE 1

1. The issue is whether Joan's will is valid under the insane delusion rule.

A will is properly executed when a person has capacity, is above the age of 18, and has testamentary intent. A formal will, such as the one here, is usually a signed writing that is executed before two witnesses and/or a notary public. The testator must intend to create a will at the time of the execution ("testamentary intent").

A will is not valid if a testator lacked the mental capacity at the time of the execution. Typically, capacity is judged based on whether a testator can understand the nature of their assets, who in their lives are potential heirs or devisees, and grasp that they are writing an instrument to give their estate away in the event of their death. However, there is a rule called the 'insane delusion rule' in which capacity can be challenged despite meeting these general requirements. For example, a man who understands that he owns a home and is married and making a will can be found to have an invalid will if he was under the insane delusion that his wife was cheating on him with a dragon or other hallucination or delusion, thereby invalidating a will that leaves the wife with nothing.

Here, there are several factors to examine regarding Joan's mental state. First, she started taking a prescription drug that produced hallucinations as a side effect about three years ago. She executed the will one year ago, so it is fair to presume that she was still taking the prescription drug, and experiencing its side effects, at the time of the will's execution. These hallucinations led to a delusion that the male line of her family was "cursed" by Martians. Upon drafting the will, Joan told her lawyer "leaving the males in my family anything valuable would be a complete waste on burglars and thieves." On its face this raises questions about whether Joan is under an insane delusion and acted on reliance of that delusion in her bequests. However, here, Joan's son and her three grandsons actually do have, in reality, extensive criminal records for theft and burglary. Therefore, while a little unkind, Joan's attitude about her male line being "cursed" and refusing to leave them with a share is not apparent to have taken place due an insane delusion, even if she believes a Martian curse is the cause of their burglary and theft convictions.

Second, Joan has been telling her friends over lunch that she is a multimillionaire who owns a luxurious home and a very expensive car. Because this is not the reality of her life, as Joan has a modest Social Security income, this gives rise to a question about whether Joan is under an insane delusion. A delusion of this sort could also go towards a general lacking of mental capacity, as will be discussed below, because it goes to a core element of capacity: the ability to understand the assets one owns. With these facts, it does not appear that Joan is suffering an insane delusion. Firstly, it is not uncommon for people with significantly richer friends to pretend that they, too, are of that upper economic class. Additionally, Joan took a cab to lunch each time, rather than driving her

own automobile that she believed to be a very expensive car. This serves to show that Joan understood that she did not actually have a very expensive car, as she took pains to hide it from her friends by spending her limited income on a cab. She also never invited her friends over to her home. If Joan had been under an insane delusion that she actually owned these things, it seems more likely that she would have driven to lunch in an old Honda Civic and invited her friends to her modest apartment and truly believed that these cars and homes were luxurious and fancy. Because this is not the case, Joan appears to have known this was a lie.

Under these facts, Joan's will should not be invalidated under the insane delusion rule.

2. The issue is whether these facts establish that Joan's will is invalid because she lacked the general mental capacity to execute a will.

As stated above, certain elements are required to have mental capacity to make a will. It is not the case that any cognitive symptom or old age alone disqualify a person from creating a valid will. Instead, a testator must lack one of the following abilities: the ability to remember and understand her own assets in her estate, the ability to remember who in her life she would like to devise her estate to, and the ability to understand that she is making a will that will dispose of her property upon death.

As flagged above, Joan's ability to recall and understand the assets in her estate were put into question by her statements to her rich friends. However, these statements above, for the same reasons as the insane delusion rule analysis, do not serve to indicate that she did not know her assets. In addition to taking a cab in order to hide her real financial situation, Joan also monitored her bank account regularly and reconciled her bank statement every month. This shows that Joan did have the capacity to understand her assets and knew what she owned.

In regards to her ability to recall who was in her life, such as family and friends to whom to devise her estate, there is nothing in the fact pattern that suggests she lacked the ability to comprehend who those people were. She mentioned her son and grandsons to her lawyer, albeit with derision, and therefore did not lack the capacity to recall of their existence. Additionally, her heated attitude towards them was based on their own valid convictions and criminal records. She also sends them birthday cards and inexpensive presents with regularity. Therefore, Joan appears to have had the capacity to recall who was in her life.

Lastly, Joan appears to have had testamentary intent, and knowledge that she was leaving a will, as evidenced by her conversation with her lawyer, in which they explicitly discussed who she wanted to leave her property to upon her death.

Therefore, under these facts, the will is valid and Joan had the mental capacity required to make a will.

3. The issue is who had standing to contest the will.

In general, interested parties may contest a will. Interested parties are those that would take, either under the will, or under the laws of intestate succession. When a person dies intestate unmarried and with issue, the children take equal shares. Under the will, Joan's daughter takes. Under intestate succession, Joan's daughter and Joan's son would split the estate. Therefore, the daughter and son each have standing to contest the will. However, the will leaves twice as much to daughter as the daughter would get under intestate succession, so it is highly unlikely that the daughter would contest the will. While the grandchildren are likely to benefit indirectly from such testamentary gifts, they do not have standing to contest the will. The son is therefore the most likely person with standing to contest the validity of the will.

ANSWER TO MEE 2

1. No, the officers' entry into the house should not result int he exclusion of evidence. Here, there is state conduct because the action is by the police. And while executing a valid search warrant, the police must also abide by proper warrant procedure including knocking on the door, announcing their presence, and waiting to be let into the home. Therefore here, the police officers failing to knock, announce, and either wait to be let in but instead letting themselves in through the door is a violation of knock-and-announce. There are exceptions to knock-and-announce, such as if they hear evidence being destroyed (evanescence of evidence) or a fleeing felon or an emergency, none of which we have here. Therefore, this is a violation of knock-and-announce, and therefore a violation of the 4th amendment right for people to be free from unreasonable search and seizures unless there is an adequate warrant and proper warrant procedures.

However, the Supreme Court has found that while knock-and-announce are 4th amendment violations, they are often harmless errors and therefore do not prohibit the introduction of evidence violating the 4th amendment thereafter obtained. Therefore, what otherwise unlawful evidence obtained may be introduced. The rationale is that the knock and announce is only a small procedure that is rather harmless because the police are entering with a valid warrant and the warrant provides independent justification for entering the home and adequate basis, so there is no fruit of the poisonous tree to exclude the evidence under the 4th Amendment, as applied to the states through the 14th. In other words, whether the officers had knocked or not, they still would have entered the home

and found the evidence that they did, so the error was harmless so the evidence cannot be excluded.

2A. In order to seek to exclude evidence, the defendant must have standing. Standing is based on a reasonable expectation of privacy. Here, the driver was a delivery driver who entered the home of Homeowner to deliver a pizza. The Court has found that land owners, and renters, and people who pay to stay in apartments or hotel rooms have reasonable expectations of privacy, and therefore have standing. The Court has also found that overnight guests have a reasonable expectation of privacy. However, the court did not find a reasonable expectation of privacy when a drug dealer entered the home of another drug dealer to sort and divide drugs- because of the illegal commercial activity. here, the Driver was not there to engage in illegal commercial activities, however the driver was also not there as an overnight guest. he was only there to quickly drop off the pizza and leave -therefore the driver does not have sufficient expectation of privacy in order to have standing to dispute the introduction of the marijuana evidence.

If the driver did have standing, the driver would argue that the Terry search may have had reasonable suspicion because the officer saw a lump in the back pocket of the driver- a weapon would likely leave a lump *I* shape, and a weapon is often in the back pocket, so there is support there was reasonable suspicion. However, a Terry pat down when reasonable suspicion armed and dangerous only allows the officer to pat down for the plain feel, and may not manipulate objects in their hands, so the officer knew she felt something but if she did not believe it was contraband based on the plain feel, she was not permitted to further probe the item, to remove it from the pocket or to inspect it. Therefore, this was unlawful search and seizure.

2B. Under the plain view doctrine, when an officer is lawfully in a space, anything they see in plain view and have probable cause to believe is evidence of a crime, they are lawfully allowed to inspect. Here, the officers had a lawful search warrant for the home. The search warrant was for the entire home, so they were within the scope of the warrant by being in the kitchen looking for the fraudulent $100 bills a place he was lawfully allowed to be - and on top of the counter they saw the computer and purely from looking at the computer- without having to turn the computer over - they saw the serial number which they then ran in the system to get probable cause that it was evidence of a crime. Therefore, this evidence was validly found under plain view.

As the homeowner, he has reasonable expectation of privacy in his home so he can try to challenge this, but will likely be unsuccessful.

2C. When a search warrant is created, it must particularly describe the place to be searched and the items to be searched for. Here the search warrant was for Homeowner's home and was for counterfeit $100 bills. Therefore, the officers were permitted to enter the home and look anywhere and open any container that was large enough to fit $100

bills. Here, the officers saw a bill bottle which was 2 inches tall and was see through so did not show any $100 bills stuffed inside- therefore this was not within the scope of the search warrant.

This was also not plain view because while the pills were visible to the naked eye - the pills themselves did not indicate any unlawfulness -they were not saying marijuana or crack which is clearly unlawful from the plain view. Rather, the police had to take the pills to be processed in a lab to be told they were illegal substances. Therefore, the police did not garner sufficient probable cause just seeing pills in a bottle to determine they were unlawful. As such, the police seizure of the pills was a violation of the 4th Amendment. And as the owner of the house, homeowner has reasonable expectation of privacy and can invoke the exclusionary rule and challenge the introduction of this evidence. He will likely succeed because there are no facts to provide that the police had an independent source or alternative means of obtaining these pills besides in that moment, so it was the poisonous tree that directly led to the unlawful search. Therefore, this 4A violation, as applied to the states through the 14th A will prohibit the introduction of this evidence.

ANSWER TO MEE 2

1. Exclusion of Evidence.

The police officers' entry into the house without knocking and announcing their presence would not, by itself, result is exclusion of the evidence. The issue is whether violation of the knock and announce rule results in exclusion of evidence. Here, we are told that the police have a valid search warrant to search the house for $100 bills. Although police officers are required to knock and announce their presence (other than where public safety and/or exigent circumstances require otherwise), failure to comply with that rule does not require exclusion of evidence. The knock and announce rule has many benefits, including safety of the police. The police officers would have needed consent to enter and search the house if they did not have a search warrant. Since the police officers had a valid search warrant for the house, consent to enter and search was not required. As such, regardless of the police officers' decision to enter without knocking and announcing their presence, except as noted below, evidence will not be excluded.

2. Additional Conduct.

(a) Marijuana. The marijuana seized from Driver should be excluded. The issue here is whether the police officer was entitled to seize the marijuana despite their plain feel pat-

down not revealing what the Driver's "lump" was. Police officers are not authorized to search persons present in a house while executing a search warrant unless those persons are specifically identified in the search warrant. Where a police officer has reasonable suspicion that there may be a weapon on a person, they are entitled to conduct a "terry stop" (pat down) of the person to see whether, based on plain feel, the person has any weapons on them. The plain feel must be exactly that; based on a plain feel, whether it can be determined that illegal contraband is in the person's possession. Here, the police officer saw that Driver had a lump in the back pocket of his pants and thought that the lump could be a handgun. The police officer patted Driver down and determined at that time that the lump was not a weapon but a soft object. We are also specifically told that police officer was unable to determine what the object was by patting the outside of Driver's pants (i.e., not by plain feel), so she reached into his pants pocket and retrieved a plastic bag containing marijuana. The police officer, based on the facts provided, did not have probable cause to search Driver based on the pat down. Since a search of the person must have probable cause in this circumstance, the search was unconstitutional. As such, the Driver's marijuana must be excluded.

(b) Computer.

The computer can likely be included in evidence. The issue here is whether the police officer exceeded the scope of the search warrant. Generally speaking, the police are authorized to execute a search warrant and seize any information set out in the warrant, as well as anything that the police can tell is illegal contraband during their search. During the search, police officers are entitled to search any area of the house that the items could be located.

Here, the search warrant is for counterfeit $100 bills, which would presumably be quite small and capable of fitting in most areas (e.g., closets, under beds, etc.) The police officer was executive a valid search warrant and was lawfully in the house at the time that he was the computer. As well, we are told that the police officer could tell by looking at the computer, and using a law-enforcement app, that the serial number appeared on list of serial numbers of recently stolen computer equipment. Although the computer did not appear in the search warrant, since the police officer could tell that it was illegal contraband merely by looking at the computer. Since the police officer knew that the computer was illegal contraband at the time of seizure, it is likely admissible evidence.
(c) Narcotics. The narcotics will likely be excluded from evidence. The issue is whether the police officer knew the narcotics were illegal contraband before seizing them. The same rules described in 2(b). above will apply. Here, we are told that the police officer found a two-in-tall, unlabeled, transparent medicine bottle that contained several pills with no markings on them on the nightstand next to a bed. The search warrant that the police were executing had nothing to do with illegal drugs. To the contrary, it had to do with counterfeit $100 bills. The police officer did not know what the pills were when viewing them. The pills were in a medicine container and could quite easily be legal

prescription medication or over-the-counter drugs. The police officer had to have the drugs tested in a lab to determine that they were illegal narcotics. As noted above, the police should generally be able to tell that an item is illegal contraband during the search (or have the item listed in the search warrant) to be able to seize the property. Since that was not the case here, it is likely that the narcotics will be excluded.

ANSWER TO MEE 3

(1) The issue is whether the Federal Rules of Civil Procedures permit the woman to bring the company into the action as a third-party defendant.

Under the FRCP Rule 14, a defendant can implead a third-party defendant based on derivative liability. Indemnification is a derivative liability, under which the third-party defendant is liable for all of the plaintiff's claim against the defendant. An impleader claim must be timely filed within 14 days after the defendant files the answer. The third-party complaint must adhere to the same service requirement under the FRCP: (1) the summons and complaint must be served within 90 days of the complaint, and (2) if the third-party defendant is a corporation, by serving to the officers of the corporation through a non-party over the age of 18.

Here, the woman asserts that her insurance company is liable for the man's claim against her based on the indemnification clause in the policy. Such a claim would be a proper impleader claim under the FRCP. The woman filed the third-party claim timely by filing it simultaneously with her answer to the man's complaint. She also timely served the insurance company by delivering the summons and complaint to the president of the company within 10 days of filing the third-party complaint. The service to the president is also proper under the FRCP Rule 4 because the president is an officer of the insurance company. The professional process server is a non-party over 18 years old. Whether the woman has a valid insurance and whether the insurance company is required to indemnify her under the policy are relevant only to the merits of her claims, not to the propriety of the device used.

Therefore, the woman can bring the company as a third-party defendant.

(2) The issue is whether the court has personal jurisdiction over the company.

Under the Due Process Clause of the Constitution, the defendant must have minimal contacts with the forum so that the exercise of personal jurisdiction would not violate traditional notion of fair play and justice. An exercise of general personal jurisdiction on

the corporation is proper where (1) the corporation is incorporated, and (2) the principal place of business is located, which is traditionally the nerve center or the headquarter of the corporation. For general jurisdiction, the cause of action does not have to be related to the contact. Under the FRCP Rule 4, for an impleader claim, personal jurisdiction of a third-party defendant is proper if the third-party defendant has minimum contacts either with the forum state or with the bulge area, that is, within 100 miles (air miles) of the forum court where the third-party defendant could be served.

Here, Big City and Small Town, which is where the forum court is located, are 10 miles apart, and therefore Big City is within the bulge area under Rule 4. Therefore, under the FRCP, if the insurance company has minimum contacts with the bulge area, personal jurisdiction is proper. Big City is where the insurance company's headquarters are, and therefore the insurance company has sufficient contact with Big City for the court to exercise general personal jurisdiction.

Therefore, the court has personal jurisdiction over the company despite the lack of contacts with State B.

(3) The issue is what actions can be taken by the district court to allow the woman to immediately appeal the court's dismissal of her complaint against the insurance company.

Under the final judgment rule, only a final judgement on the merits are immediately appealable. A judgment is final if there is nothing left for the court to do other than entering the judgment. General exceptions are (1) if the court has entered judgment for a part of the claim and certifies that there is no just reason to delay, (2) the collateral order exception, where the issue is important, unrelated to the merits of the case and essentially unreviewable if the parties wait for a final judgment, (3) grant or denial of injunction, attachment, and class certification. In extraordinary circumstances, the party can also petition for a writ of mandamus if the district court abuses its discretion.

Here, the court dismissed the woman's third-party complaint against the insurance company. However, the main action between the man and the woman was still ongoing, and therefore there is no final judgment on the merits. The collateral order exception does not apply to the dismissal of the impleader claim because it is reviewable on appeal. The writ of mandamus is sought by the parties, not by the court. Nonetheless, the court may certify under Rule 54(c) that there is no just reason for delay on the issue of the third-party claim and that the woman could appeal immediately. This is totally within the discretion of the court. Because the woman's claim against the insurance company includes requiring the insurance company to provide an attorney to represent her in the action with the man, her injury would not be easily redressable should the court denies immediate appeal, as the woman would be left on her own to defend the claim against the man.

Therefore, the court can certify under Rule 54(c) that there is no just reason for delay on the issue of the third-party claim and the woman can immediately appeal, and should probably do so because otherwise her injury is not easily redressable.

ANSWER TO MEE 3

1. Can the woman bring the insurance company in as a third party defendant?

The issue is whether the woman, the defendant of a diversity action involving negligence, can implead the insurance company as a third party defendant.

In order to implead a third party, the woman, as third party plaintiff must file a timely complaint against the third party defendant (the insurance company) which the facts state she did. The cause of action alleged by the third party plaintiff must be derivative of the complaint alleged against the third party plaintiff by the original plaintiff (the man). That is, if the third party plaintiff is found liable then the third party defendant should indemnify them or contribute. The woman must also serve the third party defendant properly.

Service

The woman needs to serve the complaint on the insurance company. Service on a company under the Federal Rules is allowed by having a non-party process server who is older than 18 years old leave the service (complaint and summons) with an officer of the company. Here, the process server personally delivered the summons to the president of the insurance company (agent and officer of the company). Assuming the process server was over 18, service was conducted permissibly under the Federal rules.

Woman's complaint derivative?

The woman's complaint reveals two causes of action against the third party defendant, (1) that the insurance company provide her a lawyer as per the insurance policy and (2) that the insurance company indemnify her if she was found liable to the man.

Here, the second prong of her cause of action is clearly derivative of the action by the man against her. This is because she is seeking an indemnity if she is found liable to the man from the insurance company. Therefore, the second prong is clearly allowable.

In relation to the first prong, this is a little more unclear about whether this is derivative of the man's claim against the woman. On one hand, the woman would not need to petition her insurance company for a lawyer without the man's claim against her, showing that it is somewhat derivative. However, on the other hand, she is merely seeking to enforce her contract with the insurance company and it is not related to the claim by the man. Therefore, I think that a court could go either way on whether this claim is derivative and therefore properly brought under the third party defendant rules.

Destroying diversity

One might erroneously try and argue that because the insurance company is a citizen of State A, through its headquarters (principal place of business) that it cannot be joined because it destroys diversity because the woman becomes a "third party plaintiff". However, this is incorrect. The woman still is a defendant and the insurance company is also a defendant.

Overall, in summary, the woman can bring the company into the action as a third party defendant for all claims that are derivative.

2. Does the court have personal jurisdiction over the insurance company despite lack of contacts with State B?

The issue is whether the court has personal jurisdiction over the insurance company in State B.

There are three ways a court may have personal jurisdiction over a party. They are (1) specific personal jurisdiction (2) general personal jurisdiction and (3) jurisdiction arising from specific rules of the Federal Rules of Evidence. Personal jurisdiction is subject to the US constitution and notions of fair play and justice and ensuring that a party does not need to defend suits in places where they have no minimum contacts.

Specific jurisdiction arises out of a party's minimum contacts in a forum state, where the contacts are related to the claim and notions of fairness allow for the court to exercise jurisdiction. Clearly in this case, the insurance company has no contact with State B so this specific jurisdiction is not met.

General jurisdiction for a company is the one or more places where a company is incorporated or the one place where it has its place of business. The facts disclose that the insurance company is not incorporated in State B nor does it have its place of business there. Therefore, State B does not have personal jurisdiction generally.

However, jurisdiction here arises because of a special 100 mile bulge rule for court's exercising personal jurisdiction over third party defendants. The rule states that where a

third party defendant is located in a 100 mile radius from the district of the federal court then the court may exercise personal jurisdiction even though the party is a citizen of another state and located in another state.

Therefore, under this rule the woman can bring the company into the action despite its lack of contacts.

3. Actions to allow the woman to immediately appeal?

The issue is how the woman can immediately appeal the decisions of the district court to dismiss the complaints against the insurance company.

Usually, a party can only appeal final judgements. These are decisions where the court has disposed of all issues such that there is nothing left for it to do. However, a number of exceptions exist which the district court assist the woman being eligible for.

The clearest one is one where the district court certifies that this order can be appealed whilst making the order by stating that there is no reason to delay the appeal in the interests of justice. Here, the woman may be left without legal representation if the insurance company does not provide her one as per their insurance contract. However, these issues can also be resolved in appeal. That is, the woman could retain her own attorney, sue the insurance company separately for them to pay the attorney fees and to indemnify her against any judgement sought against her. There are a number of issues that need to be resolved in relation to the contract between the insurance company and the woman too e.g. whether premiums were paid or not. Therefore, the interests of justice don't seem to be so great as to make this a clear cut case where the court should exercise their discretion.

The second way the district court could use the Interlocutory Appeals Act however the issue needs to pertain to law that is unsettled and could benefit from a higher court's review and then higher court accepting the appeal. This seems unlikely in this case.

ANSWER TO MEE 4

1. Security interest in the couch

The furniture store does not have a fully enforceable and perfected security interest in the couch used by the lawyer. At issue is whether the store properly perfected its interest.

Generally, in order for a security interest to be enforceable against a debtor, attachment must be executed. Attachment may be completed through (i) the execution of an authenticated security agreement, (ii) the giving of value by the secured party, (iii) and the holding of rights by the debtor. The authenticated security agreement must be signed by the debtor and describe the collateral. In order for a security interest to be enforceable against third parties, perfection must be completed. Perfection can be achieved through (i) the filing of a financing statement, (ii) possession of the collateral, or (iii) control over the collateral. If a seller of personal property grants a security interest to a buyer, it is a purchase money security interest (PMSI). PMSIs, if properly perfected have super priority over conflicting security interests. PMSIs in consumer goods are automatically perfected. The nature of a good is determined by its use by the debtor.

Here, the lawyer purchased a couch for her new office's waiting room on credit. This item was to be used for business purposes, and is therefore equipment, rather than a consumer good in this transaction. The parties entered into a credit sales agreement which described the collateral, parties, and the security interest. By describing the collateral and being signed, the agreement was properly authenticated. The seller gave value in the form of the couch. The lawyer, as purchaser, had rights of possession in the same. Accordingly, attachment was executed. Since this was a sale on credit by the furniture store, it is a PMSI in equipment, which is not automatically perfected. The store gave possession and control of the couch to the lawyer, therefore it may only perfect through filing. It however filed to file a financing statement. Accordingly, it never perfected its security interest.

Therefore, the store does not have a fully enforceable and perfected security interest in the couch.

2. Security interest in the dining room table

The furniture store does have a fully enforceable and perfected security interest in the dining room table. At issue is the perfection of a purchase money security interest in consumer goods.

The rules for attachment, perfection and PMSI's described in (1) equally apply to the purchase of the dining room table.

The parties entered into a signed agreement describing the table and that the store would retain title, thereby completing an authenticated security agreement. The store similarly gave value through the table, and the lawyer similarly had rights of possession in the table. Accordingly, attachment was completed. The lawyer purchased the table on credit from the seller, making it a PMSI. The lawyer intended to use the table for personal use, specifically in her dining room, rather than as part of her legal practice. As a result, the created security interest was in a consumer good. The store did not perfect its security interest through filing, control, or possession. Although it retained title to the table, this would not suffice to grant the store possession or control as a means of perfection. However, this is not dispositive because as a security interest in a consumer good, it was automatically perfected.

Therefore, the furniture store does have a fully enforceable and perfected security interest in the dining room table.

3. Security Interest in the desk used in State Y

The furniture store in State Y likely does have an enforceable and perfected security interest in the desk used by the lawyer in her office in State Y. At issue is whether a security interest that is filed in the state where the collateral is located, rather than the state of the debtor's domicile, may be validly perfected and enforceable.

The same rules for attachment and perfection of security interests described in (1) would apply to this transaction. Additionally, in order for a security interest to be validly perfected it must be filed in the state of domicile of the debtor. If the collateral is located in a different state, filing must also be executed in this state. A debtor's domicile is determined by their state of permanent residence, and may be changed only upon a manifest clear intent to relocate.

Here, the lawyer purchased a desk to place in her parents' home. Although it was to be placed in home, its use was intended for business purposes while she represented clients in State Y. Accordingly, the desk may be considered equipment in this transaction. The lawyer purchased the desk on credit, with the obligation secured by a security interest. Accordingly, the security interest is a PMSI in equipment. The parties executed an authenticated security agreement. The store gave the lawyer value through the desk and the lawyer had rights of possession in the desk. As a result, attachment was properly executed.

The store filed a financing statement in the central filing office of State Y. This action however did not suffice to fully perfect the security interest. Although the collateral was to be located in the parent's home office in State Y, the lawyer did not change her domicile to State Y. As indicated by the facts, she only stays at her parents' home a few weeks each year, and wanted to make use of the desk only at that time. She retained her

residence and practice in State X and had no intent of relocating permanently. As a result, the financing statement was not filed in the debtor's home state.

Therefore, the furniture store does not have a fully enforceable and perfected security interest in the desk used by the lawyer in her office in State Y.

ANSWER TO MEE 4

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.

UCC Article 9 governs secured transactions in which personal property (collateral) is used to secure a debt obligation. The party who holds the security interest is the secured party, the party who owes the obligation is the obligor, and the party who owns the collateral is the debtor. Usually the obligor and debtor are the same person, so I will use debtor to refer to both. The secured party's security interest must be attached to be enforceable. The secured party's security interest must be perfected to have priority over third party claims.

Attachment

Tangible collateral that can secure a secured transaction are classified as consumer goods, inventory, farm products, or equipment. Consumer goods are goods used for personal or household use, inventory is goods held by a business for sale or lease, and equipment is a catchall category for other items that are not consumer goods, inventory, or farm products. A secured party's interest in the collateral attaches, and is enforceable against the debtor, when (1) the secured party gives value, (2) the debtor has rights in the collateral, and (3) the debtor authenticates a security agreement or the secured party maintains possession or control of the collateral pursuant to an unauthenticated or oral security agreement. A properly authenticated security agreement must be (1) contained in a record, (2) contain a reasonably identifiable description of the collateral, and (3) be authenticated by the debtor.

Here, the couch sold by the State X furniture store qualifies as equipment-the couch is not inventory because it is being used in the lawyer's law practice, and the couch is not inventory because it is not being held for sale or lease in the lawyer's business. The State X furniture store's security interest in the couch as attached because (1) the store gave value in the form of the credit extended for the lawyer to purchase the couch, (2) the lawyer has rights in the couch because she has possession of the couch, and (3) the

lawyer properly authenticated a security agreement by signing the Credit Sales Agreement. Therefore, the State X furniture store has an enforceable security interest in the couch.

Perfection

To perfect a security interest in the collateral to have priority over the claims of third parties, the secured party must perfect their interest. Perfection can be accomplished by filing a financing statement in the secretary of state office in the state of residence of the debtor, possession or control of the collateral, or automatic perfection in some circumstances. Here, the store has not filed a financing statement regarding the couch transaction, and the store has delivered the couch to the lawyer so it does not have possession or control of the couch. Note, that the store has a purchase-money security interest (PMSI) in the couch, but because the couch is not a consumer good, this is not a PMSI in consumer goods and does not automatically perfect (discussed further below). Thus, the State X furniture store does not have a perfected security interest 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 the lawyer in her dining room in State X.

Attachment

The table sold by the State X furniture store qualifies as a consumer good because it was purchased for the lawyer's personal use in her home. Based on the rules for attachment explained above, the State X furniture store has an attached security interest in the table as attached because (1) the store gave value in the form of the credit extended for the lawyer to purchase the table, (2) the lawyer has rights in the table because she has possession of the table, and (3) the lawyer properly authenticated a security agreement by signing the sales agreement. Therefore, the State X furniture store has an enforceable security interest in the table.

Perfection

One type of security interest is a purchase-money security interest (PMSI), which arises when the secured party sells the collateral on credit to the debtor or the secured party gives a loan to the debtor which is then used to purchase the collateral that secures the loan. A PMSI in consumer goods perfects automatically. Here, the table is a consumer good because it was purchased for the lawyer's personal use in her home. The furniture store has a PMSI in the table because it sold the table to the lawyer on credit but retained a security interest in the table by maintaining title until the table is paid off. Thus, this is a PMSI in consumer goods and perfects automatically, even though the store has not filed a financing statement regarding the table transaction. Thus, the State X furniture store has a 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 the lawyer in her office in State Y.

Attachment

The desk sold by the State Y furniture store qualifies as equipment because it is only being used in conjunction with the lawyer's law practice-the desk is not inventory because it is being used in the lawyer's law practice, and the desk is not inventory because it is not being held for sale or lease in the lawyer's business. Based on the rules for attachment explained above, the State Y furniture store has an attached security interest in the desk because (1) the store gave value in the form of the credit extended for the lawyer to purchase the desk, (2) the lawyer has rights in the desk because she has possession of the desk, and (3) the lawyer properly authenticated a security agreement by signing the agreement. Therefore, the State Y furniture store has an enforceable security interest in the desk.

Perfection

A properly filed financing statement must (1) name the debtor, (2) name the secured party, and (3) identify the collateral. A financing statement must also be filed in the secretary of state office in the state in which the debtor is located. This allows other secured parties to see the existing security agreements involving the debtor, which may influence their decision to make a loan to the debtor.

Here, the State Y furniture store has a PMSI in the desk, which is equipment, so it does qualify as a PMSI in consumer goods and does not perfect automatically. The lawyer's principal residence is in State X. However, the State Y furniture store filed the financing statement in State Y. Thus, the State Y furniture store improperly filed the financing statement and does not have a perfected security interest in the desk.

ANSWER TO MEE 5

1. The issue is whether Wendy acquired title in Central Acre by adverse possession.

In order to acquire title by adverse possession, the adverse possessor must possess the land in a manner that is (1) actual and exclusive, (2) continuous, (3) open and notorious, (4) hostile and under claim of right and (5) for the statutory period.

Here, the Court held that from 2010 to the end of 2021, Wendy possessed Central Acre in a manner that was actual and exclusive, continuous, open and notorious, hostile and under claim of right. Moreover, the statutory period in this state is 10 years. Since Wendy began occupying the land in January 1, 2010, by January 1, 2020, Wendy would have occupied the land for the required 10 year statutory period. Therefore, in 2020, Wendy acquired title by adverse possession to the Central Acre.

Notably, the fact that John had promptly recorded his valid deed is irrelevant since a recording statute does not protect against persons with interests that arise as a matter of law (e.g. adverse possessors). It is also irrelevant that Wendy later ceased actual possession of Central Acre in 2022 because by then she had already acquired title by adverse possession.

The issue is whether the tolling statute in the state's adverse possession laws apply given that Mary was 12 years old when she acquired the property.

Under the state's adverse possession laws, if any person entitled to bring an 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 the age of 18. Here, when Mary acquired the property after John died, she was 12 years old. Therefore, Mary would have only turned 18 when Wendy brought the claim in 2022. Assuming the cause of action accrued at the time Mary acquired the property, then under the state's adverse possession laws, Mary would still have 5 more years to contest Wendy's adverse possession.

However, Wendy may argue that on the plain reading of the law, the time to recover title or possession only tolls if at the time the cause of action accrues, the person entitled to bring the action is under the age of 18 years. Here, the cause of action accrued when Wendy first began to occupy the one acre of the three-acre parcel in 2010. At the time, the person who was entitled to bring the action was John who was not under 18 years of age at the time. Therefore, Wendy can argue that the tolling statute should not apply at all and that Wendy acquired title to Central Acre in 2020.

(a) The issue is whether constructive adverse possession applies given that Wendy had colorable title to Western Acre as well.

Generally, an adverse possessor only acquires title by adverse possession in the land that was actually occupied by the adverse possessor. Here, Wendy only occupied Central Acre, but did not occupy Western or Eastern Acre. Nevertheless, adverse possessor may acquire title in the entire land (including portions of the land not actually occupied) if there is constructive adverse possession. This requires the adverse possessor to act under the color of title for the entire land including portions not actually occupied.

Here, the Court held that the quitclaim deed from Smith's descendant gave Wendy colorable title to the three-acre parcel described in the deed. Assuming Wendy acted in a manner consistent with colorable title over the three-acre parcel, then she would have acquired the Western Acre by adverse possession as well.

Wendy also acquired title to the Western Acre in that year.

(b) The issue is whether constructive adverse possession applies given that Wendy never actually occupied Beth's land.

Generally, an adverse possessor only acquires title by adverse possession in the land that was actually occupied by the adverse possessor. Here, Wendy only occupied Central Acre, but did not occupy Eastern Acre. Nevertheless, adverse possessor may acquire title in the entire land (including portions of the land not actually occupied) if there is constructive adverse possession. This requires the adverse possessor to act under the color of title for the entire land including portions not actually occupied. That being said, constructive adverse possession would only apply where the adverse possessor occupied at least a part of the land claimed.

Here, Wendy only possessed John's land (Central Acre). Wendy did not at any time possess Eastern Acre which is Beth's deed. Notwithstanding the fact that court held that the quitclaim deed from Smith's descendant gave Wendy colorable title to the three-acre parcel described in the deed, the fact of the matter is that she never possessed Beth's land. However, Therefore, constructive adverse possession cannot apply.

Notably, the fact that Beth had promptly recorded his valid deed is irrelevant since a recording statute does not protect against persons with interests that arise as a matter of law (e.g. adverse possessors).

Wendy did not acquire title to the Eastern Acre in that year.

ANSWER TO MEE 5

1. Adverse Possession

Wendy acquired titled by adverse possession to the Central Acre given that she occupied such land in compliance with the elements of adverse possession and the claim for ejectment was not tolled by Mary's disability of infancy given that the cause of action accrued before Mary obtained title of the land.

The issue is whether the infancy of a child (i.e., being under the age of 18) tolls the statute of limitations of a claim of ejectment and thus the period for adverse possession when the cause of action accrues before a minor comes into possession and title ownership of the property.

In general, adverse possession is a byproduct of the failure of an owner to bring a lawsuit against a person occupying land under the elements of adverse possession within the statute of limitations for a claim of ejectment. The elements of adverse possession include (1) actual and exclusive possession of another's land, meaning actual occupation and not sharing it with the actual owner of the land, (2) open and notorious use of the land, meaning using the land as an owner would in a manner that would provide the owner with notice of such occupation, (3) adversely, meaning, without consent of the owner and (4) continuously for the statutory period of adverse possession, here being ten years. The statute of limitations for bringing a claim for ejectment is tolled when the adverse possession claim accrues when the owner of the land at the time is subject to a disability, usually inclusive of the owner being under the age of 18 at the time the cause of action arises. However, if no disability exists at the time the cause of action arises, then the statute of limitations is not tolled, even if a disability later arises.

Here, Smith owned a three-acre undeveloped parcel of land in State A that he subdivided into two parcels in 2001. The western portion was conveyed to John and the eastern portion was conveyed to Beth. Both deeds were recorded, but recordation has no impact on adverse possession. In 2009, one of Smith's descendants purported to convey Wendy by quitclaim deed the entire three-acre parcel that had originally belonged to Smith. Beginning in 2010, Wendy began to occupy the one acre of land, which became known as the Central Acre. It is undisputed that Wendy obtained colorable title to the three acre parcel and otherwise met the elements of adverse possession in her occupation and possession of the Central Acre. Namely, the facts at trial established that (1) from 2010 until the end of 2021, Wendy possessed the Central Acre in manner that was (2) actual and exclusive, (3) open and notorious and (4) hostile under the circumstances under a claim of right to same. The statute of limitations to bring a claim for ejectment, the continuous possession required for a claim of adverse possession, is 10 years from the time the cause of action accrues. Wendy adversely possessed the land of Central Acre from 2010 until the end of 2021, eleven years, and thus has a validly obtained title to

Central Acre. Mary will argue that the statute of limitations for adverse possession should be tolled until 2021, when she turned 18, at which point she can bring a claim for ejectment within 5 years thereafter. Mary obtained title to John's land upon his death. She was 12 at the time. During the five years before and after that, Wendy had occupied one acre of John's two-acre lot. Wendy began occupying one acre of John's land when John was still in possession, not when Mary, a minor, was the owner. Therefore, there is no tolling of the statute of limitations for adverse possession given that, at the time of adverse possession cause of action accrued, a minor did not own portion of land Wendy adversely possession.

Therefore, Wendy acquired title by adverse possession to the Central Acre.

2(a) Western Acre

Wendy will be found to have acquired title to the Western Acre in 2020 given that she took the three-acres of land under a color claim of title (i.e., a defective quitclaim deed) and occupied a proportional amount of the Western Acre to enable her to obtain title to the whole.

The issue is whether Wendy, acting under a colorable claim of title, sufficiently occupied a proportional amount of the Western Acre to acquire title to the whole land.

In general, an adverse possession obtains possession of the land that is actually occupied. However, an adverse possession may obtain title to more land than that that was actually possessed and occupied during the time for acquiring title by adverse possession when an adverse possessor takes title pursuant to a colorable claim of title, such as a defective deed, and occupies a proportional amount of the land compared to the entirety of the land to acquire title to the whole.

Here, John's western acre portion of Smith's original undivided three-acre undeveloped parcel of land comprised of two-acres. Wendy occupied one acre of the three-acre parcel of land. Generally, meeting the elements of adverse possession and without any valid defense, Wendy would have obtained title to just the one-acre that she possessed. However, the facts at trial established that Wendy obtained colorable to the entirety of the three-acre parcel of land by reason of the defective quitclaim deed. She occupied a one-acre portion of John's land, which was 50% of the entirety of the Western Acre. Given that she was occupying under color of title and 50% occupation of the Western Acre should be found to constitute a proportional portion of the land, especially to put John and his successors in interest on notice of the occupation, Wendy should be found to be the owner of the entirety of the Western Acre.

Therefore, given the colorable claim of title and the proportional occupation of the Western Acre, Wendy should be found to have acquired title to the entirety of the Western Acre by way of her adverse possession.

2(b) Eastern Acre

Wendy should not be found to have acquired title to the Eastern Acre given that she did not occupy any portion of the Eastern Acre and thus could not be found to have occupied a proportional portion of it during her adverse possession period.
As mentioned above, a colorable claim of right to land by way of a defective deed, and a proportional occupation of such land subject to the deed, may give way to an adverse possessor to obtain title not only to the actually possessed land but also to the broader parcel of property. It is established here that Wendy obtained a color claim of title through a defective quitclaim deed, meaning the conveyor did not have the right to convey such property to Wendy because the grantor did not have ownership rights. However, the deed gave Wendy a colorable claim of title. It is established that Wendy occupied one acre of the three-acre parcel that was purportedly conveyed to her in 2009, which only comprised of one acre of John's western parcel at the time. Wendy did not occupy any portion of the Eastern Acre. Therefore, although she obtained colorable title to the Eastern Acre, she did not actually possess or occupy a portion of same. Therefore, there is no proportional occupation, or any occupation at all for that matter, of the Eastern Acre that would allow her to obtain title through adverse possession.

Therefore, Wendy will not be able to obtain title to the Eastern Acre by means of her adverse possession of the Central Acre.

ANSWER TO MEE 6

1. The admissions of defendant made in connection with a withdrawn guilty plea are inadmissible.

Under the FRE, relevant evidence is admissible unless it excluded by rule or statute. Evidence is relevant if it is probative with respect to any material fact in the action.

In connection with his guilty plea, defendant admitted that he knew about the hole in the closet and that he had repeatedly sued it to spy on Plaintiff while she was dressing. Both of those statements would be relevant to plaintiff's current invasion of privacy claim against defendant.

However, as a matter of policy, a withdrawn guilty plea and statements made in connection with it, are generally inadmissible. They would be inadmissible here.

2. The deposition testimony of the man who stated that defendant watched him would likely be admissible.

Prior bad acts are generally admissible to prove later misconduct. However, evidence of prior bad acts can be admitted for the limited purposes of motive, pattern, modus operandi, intent, and lack of mistake. Here, the proponent of the testimony will argue that it demonstrates a pattern of behavior by the defendant. On the other hand, the defendant will argue that it fails to show a pattern because it is not sufficiently similar (e.g., the declarant was a man not a woman, but that will be challenging. The proponent can also argue that the testimony goes to lack of mistake, as the defendant is claiming in this case that hole in the wall is not there for his voyeuristic purposes.

Rule 403 also gives the judge discretion to exclude evidence if its unfair prejudice substantially outweighs any probative value. Given the highly probative nature of the man's testimony in light of the defendant's position, that is an unlikely basis to exclude the testimony.

The deponent's testimony is also hearsay. Hearsay is an out of court statement offered to prove the truth of the matter asserted. Here the man's testimony would be offered to prove its content--that he had confronted the defendant in connection with similar conduct. Hearsay is inadmissible unless it's subject to an exception.

Here, there is an applicable exception for prior sworn testimony. For an unavailable witness, prior sworn testimony is admissible so long as the party opposing its admission had the motive and opportunity to cross-examine the declarant. Here, the declarant is "unavailable" because he is 100s of miles from the court, outside its subpoena power, and refusing to testify. And the facts indicate that the defendant and his attorney were present at the deposition where the man was questioned. So, assuming the testimony would otherwise be admissible, hearsay does not preclude its admission.

3. Assuming she testifies, plaintiff will not be able to preclude questioning about her plagiarism and lying.

When a party testifies and puts their credibility at issue, they can be impeached with questioning about prior bad acts going directly to their credibility, so long as the questioning attorney has a good faith basis for questioning the witness about them. Because the plaintiff plans on testifying, and has put her credibility at issue, the defendant's attorney will be permitted to ask her whether she plagiarized her college thesis, and whether she lied about that on her grad school applications. Both of those acts go squarely to credibility and would be the subject of permissible questioning.

However, if she denies them, the defendant's lawyer will not be allowed to prove them with extrinsic evidence (such as documents, or testimony by others). He is limited to questioning her about them.

ANSWER TO MEE 6

I. Whether the admissions of Defendant made in connection with the guilty plea he later withdrew should be excluded.

Evidence to be admissible must be relevant. Evidence is relevant if it has probative value and is material. Evidence has probative value when it tends to make a fact more or less probable. Evidence is material if it has a consequence in determining the outcome of the case. Nevertheless, evidence may be excluded if its introduction is against public policy. Guilty pleas and withdrawn guilty pleas are not admissible in evidence because its introduction is against public policy.

In this case, the guilty pleas is relevant. It tends to make Defendant's acts more or less probable because he had done it before. Further, such fact can determine the outcome because it can show that he is likely to do it again. However, it should be excluded because the evidence is against public policy. Being in the form of a withdrawn guilty plea, public policy prevents its introduction into evidence. As such, the court should exclude the guilty plea.

II. Whether the deposition testimony of the man who state that Defendant watched him under similar circumstances to those alleged by the Plaintiff should be excluded.

Evidence to be admissible must be relevant. Evidence is relevant if it has probative value and is material. Evidence has probative value when it tends to make a fact more or less probable. Evidence is material if it has a consequence in determining the outcome of the case. However, hearsay statements are inadmissible unless they fall under any of the exclusions or exceptions or if they are not being offered to prove the truth of the matter asserted. Hearsay statements are out-of-court statements offered to prove the truth of the matter asserted. An exception to the hearsay rule is when statement is: 1. a former testimony; 2. the declarant who made said statement is unavailable; and 3. the other party had the opportunity to develop the declarant's testimony and cross-examine the declarant.

In this case, the man's testimony is relevant. It makes Defendant's acts more or less probable because it shows that he has done it before. Further, because of that, it is likely

that such fact can result in Defendant being found liable. The testimony, however, is hearsay because it is not made in court by the man. Further, it appears that is being offered to prove the truth of the matter asserted because it is being presented to show that the Defendant has done the act before. However, it is admissible because it falls under the former testimony exception. The man is currently unavailable to testify. Despite this, the Defendant had the opportunity to develop the declarant's testimony and cross-examine the declarant. Therefore, even if it is hearsay, the facts show that it falls under the former testimony hearsay exception. As such, the deposition testimony of the man should NOT be excluded.

The man can, however, argue that the evidence should be excluded because it is propensity evidence. As a general rule, evidence of specific acts are inadmissible in civil cases to show that the defendant acted in accordance with past conduct unless they are essential to the claim or defense. They may also be admitted if they are MIMIC evidence or evidence to show motive, intent, absent of mistake, identity, or common plan. In this case, the Defendant can argue that the evidence is inadmissible because it is propensity evidence, and it is being offered to show that he acted in accordance with said propensity. However, the Plaintiff can argue that it is admissible to prove that is evidence to show common plan because it shows the circumstances of how Defendant does his acts.

III. Whether the evidence that Plaintiff plagiarized her senior thesis in college and lied about it on her graduate school application should be excluded.

Evidence to be admissible must be relevant. Evidence is relevant if it has probative value and is material. Evidence has probative value when it tends to make a fact more or less probable. Evidence is material if it has a consequence in determining the outcome of the case. Further, a witness can be impeached by character for untruthfulness, bias, or sensory incompetence. When a witness is going to be impeached by character for untruthfulness, the same must be shown by reputation or opinion evidence-not specific acts. However, if the witness is being cross-examined, the prosecutor, in good faith, can ask about specific past acts.

In this case, the evidence of plagiarism is relevant. Intends to show that the Plaintiff has an untruthful character. As such, it has a consequence of determining the outcome because her credibility will be affected. However, the evidence of plagiarism is not admissible because it is not in the form of reputation or opinion testimony. In this case, Plaintiff is testifying as a witness. The Defendant seeks to impeach her by presenting evidence of plagiarism. Though it is a valid ground to impeach the witness, it is the improper form of evidence. The Defendant is presenting evidence of specific acts to impeach the Plaintiff as a witness. Since impeachment for character for untruthfulness can only be done by reputation or opinion testimony, the evidence of plagiarism should be excluded.

ANSWER TO MPT 1

MEMORANDUM

To: Zoe Foss

From: Examinee

Date: February 21, 2023

Re: Jasmine Hill Matter

This memorandum discusses the viability of a potential claim by Jasmine Hill against Reliant Boating under the Franklin Deceptive Trade Practices Act (DPTA). It does not address other potential causes of action, such as breach of express or implied warranty, or other potential claims.

A consumer may succeed in a DTPA claim when (1) the plaintiff is a consumer, (2) the defendant engaged in one or more of the false, misleading, or deceptive acts enumerated in Fr Bus Code Section 204, (3) the acts constituted a producing cause of the plaintiff's damage, and (4) the plaintiff relied on the defendant's conduct to his or her detriment. *Diaz v. Ellis* (Fr. Sup. Ct. 1998). If the plaintiff proves these elements, the plaintiff may be awarded economic damages, court costs and attorney's fees, and if the defendant's conduct was knowing, treble damages and damages for mental anguish.

1. Ms. Hill is a consumer for DTPA purposes

The DTPA defines a "consumer" as "an individual who seeks or acquires any goods or services." Fr. Bus. Code 203(d). Goods are "tangible items or real property purchases or leased for use." Fr. Bus. Code 203(a). Here, the boat in question is a "tangible item" and therefore a "good" under the DTPA. Because she sought, and eventually acquired, the good (the boat), Ms. Hill is a consumer under the DTPA. This fact is unlikely to be contested in litigation.

2. Reliant Boating engaged in false, misleading, or deceptive acts under the DTPA

The DTPA bars "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce." Fr. Bus. Code 204. "Trade or commerce" mean "the sale of any good or service." Fr. Bus. Code 203(e). As discussed, above, the boat is a good. Reliant Boating was in the business of the sale of boats, i.e. goods for DTPA purposes, and therefore was engaged in trade and commerce. The question is whether Reliant's conduct was "false, misleading, or deceptive."

The DTPA defines the following acts as false, misleading, or deceptive: 1. "representing that goods or services...are of a particular standard, quality, or grade if they are of another;" (Fr. Bus. Code 204(d)(ii)), and 2. "failing 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" (Fr. Bus. Code 204(g)). Representing goods are of a particular standard, quality, or grade if they are of another does not include "mere puffing" or "sales-speak." *Diaz.* A statement is more likely to be considered "mere puffing" when it is vague or indefinite, the service provider does not have more knowledge than the consumer, and when the statement relates to a future condition. */d.*

There are several statements which may qualify as one of the deceptive practices above.

A. Mr. Stevens told Ms. Hill that the Envoy was "a real gem." (Transcript of interview, email correspondence) Mr. Stevens also further recommended the Envoy specifically (email correspondence) and stated the boat would be "perfect for you because it has plenty of room for you and your family" (email correspondence. These statements are likely to be viewed as "mere puffing" and not actionable under the DTPA. While Mr.

Stevens had more knowledge and expertise than Ms. Hill, the descriptors, "real gem" is vague and indefinite, like the statements about repair time in *Gordon v. Valley Auto Repair, Inc.* The statement that the boat would be "perfect" for Ms. Hill's family because it had plenty of room is arguably partially true, as the room in the boat is not disputed. Further, stating the boat is "perfect" for someone is similarly vague, and relates to a future condition or use. Thus, these statements are not likely to be actionable and will likely be considered "mere puffing" or "sales-speak" under *Diaz* and *Gordon.*

B. Mr. Stevens told Ms. Hill that the Envoy was in "great condition" (transcript of interview) or "excellent condition" (email correspondence). These statements could arguably be considered puffing. The statements are rather vague, but the service provider has more knowledge and experience than the consumer in this area, and the statement relates to a current condition rather than a future one. Therefore, 2 out of the 3 factors in *Diaz* weigh in favor of the statements being actionable (i.e. not "mere puffing). A court may reasonably find that these statements are or are not "mere puffing."

C. Mr. Stevens represented in the Bill of Sale that he has "no knowledge of any defects in and to the Boat." The knowledge element of this is discussed below, but if knowledge can be proven, this statement is actionable and is not "mere puffing." This is a specific and clear warranty, Mr. Stevens has more knowledge of boating in general and of the specific boat being sold, and the condition relates to past/current conditions. Therefore, all 3 factors in *Diaz* weigh against this being considered "mere puffing."

D. Mr. Stevens failed to disclose the needed defects. Under the DTPA, merely failing to disclose a known fact can be actionable. Fr. Bus. Code 204(g). The question is whether Mr. Stevens knew of the defects or was truthfully unaware. "Actual awareness" does not mean merely that a person knows what he is doing; rather, it means that a person knows what he is doing is false, deceptive, or unfair. *Gordon.* Knowledge may be inferred where objective manifestations indicate that a person acted with actual awareness. Fr. Bus. Code 203(k), see also *Gordon.* In this case, Mr. Stevens is likely to claim he was unaware of the defect in the boat's motor, but several factors weigh against this claim. First, he recommended verbally and over email the Envoy specifically. He will claim it was perfect because it had enough room for Ms. Hill's family, but the other boat was 3 feet longer and likely had more room. Therefore, the other boat was likely better on this dimension, and this may be circumstantial evidence Mr. Stevens had a unique desire to sell the Envoy to an unsuspecting customer like Ms. Hill despite her stated preference not to buy a boat that needs repairs. This claim would be contested in litigation and would need more evidence to prove. Second, the engine block was not only defective, but had been repaired. It was repaired with an apparently substandard quality, using epoxy glue that was obvious to a trained mechanic, who also recognized that the repair had been completed recently (transcript of interview). No evidence in the File contradicts the claim that the repair was completed recently. If it can be shown that the repair happened while the boat was in Mr. Stevens's possession (i.e., if the boat was purchased a long time ago and was in Mr. Stevens's sole possession since he acquired it), then it can likely be proven that Mr. Stevens knew the motor was defective and tried to repair it with a substandard quality. If so, he will have acted "knowingly" in failing to disclose known defects to Ms. Hill.

In summary, Mr. Stevens likely engaged in conduct that violated the DTPA by representing in the Bill of Sale that there were no known defects in the boat and by failing to disclose the known defect to Ms. Hill.

3. Mr. Stevens's conduct was the producing cause of Ms. Hill's damages

Conduct is the "producing cause" of damages when it "substantially contributes" to the consumer's decision to purchase the product or service. *Abrams.* Here, Mr. Stevens's statements "substantially contributed" to Ms. Hill's purchase because she specifically stated she did not want to buy a boat that would need repairs, and he continued to recommend the Envoy specifically despite knowing it needed repairs (see above for knowledge analysis). While Mr. Stevens will likely claim that his conduct was not the producing cause because Ms. Hill inspected the motor and decided independently to purchase it after discussing it with her family, this will not succeed. Testimony from the mechanic suggests motors can often run acceptably for short periods of time despite cracked engine blocks. Further, in *Abrams,* the consumer did their own inspection of course offerings and succeeded in their DTPA claim anyways, because the representations of the defendant must only "substantially contribute," rather than entirely

contribute. Similarly, Mr. Stevens's statements are likely to be considered to have "substantially contributed" to Ms. Hill's purchase, and his conduct will likely be considered the "producing cause."

4. Ms. Hill relied on Mr. Steven's representations to her detriment

A buyer must establish that they relied on the seller's statements to their detriment. Fr. Bus. Code 205(a). A seller cannot be held liable for failing to disclose information about which the buyer has actual notice. *Ling v. Thompson* (Fr. Ct. App. 2008). Ms. Hill relied on Mr. Stevens to her detriment, because as discussed above, she specifically stated in writing that she did not want to buy a boat that needed repairs, and Mr. Stevens continued to recommend a defective boat even though another was available and arguably more suitable for her family. She had no actual notice of the need for repairs, because as discussed above, the defects in the motor were hidden from reasonable inspection and not disclosed. Further, the bill of sale specifically represented that there were no defects. This reliance was to her detriment, as discussed below, because she suffered multiple types of damages from purchasing this boat.

Damages

Based on the above analysis, Ms. Hill will be able to succeed in a DTPA claim and overcome the potential defenses discussed above. The remaining question is what damages she may collect.

The DTPA allows plaintiffs to recover economic damages (Fr. Bus. Code 205(b)(1)). If the trier of fact finds the defendant's conduct was committed knowingly, the plaintiff may recover three times that amount (treble damages) and damages for mental anguish (Fr. Bus. Code 205(b)(2)). Plaintiffs who succeed are automatically awarded court costs and reasonable and necessary attorney's fees (Fr. Bus. Code 205(c)). "Economic damages" includes "the total loss sustained by the consumer as a result of the deceptive trade practice," which includes reasonable and necessary expenses. *Diaz,* see also *Gordon.* Damages for mental anguish must reflect "a relatively high degree of pain and distress beyond mere worry or anxiety...and include pain resulting from grief, severe disappointment, indignation, or wounded pride." *Oliver v. Elite* Systems (Fr. Sup. Ct. 1997, see also Abrams). Attorney's fees and court costs are automatic whenever a plaintiff succeeds. *Gordon.*

After establishing the elements of a DTPA claim above, Ms. Hill will be able to recover the cost of repairing the boat ($3000) as "economic damages." The cost of her canceled trip may also qualify as economic damages as part of her "total loss" if the trier of fact determines the expenses were reasonable and necessary. If she proves Mr. Steven's conduct was knowing (and as discussed above, she will be able to), she will be able to cover three times that amount. She may also be able to collect damages for "mental

anguish," though the test used in *Oliver* and *Abrams* suggests she will have to prove her mental anguish was not just worry or anxiety, but "severe disappointment" or "grief' or "indignation" or "wounded pride." While she is justifiably upset at the representations, missing a vacation may not qualify as this high standard of damages for mental anguish. More evidence is needed to evaluate whether and how much she would recover for mental anguish. Lastly, the court costs and attorney's fees will be awarded automatically under *Gordon* if Ms. Hill succeeds, which she likely will.

Conclusion

Therefore, Ms. Hill will likely succeed in her claim, with the main question being over the amount of damages due to mental anguish, which we need to develop more factual evidence on to evaluate.

/s/

Examinee

ANSWER TO MPT 1

Foss & Associates LLP Attorneys at Law
3200 Lakefront Dr., Suite 700
Franklin City, Franklin 33012

MEMORANDUM

To: Zoe Foss

From: Examinee

Date: February 21, 2023

Re: Jasmine Hill matter examination of claims and damages under Franklin Deceptive Trade Practices Act

Background

This memorandum addresses the potential claims under the Franklin Business Code Ch.

200 § 201 *et seq.* ("Deceptive Trade Practices Act" or "DTPA") our firm's client, Ms. Jasmine Hill ("Hill"), has against the seller of a used pontoon boat, Reliant Boating, ("Reliant") due to a purchase Hill made of a used 2017 18-foot Perth Envoy pontoon boat ("Envoy"). Hill, in pertinent part described her recollection of the transaction in an interview conducted with the firm on February 20, 2023. (Transcript of interview is "Transcript"). Ins sum, Hill stated that she desired to purchase a boat after to enjoy time outdoors with her family and that she contacted Reliant in order to do so. She had not owned a boat before and relied on the statements of Reliant's owner, Greg Stevens ("Stevens").

Stevens recommended a pontoon style boat for Hill's stated goals and showed her two models, a newer, larger model, and the Envoy. Stevens ultimately recommended the Envoy as it was a "perfect fit for [her] because it has plenty of room for [her] and her family." *Email from Stevens to Hill* (Aug. 10, 2022). Hill asserts she relied on those assertions and that the Envoy is in "excellent condition and runs just like new" *id.* and Hill has provided the email exchange with Stevens including representations about the quality of the boat, the Envoy's bill of sale, and a repair report from a third-party JB Boat Repairs (Sept. 20, 2022) that diagnosed a cracked engine block with epoxy that had been recently applied in an apparent attempt to address the crack to support her position.

The memorandum is limited to claims under the DTPA and excludes analysis of any other type of potential cause of action.

Legal Analysis

I. Claims to be made under the Franklin Deceptive Trade Practices Act.

The four elements of a DTPA cause of action are: 1) plaintiff is a consumer; 2) the defendant engaged in one or more false, misleading, or deceptive acts enumerated in § 204; 3) the act(s) constituted a producing cause of plaintiff's damages; and 4) the plaintiff relied on the defendant's conduct to his or her detriment. *Gordon v. Valley Auto Repair, Inc.* (Fr. Ct. App. 2009) (citing *Diaz v. Ellis* (Fr. Sup. Ct. 1998); Fr. Bus. Code § 205(a). It is a plaintiff's burden to prove each element of the cause of action.

In this instance, the first element appears to be one to which there can be no dispute. Hill is a private individual who sought goods from Reliant. The relevant portion of the DTPA defines consumer as an "individual ... who seeks or acquires any good or services ...." Fr. Bus. Code§ 203(d). In support of this position, Hill has provided the Boat Bill of Sale which names Greg Stevens d/b/a Reliant Boating as the seller and Jasmine Hill as the buyer. That Stevens apparently sold this boat as an individual rather than a corporate entity is a non-issue as the DTPA relies on the legal status of the buyer, which in this case is Hill and there is no indication she is anything other than an individual consumer.

Furthermore, it appears that the final element, reliance to the detriment of plaintiff, of a DTPA claim appears to be largely without dispute. Hill reported to Stevens that she was a first time boat purchaser and that she told Stevens on the phone that she was a first time boat purchaser and she sought out his advice in making her selection. Hill's email to Stevens specifically state that she is "leaning" to purchase the Envoy because it is the one Steven's recommended. *Email from Hill to Stevens,* August 10, 2022.

The main areas of contention in this matter will likely be the purported number of misrepresentations by Stevens and whether those were the producing cause of Hill's damages--in short elements 2 and 3 of the cause of action. *Gordon* (Fr. Ct. App. 2009). As set forth in the *Gordon* matter, each individual false, misleading, or deceptive act by a putative defendant may stand alone as a cause of action of the DTPA. Moreover, actionable representations may be oral or written. */d. (citing Diaz v. Ellis* (Fr. Sup. Ct. 1998)). In this instance there appear to be at least three potentially actionable representations:

1. Oral representation that the boat was a gem and in great condition (Transcript)

The first representation is the least likely to succeed. On the one hand it appears to be misleading which was the producing cause of Hill's damages. However, Stevens would likely defend this claim on the basis that such descriptions were mere puffing. *Gordon* (Fr. Ct. App. 2009) *citing Diaz.* There are three elements to mere puffing: 1) if the alleged misrepresentation was vague or indefinite; 2) comparative knowledge of the consumer and the seller or service provider; and 3) whether the representations relate to past or current conditions as opposed to future conditions. */d.* In this instance, Stevens would likely take the position that the assertion is insufficiently specific as to support a DTPA claim. \1\while the first point of the three-part test would likely cut in favor of Stevens, points two and three appear to hold weight for Hill. Accordingly, this appears to be a valid claim to assert, however it is the most likely to suffer attack.

2. Envoy is a few years old but <u>runs just like new</u>

The second representation by Stevens, which is in writing, appears to be a more concrete and specific assertion which was factually untrue. Running like new is an ascertainable state of affairs and tends to indicate that the engine will run for a good length of time without repair or maintenance issues. Furthermore, Hill specifically indicated that she did not want to "buy a boat that's going to need repairs." *Em*ails *Hill to Stevens* Aug. 10, 2022. The fact that Steven's written representation that it "runs like new" followed Hill's statement does not indicate that it could not be relied upon. *See Abrams v Chesapeake* Business *College* (Fr. Ct. App. 2012) (representations in marketing material reviewed after school contract signed could still cause reliance due to revocation period permissible in contract). Like in *Abrams,* Hill was not yet bound to purchase the boat at the time that

Stevens made the representation that it "runs just like new" and accordingly, Hill could be viewed as relying on such statement.

3. Boat Bill of Sale states Seller has no knowledge of any defects in and to the Boat

Finally, the Boat Bill of Sale states that the Seller has no knowledge of any defects in and to the Boat. This separate written representation appears to be a basis for a third DTPA claim. The critical issue here is whether Stevens, in fact, had knowledge of the cracked engine block. As indicated from the statements of JB Boat Repairs it appeared that the engine block had been recently epoxied--potentially indicating that Stevens was in fact the bad actor in attempting to hide the crack or indicating that Stevens purchased the boat with the hidden repair and did not know of it himself. Indeed, the mechanic at JB Boat Repairs indicated that it is possible for a boat with a cracked block to startup and run for a few minutes under test conditions but when used on the water it will fail.

II. Relief Available Under DTPA

Each claim above presents the possibility of recovering the following four types of damages. Assuming a successful claim, economic damages and attorney's fees are the most probable recovery, treble damages and emotional distress damages requires the highest showing by Hill.

A. Economic Damages

Section 205 of DTPA provides that a successful claim under the act will entitle the consumer to economic damages. In this case the clearest example of economic damages would be the $3000 to repair the boat. Additional damages that may be cognizable under this section would be the cost of the trip to Lake Franklin for which the Hill family intended to use boating. Because they had relied on the boat they anticipated the would do no other activities and the weekend activity was "ruined" and the family packed up their camping gear and left. (Transcript).

B. Attorney’s Fees

Pursuant to the DTPA an award of attorney’s fees is mandatory under the DTPA to a prevailing plaintiff. Accordingly, if Hill is successful at least as to one of the three claims, she will be entitled to reasonable and necessary attorney’s fees regardless of the outcomes of the other types of damages. *Gordon* (Fr. App. Ct. 2009).

C. Exemplary Economic Damages and Emotional Distress

If a trier of fact finds that a defendant's conduct was committed knowingly then it can award treble damages and emotional distress. In this case, the principle point of inquiry

as to whether Stevens acted knowingly is the repair to the engine's block. If it can be shown by direct or circumstantial evidence that Stevens was aware of the cracked block or fixed the crack with epoxy himself or through an agent, then it would appear that Hill is entitled to both treble economic damages and emotional damages provided she can make the requisite showing for emotional damages.

Emotional distress damages are awardable under the DTPA when there is a showing of" 'a relatively high degree of pain and distress beyond mere worry or anxiety ... and includes pain resulting from grief, severe disappointment, indignation, wounded pride' and similar emotions." *Abrams* (Fr. App. Ct. 2012) *citing Oliver v. Elite Systems* (Fr. Sup. Ct. 1997). In this instance, Hill described her reaction to the ruined trip to Lake Franklin as highly upsetting. Further discovery would be required to determine if this raised to the level of severe disappointment required under the act. Furthermore, the firm should interview Hill's relatives to evaluate if they have standing to pursue a claim for their disappointment with the outcome of the trip.

Conclusion

Hill appears to have several viable causes of action against Stevens which, if successful would produce a minimum of economic damages and attorney's fees recovery, and potentially treble damages and emotional distress damages.

ANSWER TO MPT 2

Memorandum

To: Hamad Aziz
Re: B&B Inc. v. Happy Frocks Inc.
Date: February 21, 2023

I. Happy Frocks **(HF)** is not liable for an award of profits attributable to the sale of goods that infringed B&B's **(88)** mark because its mental state was innocent. there is no connection between HF's profits and the infringement. other remedies are adequate. **HF** has equitable defenses. and there is no public interest at stake.

A district court may award a wining plaintiff the defendant's ill-gotten profit. Without question, a defendant's state of mind may have a bearing on what relief a plaintiff should receive. However, an innocent trademark violator often stands in very different shoes than an intentional one. (Romag). The court must determine, as best it can, what portion

of the defendant's profits are attributable to the infringement, and what portion are attributable to non-infringing aspects. (Holt).

An award of profits is justified by three rationales (1) to deter a wrongdoer from doing so again; (2) to prevent the defendant's unjust enrichment; and (3) to compensate the plaintiff for harms caused by the infringement. In determining whether to award an infringer's profits as part of a recovery, a court must balance many factors including the defendant's mental state, whether willful or otherwise. The various factors are not assigned equal weight and the district court's discretion lies in assessing the relative importance of these factors in a particular factual situation and determining whether, on the whole, the equities weigh in favor of an accounting for profits. The court should consider the following factors: (1) Infringer's mental state; (2) Connection between infringer's profits and the infringement; (3) the adequacy of other remedies; (4) equitable defenses; and (5) the public interest. Here, the Court will determine that HF's innocent state of mind, coupled with the other four factors, do not justify an award of profits because the facts do not merit a deterrence from the wrongdoer infringing again, the defendant will not be unjustly enriched, and the plaintiff is adequately compensated for harms caused by the infringement through other measures of damages.

1. Because HF's mental state was innocent and did not deliberately sell infringing products, and merely intended to accelerate production, it does not justify an award of profits.

A trademark defendant's mental state is a highly important consideration in determining whether an award of profits is appropriate. (Romag). Willfulness is a highly important consideration in awarding profits but not an absolute precondition. (Romag, Alito concurrence). The court must consider the infringer's mental state in light of the harm to the trademark owner and consumers, for particularly culpable defendants should be more likely to be subjected to an award of profits. In addition to willfulness, factors such as recklessness, callous disregard for the plaintiff's rights, willful blindness, and a specific intent to deceive should be taken into account. Mere negligence, or an innocent nature to the infringement, would argue against an award of profits. (Holt) (holding that defendant's mental state justified an award of profits because defendant's mental state was not innocent when defendant knowingly and deliberately sold parts not made by plaintiff but containing plaintiff's trademark, and continued to do so when plaintiff notified defendant).

Here, unlike in Holt, HF's mental state does not justify an award of profits because it was innocent and did not knowingly and deliberately sell parts not made by plaintiff but containing its mark. Further, as soon as HF discovered it was selling infringing products, it stopped selling that inventory. HF was not reckless, willful, willfully blind, nor did it have intent to receive or callous disregard for the plaintiff's rights. Because BB's cease and desist did not specify which clothes infringed, and H F did not have any knowledge

of the infringement, it was required to investigate to determine which clothing contained the infringing buttons. As soon as H determined it was Quality Clothes (QC), it told them to stop immediately and terminated the relationship, and stopped selling inventory that QC had manufactured. Unlike the defendant in Holt, H F's actions were not deliberate because it did not intentionally sell infringing products and stopped selling the products once it had knowledge.

Moreover, mere negligence, or an innocent nature to infringement, argues against an award of profits. Although HF may have been negligent in maintaining its quality control because it did not notice the quality from the three previous shipments did not meet its standards, the mental state of an innocent nature to infringement does not amount to an award of profits. The fact that HF accelerated production does not lend itself to a conclusion that HF had intent to sell infringing products. Therefore, HF did not have the appropriate mental state to justify an award of profits.

2. Because BB was not harmed due to the infringement. HF's profits were not caused by the infringement. consumers were not confused by the infringement. and there is no certainty that HF benefited from the infringement. this factor weighs against an award of profits.

Pursuant to Holt, the Court considers the following: (1) Whether the trademark owner was harmed by lost or diverted sales due to the infringement, beyond those sales lost by the infringement itself; (2) Whether the infringer's profits flow directly from or were caused by, the infringement-- if so, an award of profits would be justified; (3) whether consumers were confused by the infringement in thinking that the trademark owner authorized the infringing acts--if so, an award of profits would be justified; (4) What the certainty is that the infringer benefitted from the infringement--a certain benefit would argue for an award of profits. (Holt) (holding that the connection between the infringer's profits and the infringement justified an award of profits because defendant benefited economically from the infringement where it cost defendant 25% of the cost it would have paid for genuine plaintiff parts and defendant then charged the public the full amount that the genuine parts would have cost).

Here, (1) BB was not harmed by lost or diverted sales due to the infringement, beyond those sales lost by the infringement itself because not only does expert testimony demonstrate that use of BB's logo played a minimal role in clothing purchase (3% said added to desirability to purchase), and brand name on a button for children clothes generally (less than 1% said appearance of logo on button was only reason for purchase), but also BB's overall sales increased.

(2) HF's profits did not flow directly from or were caused by, the infringement because it actually lost as a result of the infringement. QC still billed HF for the cost of BB's buttons

while QC pocketed the difference and used the cheaper buttons. Moreover, HF lost the value of its on hand inventory.

(3) HF's customers were likely not confused by the infringement in thinking that the trademark owner authorized the infringing acts. As stated by the expert, 3% of respondents notice the button, and in quality control, three rounds of shipments passed without the company noticing. Although BB hopes that customers who buy HF clothing know who makes the button on the clothes and know the difference between their buttons and other inferior buttons, it has proffered no evidence to substantiate this claim.

(4) There is no certainty that HF benefitted. Although HF sales increased, this was not due to the buttons but for the retailer's satisfaction with the clothing designs. As stated above, HF lost because it was billed for BB's buttons and QC did not use those buttons. Moreover, it lost because it had to destroy inventory. Although BB will argue that HF's failure to recall clothing from its 900 stores demonstrates that it did benefit, this does not rise to the level of other cases where it was absolutely certain that the infringer benefitted from the infringement. See Holt (holding that the connection between the infringer's profits and the infringement justified an award of profits because defendant benefited economically from the infringement where it cost defendant 25% of the cost it would have paid for genuine plaintiff parts and defendant then charged the public the full amount that the genuine parts would have cost). Unlike in Holt, the reduction in cost was borne by QC, not HF. Therefore, it cannot be said that HF benefited with certainty.

Because the four sub factors weigh against awarding profits, this factor should weigh against an award of profits.

3. Because actual damages and injunctive relief will make BB whole, there is no basis for an award of profits.

Pursuant to Holt, the Court considers whether the trademark owner will be made whole by other available remedies, such as actual damages and injunctive relief. If so, there would be no basis for an award of profits. (Holt) (Holding that the adequacy of other remedies did not justify an award of profits because there was nothing in the factual record to support plaintiff's allegation that infringing parts are inferior to its genuine parts and consumers buying infringing parts will lose confidence in its products).

Here, BB will be made whole by actual damages and injunctive relief. Although BB will argue that the fact that HF will not recall the pieces to the 900 retailers shows it does not have an adequate remedy, the fact that it has not shown consumers will draw any conclusions that BB's products are inferior, or even notice BB's product at all, and that BB will be profiting as sales have increased, weighs against awarding profits. Moreover, unlike the recall for its children's pajamas with defective fabric undertaken out of the interest of health and safety, there were merely ownership issues at stake and no children

were placed in harm's way - a recall would have incurred unnecessary expenditure and waste when consumers barely even notice the BB button in the first place. Therefore, a recall would be an unreasonable remedy. Here, because HF is paying actual damages and will receive final injunctive relief BB will be made whole and
HF need not pay profits.

Moreover, if BB were to argue that HF was wrong to not inform BB that it stopped selling its inventory of QC clothing, HF could argue that in its cease and desist BB only demanded that it immediately stop the manufacture and sale of the clothes, which it did, and did not request an update when the task had been accomplished.

4. Because **HF** has equitable defenses of laches due to its unreasonable delay in pursuing a legal remedy and unclean hands in its failure to disclose the infringing manufacturer there is no basis for an award of profits.

Pursuant to Holt, the Court considers whether the defendant has a claim of equitable defenses such as laches (unreasonable delay in pursuing a legal remedy) or failure to timely act on the part of the plaintiff, acquiescence by the plaintiff in the infringement, or unclean hands. Such defenses would argue against an award of profits. (Holt) (Holding that equitable defenses justified an award of profits because as soon as plaintiff learned of the sale of infringing parts it took action to stop their sale including filing suit and seeking and obtaining a preliminary injunction).

Here, HF has a claim of equitable defenses for laches because BB undertook unreasonable delay and failed to timely act in pursuing a legal remedy. BB undertook unreasonable delay because after discovering the use on the infringing buttons and receiving no response to its cease and desist letter, it waited nine months to file the instant complaint. This defense is bolstered by the unclean hands of BB because it perfectly timed its injunction with the timing of Black Friday, when HF would suffer the most damage from an injunction. While BB may argue it took immediate action to cease the infringement, the court will likely find that action must rise to the level of filing suit and seeking to obtain a preliminary injunction, as was done in Holt, to be considered immediate action.

Moreover, the only reason HF experienced delay in responding to BB's cease and desist was because despite BB had knowledge that the manufacturer at issue was QC, it failed to inform HF of this fact, leaving HF to scramble and incur more time and costs in determining which of its overseas manufacturers were responsible.

5. Because there is no public interest concern such as preserving public safety or deterring other infringements. there is no basis for an award of profits.

Pursuant to Holt, the Court considers whether there is a public interest in making an award of profits, such as preserving public safety or deterring other infringements. (Holt) (Holding that unlike a case where an infringing medicine containing a harm causing ingredient would raise significant concerns for the public interest, there was no justification for an award of profits where there existed an injunction and no evidence existed that the infringing parts caused a danger to the public).

Here, there is no issue of public safety or concern of deterring other infringements. First, there is no public safety issue because there is no higher likelihood that the buttons would pose a choking hazard for a child if it became loose such that it would raise significant concerns for the public interest like the exemplar in Holt. Rather, these facts are closer to the conclusion in Holt itself, where there existed an injunction and no evidence exists that the infringing parts caused a danger to the public. Moreover, there is no concern of deterring other infringements because H F did not even cause the infringement itself. Therefore, this factor weighs against an award of profits.

ANSWER TO MPT 2

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF FRANKLIN

B&B INC., PLAINTIFF

v.

HAPPY FROCKS, INC., DEFENDANT

II. Statement of Facts [omitted]

III. Legal Argument

As a general matter, an award of profits is justified by three rationales: (1) to deter a wrongdoer from doing so again, (2) to prevent the defendant's unjust enrichment, and (3) to compensate the plaintiff for harms caused by the infringement. *Spindrift Automotive* Accessories, *Inc. v. Holt Enterprises, Ltd.* (U.S. District Court for the District of Franklin (2021)). In determining whether to award an infringer's profits as part of a recovery, a court must balance five factors: (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; (5) the public interest.

Importantly, the Court must consider the defendant's mental state and whether the infringement was willful. While important, in cases brought under the Lanham Act, proving willfulness is not a prerequisite to an award of profits. */d.* Rather, the Court considers the defendant's mental state as "highly important" in determining whether an award of profits is appropriate. */d.* citing ***Romag Fasteners, Inc. v.*** Fossil ***Group, Inc.*** 140 S.Ct. 1492 (2020). Thus, a defendant may not circumvent an award of profits simply because its actions were not willful. Moreover, the Court must determine, as best it can, what portion of the defendant's profits are attributable to the infringement and what portion are attributable to non-infringing aspects. ***Spindrift.***

A. Happy Frocks Inc. did not act with a willful mental state to award profits to B&B Inc. because it was unaware of the infringement. conducted a proper investigation into the allegedly infringing buttons from overseas manufacturers. and immediately ceased and terminated its relationship with Quality Clothes upon learning of the infringement.

When assessing an award of profits, the Court must consider the infringer's mental state in light of the harm to the trademark owner and to consumers. ***Spindrift.*** Particularly culpable defendants should be more likely to be subjected to an award of profits. */d.* The Court will consider the following factors when evaluating an infringer's mental state: (1) willfulness; (2) recklessness; (3) callous disregard for the plaintiff's rights; (4) willful blindness; and (5) a specific intent to deceive should be taken into account (mere negligence or an innocent nature to the infringement would argue against an award of profits). */d.*

Here, Chief Executive Officer of Happy Frocks Inc. Samuel Harris testified that B&B Inc. (B&B) sent a letter to Happy Frocks Inc. (Happy Frocks) demanding that Happy Frocks immediately stop the manufacture and sale of clothes containing infringing buttons. Direct Examination of Samuel Harris. When Mr. Harris, on behalf of Happy Frocks, received this letter, he took immediate action to investigate the matter further. According to his testimony, B&B's letter did not specify which clothes from which of Happy Frock's overseas manufacturers contained allegedly infringing buttons, so Happy Frocks properly proceeded to conduct an inquiry into the matter. This, despite the fact that B&B CEO Vera Garcia has knowledge that it was Quality Clothes. ***Testimony of Garcia.*** Nonetheless, once Happy Frocks was able to ascertain that the infringing buttons were coming from Quality Clothes, Happy Frocks directed that it stop production immediately and cease its relationship entirely. This immediate investigation and subsequent termination of the relationship demonstrates not only that Happy Frocks did not willfully infringe upon B&B's rights, but it also did not do so with any sort of callous disregard, willful blindness, or specific intent to deceive. Further, Happy Frocks did not act recklessly because it samples the goods that are manufactured for the store each and

every time to see if they are up to the quality standards that Happy Frocks requires. Cross Examination of Harris.

B&B will argue that Happy Frocks acted with a specific intent to deceive by acting negligently because, despite the quality checks conducted on each shipment, Happy Frocks failed to catch that Quality Clothes was providing buttons to Happy Frocks that are not produced by B&B. However, the Court held in *Spindrift* that mere negligence works against a finding of an award of profits. The fact that Happy Frocks missed the non-B&B buttons until its fourth shipment of infringing materials will therefore not be sufficient on this factor because Happy Frocks made all reasonable efforts to remedy the matter afterwards and negligence is insufficient to make a finding on this factor.

Therefore, Happy Frocks did not act with the type of willful, reckless, or callous disregard for B&B's rights, nor did it act with willful blindness or attempt to deceive, such that an award for profit on the factor

B. The Court cannot award profits because the connection between Happy Frocks' profits and the use of infringing buttons is so *de minimus* in that the infringing buttons likely had little to no effect on the consumer. B&B did not lose sales from the infringement. and Happy Frocks did not suffer any tangible benefit from the infringement.

In awarding profits, the Court will evaluate several factors with regards to the connection between the infringer's profits and the infringement in and of itself. These include: (1) whether the trademark owner was harmed by lost or diverted sales due to the infringement; (2) whether the infringer's profits flow directly from or were caused by the infringement; (3) whether consumers were confused by the infringement in thinking that the trademark owner authorized the infringing acts; and (4) what level of certainty there is that the infringer benefited from the infringement (a *certain* benefit would argue for award of profits). */d.* Note that harm by loss of diverted sales due to the infringement must be beyond those sales lost by the infringement itself, which would be accounted for by actual remedies rather than an award of profits. */d.*

Here, B&B Inc.'s sales actually *increased* during the period that the infringing buttons were used. Cross *Examination of Vera Garcia, CEO of Plaintiff B&B Inc.* Additionally, Ms. Tiffany Chen, expert on construction and conduct of trademark surveys, conducted a survey of 839 consumers of Happy Frocks clothes manufactured by Quality Clothes and found that the use of B&B's logo on the buttons played a minimal role in the clothing purchase in that only three- percent of the respondents said that they noticed the logo and thought it added to the desirability of the clothes. Direct Examination of Tiffany Chen (Defendant Happy Frocks' Expert Witness). Moreover, another survey conducted by Ms. Chen found that of nearly 1,000 consumers, only six percent stated that whether there was a brand name printed on the buttons of clothes was one reason, among others, for purchasing one item of clothing over another, *and* less *than one percent said that the*

appearance of a brand name on a button was *the only reason for purchasing a particular item of clothing over another.* Direct Examination of Tiffany Chen. Ms. Garcia simply put forth that she "hopes" customers notice the difference between B&B buttons and those of other "inferior quality" ones, but put forth no evidence as to this fact. Thus, it is highly reasonable to conclude that the infringement had little to no effect at all on the consumers and the consumers were not confused by the infringement in thinking that the trademark owner authorized the infringing acts. Moreover, Happy Frocks actually suffered a loss in that Quality Clothes was supposed to purchase buttons directly from B&B then bill Happy Frocks for the cost of the buttons; but instead, Quality Clothes was billing Happy Frocks for the higher quality buttons while providing them with the lower quality ones, and Happy Frocks lost the quality of its on-hand inventory that is at risk of non-recovery due to the manufacturer's overseas location. B&B will state that Happy Frocks' $450,000 profit on the clothes with the non-B&B buttons flowed directly from the infringement, but again, it is highly speculative that the buttons had any effect on the consumer and there are only facts to the contrary from Ms. Chen. Lastly, B&B's sales increased and it can only show that it lost revenue from the sales of the buttons for the time that they used the infringing buttons until they stopped -this is an award for actual damages, not profits.

Therefore, the Court should not award profits on this factor because the connection between Happy Frocks' profits and the use of infringing buttons is so *de minim*us in that the infringing buttons likely had little to no effect on the consumer, B&B did not lose sales from the infringement, and Happy Frocks did not suffer any tangible benefit from the infringement.

C. An award of profits is excessive in light of Happy Frock's infringement because it likely had little to no effect on B&B's reputation as a provider of high-quality buttons and there may be other available remedies for **B&B** to pursue.

When a trademark owner will be made whole by other available remedies, such as actual damages and injunctive relief, there is no basis for an award of profits. Spindrift.

Here, there is no injunctive relief because Happy Frocks stopped the infringement on its own accord. While B&B alleges that the infringing buttons are inferior to its genuine buttons and that consumers buying the infringing buttons will lose confidence in its products, there is nothing in the actual record to support such a claim. In fact, there are only facts to the contrary as put forth by Ms. Chen, *supra,* in that the quality of the buttons had little if any bearing on the average consumer. Therefore, this factor does not justify an award of profits.

D. B&B's intentional delay of filing against Happy Frocks and failure to alerting Happy Frocks which manufacturer was committing the infringement shows that **B&B** has unclean hands and may not recover profits on this factor.

A defendant may put forth a claim of equitable defenses when the plaintiff commits an unreasonable delay in pursuing a legal remedy or fails to timely act on the part of the plaintiff, acquiescence by the plaintiff in the infringement, or unclean hands. These factors work against an award of profits. *Spindrift.*

Here, B&B had knowledge of the infringement for nine months and waited after Black Friday (a major shopping day that is predicted to bring in massive profits) to file suit. Garcia testimony. The letter sent to Happy Frocks did not specify which manufacturer was infringing despite B&B's knowledge of which manufacturer was infringing, and instead sent Happy Frocks on an investigative mission that took even more time.

Therefore, the Court should not award profits to B&B on this factor.

5. Happy Frocks' unintentional use of buttons made from cheap plastic versus that of the high-quality material used by **B&B** Inc. does not pose a threat to public safety because it posed no safety risk by virtue of being poisonous or any other defect.

To award profits, the Court will also consider whether there is a public interest in doing so. The public interest consideration will take into account whether an award of profits may preserve public safety or deter other infringements. In *Spindrift,* the Court held that when the infringing party has ceased its activity-either by court order or on its own accord -and there is a lack of evidence that the infringing parts cause a danger to the public, an award of profits cannot be justified based on this factor.

Here, Happy Frocks' infringement posed no threat to the public and an award of profits cannot be justified on this factor because the buttons were not poisonous (rather, they were merely made from cheap plastic) and the infringing buttons posed no higher risk of choking hazard to children. Cross *Examination of Vera Garcia, CEO of Plaintiff 8&8 Inc.* Moreover, deterrence is unconvincing on this factor because Happy Frocks ceased working with Quality Clothes as soon as it discovered the infringement and, as stated above, did not act with any sort of willfulness or recklessness with regards to the infringement.

Therefore, the Court should not award profits on this factor.

2. Therefore, the Court should not award profits because B&B will fail to put forth sufficient evidence on each of the aforementioned factors and Happy Frocks did not act.