

JULY 2008
MULTISTATE PERFORMANCE TEST (MPT)

The MPT Question administered by the State Board of Law Examiners for the July 2008 bar examination was *Williams v. A-1 Automotive Center*. Two representative good answers selected by the Board are included here, beginning at page 2.

The National Conference of Bar Examiners publishes the MPT Question and the “point sheet” describing the issues and the discussion expected in a successful response to the MPT Question. The “point sheet” is analogous to the Board’s Analysis prepared by the State Board of Law Examiners for each of the essay questions.

The NCBE does not permit the Board to publish the MPT Question or the “point sheet” on the Board’s website. However, the NCBE does offer the MPT Question and “point sheet” for sale on its website, and the July 2008 MPT is now available there.

Materials for an unsuccessful applicant: An applicant who was unsuccessful on the July 2008 Maryland bar examination may obtain a copy of the MPT Question, his or her MPT answer, representative good answers selected by the Board, and the “point sheet” for the July 2008 MPT Question administered as a component of the Maryland bar examination. This material is provided to each unsuccessful applicant who requests, in writing, a copy of the answers in accordance with instructions mailed with the results of the bar examination. The deadline for an unsuccessful applicant to request this material is January 6, 2009.

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REPRESENTATIVE ANSWER 1

Memo

To: Tania Miller
From: Associate Attorney
Date: July 29, 2008
Re: Williams v. Biggs d/b/a/ A-1 Automotive Center

We represent Robert Williams in a dispute with A-1 Automotive Center (A-1), concerning repairs that A-1 made to his minivan, and there are four potentially actionable statements made by Aaron Biggs, who owns and operates A-1, under the complaint of fraud. As stated by the court in *Foster v. Panera*, a complaint of fraud must allege the following elements: (1) a material misrepresentation of fact by the defendant, (2) made with knowledge of its falsity, (3) made with intent to deceive or induce reliance, (4) reasonable reliance by the plaintiff upon the misrepresentation, and (5) loss by the plaintiff as a proximate result of the misrepresentation. The following analyzes which of the four statements are actionable and which are not under the theory of fraud.

1) The first statement made by Aaron was that he had "found a notification from Dodge about a defect causing the gears to grind down." For this to be an actionable statement, the elements of fraud must be met. First, this must be a material misrepresentation of fact by the defendant. Here, the notification is material because a reasonable person learning about problems with the automobile transmission would have considered the notification as an important factor in determining whether to have the transmission repaired or replaced. Second, the statement must be made with knowledge of its falsity. Here, Dodge had not circulated any notification about any problems with the transmissions in its 2003 minivans. Therefore, it can be presumed that Aaron made the statement knowing it was false since a notification was never issued by Dodge. Third, the statement must be made with the intent to deceive or induce reliance. Here, Aaron intended to deceive Williams into believing that there was a problem with the transmission and that the transmission had to be repaired or replaced. Fourth, there must be reasonable reliance by the plaintiff upon the misrepresentation. Here, the transmission had already been removed from the minivan and disassembled by the time Williams arrived at the shop. Williams was planning on leaving for vacation the next day and felt he had no choice other than to put a rebuilt transmission into his minivan. Finally, there must be loss by the plaintiff as a proximate result of the misrepresentation. Here, Williams incurred a loss of \$1,887 for the bill from A-1 on car repairs that were unnecessary and not done correctly and a loss of \$128 on the bill from Mission to repair the transmission leak which had been caused by A-1's improper reinstallation of the transmission. Therefore, the elements of fraud for the first statement are met and Williams has an actionable claim for this statement.

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2) The second statement made by Aaron was, "Your transmission is going to fail, and soon!" For this to be an actionable statement, this must be a material misrepresentation of fact by the defendant. The issue here is whether this is an expression of opinion or a statement of fact. The court in *Madison v. Brooks* stated that fraud cannot be predicated upon the mere expression of an opinion which is understood to be only an estimate or a judgment. The person to whom such a statement is made has no right to rely upon the statement, and does so at his peril. However, the court noted an exception to this rule where the opinion relates to a subject as to which the parties do not have equal knowledge or means of ascertaining the truth. Where the party making the misrepresentation has special knowledge of the facts underlying the opinion, or is "possessed of superior knowledge respecting such matters, with a design to deceive and mislead," the positive assertion of a matter, which stated in another form might be a mere opinion, may be actionable if the statement was false. See also *Novotny and Wong v. Hall Lumber*.

Here, Williams allegations fall within this exception. Aaron alleged that the transmission was going to fail and would fail soon. As stated above, Aaron did not receive a notification from Dodge regarding defects in the gears and in fact replaced the original transmission back in the minivan. Williams relied upon Aaron's skill in the automotive business; and Williams, who had no expertise in automotive repairs, did not possess reasonable means of ascertaining the truth of Aaron's statements. Therefore, the first element of fraud is met. The remaining elements of fraud are met as discussed for the first statement.

3) The third statement made by Aaron was, "It would also help if we installed an extra cooler to keep it from running hot." Like the second statement, the issue here is whether this is an expression of opinion or a statement of fact. The exception where there is unequal knowledge between the parties that applied for the second statement does not apply. Regarding the cooler, Williams told Aaron that if the minivan needed an extra cooler, the manufacturer would have installed one. Even though Williams had no expertise in automotive repair, he knew enough about the car that an extra cooler was not needed. Therefore, this statement is an expression of opinion. As stated by the court in *Madison v. Brooks*, fraud cannot be predicated upon the mere expression of an opinion which is understood to be only an estimate or a judgment. The person to whom such a statement is made has no right to rely upon the statement, and does so at his peril. Here Aaron did not rely upon the statement. Therefore, this statement is not actionable under an allegation of fraud.

4) The fourth statement made by Aaron was, "I guarantee the job." In *Rogers v. Statement Insurance*, the court concluded that when a promise is made with no intent to perform, it constitutes a misrepresentation of fact. A promise is a statement of intention to perform some action in the future. If the maker of the promise honestly intends to follow through on that intention at the time of the promise, the statement cannot give rise to an action for fraud. Here, Aaron did not rely on the statement because he had already paid for the work before he received the receipt containing the alleged guarantee.

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Cause of Action

Statements 1 and 2 are actionable statements and separate causes of action for fraud for each of these statements have been drafted below.

Statement 1:

1. Aaron made a material misrepresentation of fact because a reasonable person learning about problems with the automobile transmission would have considered the notification from Dodge as an important factor in determining whether to have the transmission repaired or replaced.
2. Aaron made the statement with knowledge of its falsity because Dodge had never circulated a notification about any problems with the transmissions in its 2003 minivans.
3. Aaron made the statement with intent to deceive or induce reliance because Aaron intended to deceive Williams into believing that there was a problem with the transmission and that the transmission had to be repaired or replaced.
4. There was reasonable reliance by the plaintiff upon the misrepresentation because the transmission had already been removed from the minivan and disassembled by the time Williams arrived at the shop, and Williams was planning on leaving for vacation the next day and felt he had no choice other than to put a rebuilt transmission into his minivan.
5. The plaintiff incurred a loss as a proximate result of the misrepresentation in the amount of \$1,887 for the bill from A-1 on car repairs that were unnecessary and not done correctly and in the amount of \$128 on the bill from Mission to repair the transmission leak which had been caused by A-1's improper reinstallation of the transmission.

Statement 2:

1. Aaron made a material misrepresentation of fact because Aaron possessed of superior knowledge respecting such matters, Williams relied upon Aaron's skill in the business, and Williams did not possess reasonable means of ascertaining the truth.
2. Aaron made the statement with knowledge of its falsity because Dodge had never circulated a notification about any problems with the transmissions in its 2003 minivans.
3. Aaron made the statement with intent to deceive or induce reliance because Aaron intended to deceive Williams into believing that there was a problem with the transmission and that the transmission had to be repaired or replaced.

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4. There was reasonable reliance by the plaintiff upon the misrepresentation because the transmission had already been removed from the minivan and disassembled by the time Williams arrived at the shop, and Williams was planning on leaving for vacation the next day and felt he had no choice other than to put a rebuilt transmission into his minivan.

5. The plaintiff incurred a loss as a proximate result of the misrepresentation in the amount of \$1,887 for the bill from A-1 on car repairs that were unnecessary and not done correctly and in the amount of \$128 on the bill from Mission to repair the transmission leak which had been caused by A-1's improper reinstallation of the transmission.

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REPRESENTATIVE ANSWER 2

To: Tania Miller
From: Applicant
Re: Williams v. Biggs - causes of action for fraud
Date: July 29, 2008

Introduction

Two of the four statements identified in the Memorandum to File will support causes of action for fraud under Franklin case law. Three of Mr. Biggs's statements to Mr. Williams can properly be characterized as misrepresentations relating to a subject about which Mr. Biggs had superior knowledge, made with a design to deceive and mislead. The fourth statement can be characterized as a statement of promise, made with no present intention to perform. The Franklin Court of Appeal has held that both of these kinds of statements are "actionable" as fraud. Although all four statements are "actionable," only two of them meet the additional requirement to state a cause of action for fraud that they actually induced Mr. Williams' detrimental reliance. Each statement is discussed below, and the two causes of action for fraud are set forth in the annex.

I. Misrepresentations relating to subjects about which Biggs had superior knowledge

While a mere expression of opinion is not a statement of fact and therefore is not actionable as fraud, a statement of opinion relating to a subject as to which the parties do not have equal knowledge or means of ascertaining the truth is actionable as fraud where the party making the statement has "special knowledge of the facts underlying the opinion" and makes a misrepresentation "with a design to deceive and mislead." *Madison v. Brooks* (Fr. Ct. App. 1979). Distinguishing these two kinds of statements, the Court of Appeals has held that a merchant's descriptions of his goods or services as "good," "the best," or "top quality," are mere statements of opinion, see *Madison*, citing *Bender v. Fiat Corp.* and *Novotny v. Ford Farms*. On the other hand, statements about the particular specifications or capabilities of particular products - such as the fact that seeds would be "drought-resistant," or that windows would "protect against rot for ten years" - are statements relating to a subject about which the representor possesses superior knowledge, such as to be actionable as fraud. See *Madison*, citing *Novotny and Wong v. Hall Lumber, Ltd.*

Here, Mr. Biggs made three statements to Mr. Williams which related to Mr. Biggs's superior knowledge of automotive parts and the automotive maintenance, and about which Mr. Williams did not have equal means by which to ascertain the truth of the statements.

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The First Statement: Mr. Biggs "found a notification from Dodge ..."

When Mr. Biggs told Mr. Williams he "had found a notification from Dodge about a defect causing the gears to grind down," Mr. Biggs apparently intended his statement to refer to a purported notification that would have been circulated by Dodge to its dealerships and other automotive repair shops servicing Dodge vehicles. Mission Dodge dealership's statement that Dodge "had not circulated any notification" indicates that such a procedure was indeed observed. Mr. Williams would have had no ability to discover whether such a special notification had been circulated among auto repair shops, not having access to such channels of communication. Thus, Mr. Biggs' statement was based on Mr. Biggs's special knowledge of repair-related advice circulated by automobile manufacturers. According to Mission Dodge, this statement was untrue and Mr. Biggs would have known as much at the time of making it. Also, Williams detrimentally relied upon it. Thus, the statement supports a cause of action for fraud.

The Second and Third Statements: "Your transmission is going to fail, and soon!" and "It would also help if we installed an extra cooler..."

When Mr. Biggs stated to Mr. Williams, "Your transmission is going to fail, and soon!" and "It would also help if we installed an extra cooler to keep it from running hot," these statements were also made based on Mr. Biggs's specialized knowledge of the inner workings of automobiles. Mr. Williams would not have been able, through his own abilities, to ascertain whether his transmission was in fact at risk of failure, or whether another particular car part could minimize that risk. The fact, discovered by Mission Dodge, that Mr. Biggs did not in fact repair Mr. Williams' transmission but merely put it back into the car, shows that the transmission was not in fact at risk of failure, or in need of an extra part, and therefore Mr. Biggs made these statements with knowledge of their falsity and intent to deceive. Mr. Williams relied upon the first statement in agreeing to have Mr. Biggs repair his transmission. Thus, this statement will support a cause of action for fraud. However, the statement that "it would help if we installed an extra cooler," will not support an action for fraud because Mr. Williams declined the installation of this part and was not charged for it; therefore he did not rely on this statement and sustain damages because of it.

II. Statement of promise made with no present intent to perform

A. The Fourth Statement: "I guarantee the job."

The Court of Appeals has held that "when [a] promise is made with no intent to perform" the promisor "has misrepresented his present intention, which would be a misrepresentation of fact" and the representation or promise is therefore actionable as fraud. When Mr. Biggs stated to Mr. Williams, "I guarantee the job," this was a promise made with no present intent to perform. Mr. Biggs had no present intention of giving Mr. Williams a guarantee on the work performed on Mr. Williams car, because Mr. Biggs had already prepared for Mr. Williams a

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receipt stamped with the words "No Guarantee." Mr. Biggs spoke his words of promise after he had already given Mr. Williams the receipt stating Mr. Biggs intent to honor no guarantee of the job.

However, although this statement is a misrepresentation it does not support a cause of action for fraud because Mr. Williams did not rely upon it to his detriment. Mr. Biggs spoke these words as Williams was leaving the shop, after he had already paid the bill. Mr. Williams therefore could not have relied upon Mr. Biggs' purported promise that the work would be "guaranteed" in making his decision to pay for the work. Therefore, this statement will not support a cause of action for fraud.

III. Annex: Causes of Action

Count I: Fraud

1. Mr. Biggs, the owner of a automotive repair shop, told Mr. Williams that Mr. Biggs "had checked and found a notification from Dodge about a defect [in cars of the model owned by Mr. Williams causing the gears to grind down."
2. Mr. Biggs made this statement with knowledge that it was false.
3. Mr. Biggs made this statement with the intent to deceive Mr. Williams into paying Mr. Biggs' repair shop to examine and repair the transmission in Mr. Williams' car.
4. In reliance of Mr. Biggs' statement, Mr. Williams, who had no independent access to auto repair notices circulated by Dodge, paid Mr. Biggs' repair shop to examine and repair the transmission in Mr. Williams car.
5. As a result of his reliance on Mr. Biggs' false statement, Mr. Williams lost the money he unnecessarily paid to have his car examined and repaired by Mr. Biggs' repair shop

Count II: Fraud

1. Mr. Biggs, the owner of a automotive repair shop, told Mr. Williams after conducting an inspection of Mr. Williams' car, "Your transmission is going to fail, and soon!"
2. Mr. Biggs made this statement with knowledge that it was false.
3. Mr. Biggs made this statement with the intent to deceive Mr. Williams into paying Mr. Biggs' repair shop to examine and repair the transmission in Mr. Williams' car.
4. In reliance of Mr. Biggs' statement, Mr. Williams, who had no independent ability to inspect his own car and determine whether the transmission was at risk of failure, paid Mr. Biggs' repair

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shop to examine and repair the transmission in Mr. Williams car.

5. As a result of his reliance on Mr. Biggs' false statement, Mr. Williams lost the money he unnecessarily paid to have his car examined and repaired by Mr. Biggs' repair shop