

# July 2023 MPT-2 Item

## *Martin v. The Den Breeder*

These materials are copyrighted by NCBE and are being reprinted with permission of NCBE. For personal use only.  
May not be reproduced or distributed in any way.

**Martin v. The Den Breeder**

**FILE**

Memorandum to examinee.....1

Memorandum on drafting advice letters .....2

Transcript of client interview .....3

Dog purchase agreement.....5

Email from Dr. Claire Turner, DVM.....6

Email attachment: "Liver Shunt Basics" .....7

**LIBRARY**

Selected statutes.....8

**Cohen v. Dent**, Franklin Court of Appeal (2020) .....10

Do Not Copy

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

**MEMORANDUM**

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

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

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

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

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

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

**MEMORANDUM**

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

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

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

**Transcript of Interview with Anthony Martin, July 24, 2023**

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

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

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

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

**Wilson:** Tell me about the dog.

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

**Wilson:** Where did you buy him?

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

**Wilson:** Tell me about the sale.

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

**Wilson:** That sounds like a lot.

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

**Wilson:** Did you ask about his health?

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

**Wilson:** When did you pay him?

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

**Wilson:** Did you sign anything?

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

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

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

**Martin:** No, nothing else.

**Wilson:** What happened next?

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

**Wilson:** What did you do?

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

**Wilson:** Thank you. Who is your vet?

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

**Wilson:** That's . . .

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

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

**The Den Breeder  
Dog Purchase Agreement**

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

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

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

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

Dated: June 12, 2023

*Simon Shafer*  
Simon Shafer, Breeder

*Anthony Martin*  
Anthony Martin, Buyer

**Email from Dr. Claire Turner**

**July 18, 2023**

**From:** Claire Turner <cturnervet@franklin.med>

**To:** Anthony Martin <amartin@franklinres.org>

**Subject:** Diagnosis and treatment of male Irish wolfhound puppy, Ash

Mr. Martin:

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

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

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

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

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

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

**Email Attachment: *Liver Shunt Basics for Wolfhound Puppies***

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

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

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

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

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

**Excerpts from the Franklin Uniform Commercial Code**

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

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

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

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

. . .

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

**§ 2-316 Exclusion or Modification of Warranties**

. . .

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

(3) Notwithstanding subsection (2)

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

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

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

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

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

## Excerpts from the Franklin Pet Purchaser Protection Act

### § 753 Sale of animal

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

- (1) within 14 business days following the sale of an animal subject to this article, a licensed veterinarian certifies such animal to be unfit for purchase due to illness or the presence of symptoms of a contagious or infectious disease; or
- (2) within 180 calendar days following the sale of an animal subject to this article, a licensed veterinarian certifies such animal to be unfit for purchase due to a congenital malformation that adversely affects the health of the animal.

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

- (1) return the animal and receive a refund of the purchase price including sales tax and reasonable veterinary costs directly related to the veterinarian's certification that the animal is unfit for purchase pursuant to this section;
- (2) return the animal and receive an exchange animal of the purchaser's choice of equivalent value and reasonable veterinary costs directly related to the veterinarian's certification that the original animal is unfit for purchase pursuant to this section; or
- (3) retain the animal and receive reimbursement from the pet dealer for veterinary services from a licensed veterinarian of the purchaser's choosing, for the purpose of curing or attempting to cure the animal.

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

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

### **Cohen v. Dent**

Franklin Court of Appeal (2020)

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

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

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

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

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

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

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

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

### **Ambiguity of the Contract**

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

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

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

### **Franklin Pet Purchaser Protection Act**

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

The FPPPA describes three remedies available to a purchaser:

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

- the right to return the animal and receive a replacement animal; or
- the right to retain the animal and be reimbursed veterinary costs incurred for the purpose of curing or attempting to cure the animal.

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

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

### **Uniform Commercial Code**

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

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

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

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

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

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

## MULTISTATE PERFORMANCE TEST DIRECTIONS

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

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

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

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

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

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

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

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