

**July 2016 MPT Summary – provided by the National Conference  
of Bar Examiners**

**In re Whirley**

In this performance test item, examinees are associates at a law firm representing Barbara Whirley. In January, Whirley began renting a house from Sean Spears. In the last few months, Whirley has had some problems with the house—a leaking toilet, a broken automatic sprinkler system, and a defective sliding door in the guest bedroom, which has allowed water to enter and cause the carpet to get mildewed and moldy. In addition, Whirley’s dog has chewed on the baseboard in the laundry room. She has told Spears about the problems with the toilet, sprinkler system, and door, but he has failed to make any repairs. Whirley seeks the firm’s advice regarding her options as a tenant. Examinees’ task is to draft an objective memorandum identifying the options Whirley has under Franklin’s landlord/tenant law to address each condition in the house and recommending which options are best, keeping in mind that Whirley prefers to continue living in the house. The File contains the instructional memorandum from the supervising attorney, a summary of the client interview, the lease agreement, an email exchange between Whirley and Spears, and a repair estimate. The Library contains excerpts from the Franklin Civil Code and two Franklin cases that discuss what conditions may constitute breaches of the warranty of tenantability and the tenant’s potential remedies.

## Question 2

John, his wife, Cathy, and their children recently went on their annual vacation to Florida. For the past fifteen (15) years, John has driven the family from their home in Tennessee to the same beach in Florida. While at the beach, John ran into some old family friends, Thomas, Pam, Thomas' wife, and their children. Thomas and his family had lived in Tennessee for many years, but had moved to Florida about five (5) years ago. Both families decided to have dinner together one evening to catch up with one another. During dinner, Thomas indicated that he and his family had moved back to Tennessee about two (2) years ago due to a job transfer. The two (2) families enjoyed visiting during the dinner. After dinner, John's children wanted to ride with Thomas' children on the way back to their condominium to get ice cream. Unfortunately, Thomas lost control of his vehicle and had a serious accident. As a result, John's children received significant injuries.

- A. John and Cathy wish to pursue a cause of action against Thomas for their children's injuries, but they desire to file the lawsuit in Tennessee. Assuming there is a conflict between the applicable law of Tennessee and Florida, identify the two (2) primary doctrines that a Tennessee Court would consider to determine which substantive law to apply in the lawsuit.
- B. State the factors enumerated in each of the two (2) primary doctrines.
- C. Provide an analysis of how a Tennessee Court would apply the facts to each of the two (2) primary doctrines to determine which substantive law to apply in the lawsuit.

### Question 3

While volunteering at a legal clinic in Shelby County, Tennessee, you meet Joseph and Mary Tennon. The Tennons are renting a massive home in Germantown, Tennessee. The written lease agreement for the rental property provides that the monthly rental payment is \$25,000. An 18% late fee will be assessed for any rental payment received after the fifth day of each month. The lease agreement also provides that tenants agree to waive notice for non-payment and agree to the limitation of any liability of the landlord to the tenant. The Tennons are experiencing financial difficulty because Joseph recently lost his job. The Tennons have not paid rent in several months and owe \$75,000 in arrears, plus late fees.

Three weeks ago, Lenny, the Tennons' landlord, directed that the electricity and water utilities be turned off at the rental property without any warning to the Tennons. The Tennons immediately wrote Lenny a letter demanding that Lenny restore the utilities; however, Lenny never responded to the letter and the utilities were not turned back on. Unable to endure the freezing temperatures, the Tennons checked into a local hotel. To date, they have spent \$3,000 for their extended hotel stay. The Tennons' furniture and belongings are still in the rental property.

During your meeting with the Tennons, they advise that Lenny filed a Forcible Entry and Detainer Warrant ("FED") in Shelby County General Sessions Court. Lenny is seeking possession of the rental property and damages for rent arrears in the amount of \$75,000 and late fees in the amount of \$13,500, totaling \$88,500. The court date is scheduled for next Monday.

- A. Discuss whether Lenny is able to seek the full amount of monetary damages requested in his FED action in General Sessions Court.
- B. Please discuss potential defenses, if any, to Lenny's action filed in General Sessions Court. Also discuss potential claims, if any, the Tennons may assert against Lenny to offset any potential liability to Lenny.
- C. The day before the scheduled court date, Lenny removed the Tennon's personal belongings from the rental property. The Tennons were mortified to find their furniture, clothes, and other personal effects on the side of the road, particularly since the Tennon's discovered their road-side property in the midst of a torrential rain. Discuss potential claims against Lenny, if any, regarding the Tennon's personal property removed from the rental home.

#### Question 4

Henry is in the business of buying and selling architectural remnants. Henry leases a warehouse in Memphis which he opens to the public. In addition to selling items from his warehouse, Henry operates an online site, Remnants.com, where he advertises and sells items. In March, 2015, Sarah, a blogger and interior designer from Nashville, came to Henry's warehouse to look at three (3) antique mantels she had seen on Remnants.com which she was considering for a client's renovation project. Sarah liked the antique mantels and purchased all three (3) of them after signing a contract of sale which detailed the terms of purchase.

Shortly thereafter, Sarah returned to Henry's warehouse attempting to return two (2) of the mantels because she stated that her client did not like them. Sarah also mentioned that she believed one (1) of the mantels was not antique, but instead was a reproduction piece and was not as advertised by Henry. Henry believed the mantels had been damaged while in Sarah's possession and refused to refund Sarah's money. Henry also disagreed with Sarah's contention that one (1) of the mantels was not antique.

Following their disagreement, Sarah began posting negative comments about both Henry and Remnants.com on her blog. On May 1, 2015, Sarah sued Henry in Shelby County, Tennessee for breach of contract and fraud. Henry filed an answer to Sarah's complaint on June 1, 2015.

Throughout the summer of 2015, Sarah continued posting negative comments about Henry and Remnants.com on her blog. Henry's warehouse and online business began to suffer, and Henry believed this was due to Sarah's blogging. On October 1, 2015, Henry sued Sarah in state court in Nashville, Tennessee for defamation. On October 15, 2015 Sarah filed a motion to dismiss claiming that Henry's lawsuit contained claims that were compulsory counterclaims in the lawsuit she filed against Henry.

- A. Does Henry's suit against Sarah contain compulsory counterclaims? Explain.
- B. Assume that the Nashville court denies Sarah's motion to dismiss Henry's defamation suit on December 15, 2015. Henry then files an amended complaint on December 16, 2015, adding additional allegations and causes of action against Sarah without seeking leave to amend. Sarah moves to dismiss Henry's amended complaint arguing that he was required to seek leave to amend prior to filing. Is Sarah correct? Explain.

## Question 5

Memphis Pyramids, LLC ("MP") imports and sells souvenir miniature models of Egyptian pyramids. MP was organized in, and under the laws of, the state of Tennessee. MP's company headquarters are in Olive Branch, Mississippi. MP also has a distribution warehouse in Shelby County, Tennessee.

MP requested a loan in the amount of \$100,000.00 from Blue Bank, a bank duly organized under the laws of the state of Mississippi ("Blue Bank") for the purchase of air-conditioning units from Nile AC Company ("Nile") to heat and cool the Shelby County warehouse. Blue Bank agreed to finance MP's purchase of the air-conditioning units, and as a condition to the loan, Blue Bank required MP to sign and deliver a security agreement containing the following language:

"MP hereby grants to Blue Bank a security interest in all of MP's personal property, including without limitation those certain Nile brand air-conditioning units, bearing serial numbers 092-106 and 101-503, located at MP's distribution warehouse in Shelby County, Tennessee, and all other equipment of MP wherever located."

Blue Bank also required MP to deliver a financing statement containing a collateral description identical to the security agreement. As authorized by MP's operating agreement, the Managing Member of MP signed and delivered the security agreement. The Managing Member also sent the financing statements.

Rather than distributing loan proceeds directly to Nile for the air-conditioning units, on August 1, 2013, Blue Bank disbursed all loan proceeds to MP, who used a portion of the loan proceeds to purchase the Nile air-conditioning units. On August 25, 2013, the Nile air-conditioning units was installed at the Shelby County warehouse. On August 26, 2013, Blue Bank filed the signed financing statement in the office of the Secretary of State of Mississippi, and on the same day, filed the unsigned financing statement in the office of the Secretary of State of Tennessee.

On November 1, 2013, Blue Bank found that: (i) Yellow Bank had filed a financing statement in the Office of the Secretary of State of Tennessee on July 28th, 2013, which statement reflected Yellow Bank as the secured party, MP as the debtor, and which described the collateral as all of debtor's equipment and inventory; and that (ii) Red Bank had filed a financing statement in the Office of the Shelby County Register of Deeds on September 21, 2013, which statement reflected Red Bank as the secured party, MP as the debtor, and which described the collateral as all of debtor's equipment and inventory.

Describe with specificity and detailed reasoning: (A) whether each of Blue Bank, Yellow Bank, and Red Bank has a perfected security interest in the following collateral, and (B) their respective priorities in the following collateral:

- 1) The Nile air conditioning units;
- 2) Souvenir pyramids in the Shelby County Warehouse awaiting shipment; and
- 3) Office machines at MP's Olive Branch, Mississippi headquarters.

## Question 6

Lily is a 42 year old woman from Boston Massachusetts. After graduating from law school in 1999, Lily moved to Nashville to practice law. As a gift for graduation, Lily's parents gave her an acre plot of land in East Nashville. Lily did not like the neighborhood so instead of building a home on the plot, she purchased a home in West Nashville. While Lily did not maintain the property by doing things like cutting the grass, she did pay the taxes on the plot of land.

In 2009, Lily became a partner in XYZ law firm. That same year, Lily reconnected with her high school sweetheart, Bob, during a visit to Boston. After a few months of long distance dating, Bob and Lily were married and Bob moved to Nashville. Because Bob and Lily knew they wanted to eventually have a family, they elected to purchase a new 4-bedroom home instead of moving into Lily's 3 bedroom home in West Nashville. Lily knew a colleague looking for a place to rent so she was easily able to rent her West Nashville home.

In 2010, Lily purchased Bob a brand new motorcycle. Two years later, Bob's company was downsizing and informed Bob that he would have to return to headquarters in Boston if he wanted to stay with the company. Because of Bob's specialized job, he knew he would have a difficult time finding another job in Nashville.

Bob decided to return to Boston and commute back and forth. While in Boston, Bob purchased a car and rented an apartment. This quickly began to take a toll on Bob and Lily's relationship, but they were determined to make it work. In 2014, during a visit to Nashville, Bob was in a serious accident with an 18-wheel truck while riding his motorcycle. Bob is currently suing the truck company for damages.

In late 2015, during a visit to Bob in Boston, Lily saw a text message from another woman about meeting for drinks that led Lily to believe Bob was having an affair. She also determined that Bob's company had recently laid him off and he was currently doing odds jobs to pay his rent. Initially, Lily considered trying to make the relationship work; however, she could not get past her belief that Bob was cheating and decided to end her marriage. Bob, however, does not want to end the marriage and has vowed to win her back.

Lily has come to you to understand her legal options, including whether she needs to rush to the courthouse or if she has time to decide how she wants to proceed. Please explain the following:

- A. Jurisdiction (subject matter and personal), including any issues with waiting to file.
- B. If the proceeding is filed in Tennessee,
  - i. What grounds she can seek to get the divorce and any defenses that may be asserted by Bob?
  - ii. How will the parties' assets be divided?

## Question 7

ABC Pasta, LLC manufactures only one product: pasta in the shape of letters of the alphabet. It sells letter-shaped pasta to soup companies throughout the United States. Alphabet Soup, LLC makes a concentrated soup product consisting of "chicken-style" broth, "carrot-like" pieces and letter-shaped pasta that it distributes to discount groceries across the country. Its label reads "It may not look great, taste great, or be great for you, but you can heat it and eat it."

Alphabet Soup, LLC and ABC Pasta, LLC enter into a written agreement. It appears below in its entirety.

For consideration, Alphabet Soup and ABC Pasta agree as follows: ABC Pasta to be exclusive provider to Alphabet Soup of pasta so long as it timely delivers pasta of quality acceptable to Alphabet Soup. Alphabet Soup will use no other provider.

Interest rate on late payments: fifty-five percent (55%).

The agreement was duly signed by authorized company representatives. Assume for the purposes of this question that the UCC does not apply.

- A. Is the contract enforceable in Tennessee? If so, what are the circumstances under which a party could terminate the contract?
- B. If Alphabet Soup later contracts with 123 Pasta, LLC to provide number-shaped pasta for a new line of soups, will ABC Pasta have a successful cause of action against Alphabet Soup?
- C. If Alphabet Soup rejects a timely shipment of pasta from ABC Pasta because ABC Pasta changed the supplier of flour that it uses, would ABC Pasta have a successful cause of action against Alphabet Soup? How would your answer be different if ABC Pasta had successfully re-sold the rejected pasta at its standard market rate?

For all questions, explain your answer by addressing why you have reached your conclusion.

## Question 8

Aaron is a lawyer licensed and practicing in Tennessee. His practice has not been successful, and he is desperately looking for clients. Aaron has a neighbor who is a graphic designer. Aaron hires the neighbor to prepare advertising materials including a brochure. Aaron has read that testimonials are dynamite ways to advertise. He doesn't have any clients who would give a reference, so he agrees to pay his neighbor an extra fee to include quotations by the neighbor stating how great a lawyer Aaron is. He never represented the neighbor. Aaron also adds a statement about how he has never lost a jury trial, which is technically true because he has never tried one. The brochure says, "Hire me and you will see the same results." He has lost numerous bench trials, but he doesn't reference those in the brochure. He also thinks it will help to add some additional punch to the brochure to put that he is the "best," "most competent," and "most highly skilled" lawyer on Broad Street (he's the only lawyer there, so he is comfortable that the statements are true), with "the lowest prices around."

One night, Aaron is watching the local news as it reports that a man who was trapped in a trench while working at a job site has been injured. The report indicates that safety standards were violated, and the state has already cited the property owner for failing to comply with regulations. Aaron decides that the injured man, Bob, would make a good client. He researches Bob on-line to see if they have any common friends or contacts, but he is not able to identify anyone who could introduce them.

Afraid he could lose potential business, Aaron goes straight to the hospital on the following night. In addition to wearing his best suit and bringing Bob flowers, Aaron decides to bring an engagement letter with Bob's name in hopes that Bob will sign on the spot. To prove how good a lawyer he is, Aaron also drafts a complaint showing Bob as the plaintiff. Aaron brings along copies of his advertising materials, including his brochure.

Bob wants to hire a lawyer and thinks that engaging one now might help get a faster and larger recovery. He doesn't know any other lawyers. He is impressed by the complaint and the information about Aaron, especially the neighbor's testimonial. Bob signs the engagement letter from his hospital bed.

Considering the applicable rules, has Aaron violated any standards of professional responsibility? If so, how?

## **Question 9**

During an undercover drug investigation, the police sent Informant to Dealer's home to buy cocaine with marked \$20 bills. Informant entered Dealer's home and waited while Dealer called somebody and asked for some cocaine. Driver arrived a short time later and gave some cocaine to Dealer. Dealer then sold the cocaine to Informant. Informant left and told the police what had happened. When Driver left, the police followed him to his home.

Later that evening, the police decided to stop Driver. Driver left his home in his car with two children, and the police followed. The police saw Driver run a stop sign. Driver drove to a gas station and parked beside a gas pump, where the police initiated a traffic stop. The police told Driver they stopped him for running a stop sign. They asked him to step out of his car so they could talk to him away from the children. They told Driver that they knew he delivered cocaine to Dealer earlier that day. They grabbed him, patted him down, and searched his pockets for illegal drugs or money connected to the drug deal. They also searched him for officer safety because drug dealers are generally known to be violent. They found a small amount of marijuana and four \$20 bills that Informant had given Dealer for the cocaine.

The police charged Driver with delivering cocaine to Dealer, conspiracy to sell cocaine with Dealer, and possession of marijuana at the gas station.

Discuss the grounds upon which Driver may move to suppress the evidence against him as the product of an unreasonable search or seizure. Analyze the strengths and weaknesses of each ground and identify any evidence that may be suppressed.

## **Question 10**

Paul owns a small coffee-roasting business located in Nashville, Tennessee. Paul sells his coffee beans to a number local coffee shops and restaurants, and in 2014 he was awarded Micro-Coffee Roaster of the Year. Paul also has a Fairtrade certification, meaning his business practices comply with certain environmental and labor standards.

Two months ago, Paul signed a vendor agreement with Grocer, a small regional grocery chain, whereby Paul will begin selling his coffee beans in Grocer's stores in Tennessee and Georgia. The vendor agreement permits Grocer to terminate the agreement for any reason upon 30-day's notice.

One month ago, Arch Vandal, a disgruntled former employee of Paul's, entered Paul's roasting facility in the middle of the night using a key that he had wrongfully kept at the time he was terminated. Vandal removed a laptop computer. As Vandal was leaving Paul's facility, he poured a bottle of Cayenne pepper oil over a small batch of coffee beans that were to be packaged and distributed the following day.

The next day, Paul, unaware of the acts by Vandal, delivered the contaminated coffee beans to DoubleD Espresso ("DoubleD"), a local coffee shop. One of DoubleD's customers, Consumer, drank the contaminated coffee, and as a result, quickly went into severe anaphylactic shock and died shortly thereafter. An investigation revealed that Consumer was highly allergic to a number of foods including peppers, and he typically carried with him an epinephrine injection device that would have prevented the fatal reaction. Unfortunately, Consumer did not have his injector with him the day he went to DoubleD's.

A few days after Consumer's death, Competitor, who owns a competing coffee roasting company and who was aware that Paul had recently began selling his coffee to Grocer, met with Grocer and, citing the recent tragic events involving Consumer, told Grocer that Paul's coffee is poisonous and unfit for sale. Competitor also stated, falsely, that Paul buys his beans from Latin American coffee farmers who violate child labor laws and that Paul's Fairtrade certification is a sham. Grocer thereafter notified Paul that it was terminating their vendor agreement in 30 days.

As word has spread about the death of Consumer, local coffee shops and restaurants have terminated their business relationship with Paul. Paul has become so distraught that he recently checked into a mental institution and has decided to close his company. Please discuss in detail:

- A. The causes of action that may be asserted on behalf of the estate of Consumer against Paul and DoubleD;
- B. Paul's causes of action against Competitor; and
- C. Paul's causes of against Vandal.

Please include in your answer a discussion of any applicable defenses.