Representative Passing Answers

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Applicant Number

MPT-1
725

MPT®
Multistate Performance Test

Lowe v. Jost

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Lowe v. Jost

FILE

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LOPEZ & NICHOLS LLP
Attorneys at Law
12 Main Street
Centralia, Franklin 33705

To: Examinee
From: Sydney Nichols
Date: July 29, 2025
Re: Lowe v. Jost

We represent Dr. Emil Jost in a medical malpractice action. The complaint alleges that Dr. Jost was negligent in performing a hip replacement on Alice Lowe. Dr. Jost's defense is that he was not negligent and that any injuries suffered by Ms. Lowe were caused by her failure to follow post-surgery precautions and her subsequent fall.

We have retained an expert witness: Dr. Ariel Shulman, professor of orthopedics at Olympia University Medical School. Ms. Lowe has also retained an expert witness: Dr. Robert Ajax, a practicing orthopedic surgeon. Each party has filed a motion to exclude the testimony of the opposing party's expert witness; the motions were argued last week. We have also filed a motion for summary judgment. The judge will be deciding the motions to exclude expert testimony and our summary judgment motion at the same time.

I need you to draft the section of our brief arguing that

(1) the Court should qualify Dr. Shulman as an expert and admit her opinion testimony;

(2) the Court should not find Dr. Ajax to be a qualified expert, but even if he is qualified, should exclude all of his proffered opinion testimony; and

(3) even if the Court qualifies Dr. Ajax as an expert, the Court should grant our motion for summary judgment because the plaintiff has failed to offer any admissible evidence on elements of her malpractice claim.

Do not draft a separate statement of facts but incorporate the relevant facts into your argument. Using appropriate headings, you should persuasively argue that both the facts and the law support our position. Contrary authority and facts should also be cited, addressed in the argument, and explained or distinguished. Be sure to anticipate and respond to opposing arguments as we may not be allowed to submit a reply brief.

EXCERPTS OF VERIFIED COMPLAINT

Alice Lowe,
Plaintiff,
v. **Case No. 2024-CV-534**
Emil Jost, MD,
Defendant.

STATEMENT OF FACTS

. . .

4. Ms. Lowe consulted with Dr. Jost because she had severe pain in her left hip. Dr. Jost diagnosed Ms. Lowe with arthritis and recommended that she undergo a hip replacement. Ms. Lowe agreed to the procedure, and Dr. Jost performed a hip replacement of Ms. Lowe's left hip on March 1, 2022, in Centralia, Franklin.

5. Ms. Lowe followed all post-operative requirements set by Dr. Jost. She went to physical therapy and followed the prescribed limitations on twisting and bending.

6. On March 16, 2022, Ms. Lowe was walking with the aid of a cane around her condominium complex. She suddenly felt a sharp and excruciating pain that caused her to drop her purse. She fell to the ground in pain.

7. Ms. Lowe was rushed to the emergency room of Franklin General Hospital. The examining physician told Ms. Lowe that she had a small fracture of the femur (thighbone) and a dislocated hip.

8. On March 20, Ms. Lowe had a surgery consult with Dr. Harry Nix, who determined that Ms. Lowe had a small fracture of her femur and a severely dislocated left hip. Dr. Nix told Ms. Lowe that she needed a hip revision surgery (a second hip replacement) as soon as possible.

9. Ms. Lowe had revision surgery on March 21, 2022. Dr. Nix removed the original prosthetic hip, which was out of place and damaged, and replaced it with a new prosthetic.

10. Ms. Lowe followed all post-operative requirements set by Dr. Nix and is now fully recovered.

11. As a result of the improperly placed prosthetic hip, Ms. Lowe suffered severe pain. In addition, she incurred costs for the revision surgery and missed work for six weeks.

* * * *

AFFIDAVIT OF KAREN BAINES

STATE OF FRANKLIN **SURREY COUNTY**

1. I, Karen Baines, first being duly sworn, make oath that I am a resident of Cloverdale Condominiums in Centralia in the State of Franklin.
2. Alice Lowe is my neighbor.
3. On March 16, 2022, I was walking my dog around the condominium complex. I saw Ms. Lowe walking with the assistance of a cane. I was about 25 feet away from Ms. Lowe.
4. I saw Ms. Lowe drop her purse, which landed on the pavement. I yelled to her that I would be happy to pick it up for her. She said that she didn't need my help and then she bent over to pick up her purse. To pick up the purse, she bent forward at the waist and touched the ground with her hands.
5. Immediately after picking up the purse and then standing back up, Ms. Lowe cried out in pain. She then fell to the pavement. I called 911, and an ambulance came and took her away.
6. Further affiant saith not.

   Dated and signed this 2nd day of April, 2025.

AFFIDAVIT OF DR. EMIL JOST

STATE OF FRANKLIN **SURREY COUNTY**

1. I, Dr. Emil Jost, first being duly sworn, make oath that I am a physician licensed to practice in the State of Franklin. I graduated from Franklin University Medical School, and I am a board-certified orthopedic surgeon, having completed a residency in orthopedic surgery at Franklin General Hospital.
2. On February 12, 2022, Alice Lowe came to my office to discuss a hip replacement. I ordered X-rays of Ms. Lowe's hips and, after examining the X-rays, told Ms. Lowe that she had serious osteoarthritis in her left hip and recommended that she have a hip replacement. I then scheduled the surgery. As best I could determine, Ms. Lowe complied with pre-surgical preparations and tests.
3. On March 1, 2022, Ms. Lowe was admitted to Franklin Medical Center for a hip replacement of her left hip. I performed the surgery, replacing her damaged hip with a prosthetic hip. After I completed the surgery, Ms. Lowe went to the post-anesthesia care unit where she underwent a single anteroposterior ("front-to-back view") X-ray. I did not request, and Ms. Lowe did not undergo, any additional X-rays after the surgery.
4. The day after the surgery, I told Ms. Lowe that, for six weeks, she should not bend more than 90 degrees at the waist and should not twist at the hip. She was scheduled for six weeks of physical therapy. At the first meeting, the physical therapist reminded Ms. Lowe of the precautions against bending and twisting.
5. Immediately after surgery, as directed by me and the physical therapist, Ms. Lowe used a walker to assist her when she walked. Two weeks after Ms. Lowe began physical therapy, the physical therapist (in consultation with me) told Ms. Lowe that she could begin using a cane instead of a walker, thus allowing her hip to be more weight-bearing. She was reminded again about the precautions against bending and twisting.
6. I had no further contact with Ms. Lowe. She failed to appear for her scheduled checkup six weeks after the surgery.
7. Further affiant saith not.

Dated and signed this 2nd day of April, 2025.

EXCERPTED HEARING TESTIMONY OF DR. ARIEL SHULMAN

Direct Examination by Defendant's Attorney Sydney Nichols

Q: Could you state your name and your educational background for the Court?

A: My name is Ariel Shulman. I am a 2000 graduate of Franklin University, and I graduated from the University of Franklin Medical School in 2004. I completed a residency in orthopedic surgery at Franklin Medical Center. I was a resident from 2004 to 2009. I am board-certified in orthopedics. I am currently a professor of orthopedics at Olympia University Medical School.

Q: What does it mean to be "board-certified"?

A: It means that I have finished my residency in orthopedics and that I have passed the board certification exam.

Q: Are you currently practicing orthopedics?

A: No, I am teaching orthopedics at the Olympia University Medical School.

Q: Do you have any specialties within orthopedics?

A: I teach students how to do knee and hip replacements.

Q: Does your practice currently involve any actual hip replacements?

A: Currently I teach a simulated joint replacement class to medical students. In the past, from 2009 to 2019, I was in private practice in Olympia, and my practice was limited to hip and knee replacements. I probably performed an average of 100 knee and hip replacements per year during that time.

Q: Does the standard of care in Olympia equate with the standard of care in Franklin?

A: Well, Olympia has a much smaller medical community than Franklin. But the practice of orthopedics is pretty much the same in both states.

Q: Have you written any articles in the medical field?

A: Yes, I have written three articles on the proper procedures for knee replacement.

Q: Have you reviewed the records of Ms. Lowe's hip replacement that was performed by Dr. Jost?

A: Yes, I have reviewed all the surgical and medical records. I have also performed a physical examination of Ms. Lowe.

Q: Are you aware of the issues in this litigation?

A: Yes, I have reviewed the complaint and answer in this case.

Q: What is your opinion as to the surgery? Do you believe that Dr. Jost's performance of the hip replacement met the standard of care for an orthopedic surgeon in the community of Franklin?

A: Yes, I believe his care was well within the standard of care in the community**.**

Q: What is the basis of your opinion?

A: I base my opinion on my long experience performing hip replacements. And I keep up with the medical literature in the area.

Q: Is there any literature that you would refer to in this area?

A: I just follow all the articles on joint replacement that are in the *Journal of the American Medical Association (JAMA)* and *The New England Journal of Medicine*. They are considered the most up-to-date and reliable sources of information in medicine.

Q: Do you attend conferences on joint replacement?

A: I attend them regularly. I also present lectures at conferences annually discussing the appropriate procedures for joint replacements.

Q: Could you elaborate on your opinion that Dr. Jost's treatment met the standard of care in the area?

A: I reviewed the notes from the surgery. Once all the permanent prosthetic components were in place, the hip was taken through range-of-motion testing and stability testing in the operating room while the patient was still under anesthesia. After that testing confirmed that range of motion and alignment of the components were acceptable, Dr. Jost closed the incision. He ordered and reviewed a post-operative X-ray to confirm that the new hip was properly situated. Dr. Jost's surgical management of the patient, the manner in which he carried out the surgery, and his medical assessment of the patient's condition were at all times appropriate and fully comported with accepted standards of surgical care. In my opinion, no act or omission attributable to Dr. Jost proximately caused any of the injuries that the patient sustained.

Dr. Jost also gave Ms. Lowe specific instructions not to bend or twist for six weeks after surgery. The reason for these precautions is that twisting and/or bending can cause a dislocation of the hip and possible injury to the femur. Giving such instructions comports with the recognized standard of medical care for hip replacements.

In my opinion, Ms. Lowe's fracture did not occur during the original hip-replacement surgery. During surgery, Dr. Jost was able to fully observe the prosthetic joint, and there is no evidence that the pieces were improperly placed. The joint was stable at the conclusion of the surgery, and the X-ray done in the surgical suite supports this finding. I reviewed that X-ray myself, and there was no evidence of a fracture or of dislocation at that time.

Thus, it is my conclusion that the fracture and dislocation did not occur during or immediately after the surgery but occurred two weeks later when Ms. Lowe fell. At no time did Dr. Jost's treatment depart from good and accepted standards in the community.

* * * *

Cross-Examination by Plaintiff's Attorney Jeffrey Mansfield

Q: So, to be clear, you have not practiced orthopedics in Franklin since your residency in 2009, is that correct?

A: Yes.

Q: And the 10 years you were in practice from 2009 until 2019, you practiced exclusively in Olympia, right?

A: Yes.

Q: And since 2019, you have not performed even one hip replacement on a living patient?

A: That is correct.

Q: And you have not made a thorough comparison of the population and availability of medical care in Olympia and Franklin.

A: That is correct.

* * * *

EXCERPTED HEARING TESTIMONY OF DR. ROBERT AJAX

Direct Examination by Plaintiff's Attorney Jeffrey Mansfield

Q: What is your name and educational background?

A: I am Robert Ajax. I completed my bachelor's degree in biology at Franklin State University in 1998 and received my MD degree from Franklin State University in 2002. I completed my residency in orthopedics at Olympia General Hospital in the state of Olympia in 2007. I have a practice in orthopedics in Franklin, and I am board-certified in orthopedics.

Q: Are you familiar with the standard of care in hip replacements in the state of Franklin?

A: Yes, I currently practice in Franklin.

Q: Do you specialize in any type of orthopedics?

A: I do all of it—fractures, knee replacements, hip replacements.

Q: How many hip replacements have you done since you finished your residency?

A: Probably 50.

Q: Did you do any during your residency?

A: I assisted in over 100. I probably did about 20 myself.

Q: What is your opinion about the care that was given to Ms. Lowe during the hip-replacement surgery performed by Dr. Jost?

A: Dr. Jost departed from good and accepted medical practice in failing to order another X-ray from a different position. A second X-ray, from a different angle, might have shown that the prosthesis was out of place or that there was a broken bone. Because he did not order X-rays from different positions, he could not see whether there was a bone break or a misplaced prosthesis.

Q: On what evidence do you base this conclusion?

A: Dr. Jost did just one X-ray after surgery. That X-ray was front-to-back. That practice did not comport with the standard of care in Franklin.

* * * *

FRANKLIN RULES OF EVIDENCE

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

FRANKLIN RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

. . .

Jacobs v. Becker
Franklin Court of Appeal (2020)

Elise Jacobs has sued Dr. Carl Becker, a surgeon, for malpractice claiming that Dr. Becker failed to properly treat her post-surgical wound and that, as a result, she needed additional surgery and suffered intense pain. The trial court granted summary judgment to Dr. Becker. We affirm.

In support of his motion for summary judgment, Dr. Becker presented the affidavit of an expert witness, Dr. Otto, a surgeon practicing in the state of Franklin. In the affidavit, Dr. Otto stated that Dr. Becker's treatment of Ms. Jacobs at all times met the standard of care in the community. Dr. Otto concluded that the wound became infected, which is a common post-surgical occurrence. It was undisputed that Dr. Becker had prescribed antibiotics for Ms. Jacobs, and by the patient's admission, she failed to use them as prescribed. Ms. Jacobs did not present any expert testimony regarding her malpractice claim.

We have consistently held that a plaintiff must prove three elements to establish a prima facie case for negligence: (1) that a duty existed requiring the defendant to conform to a specific standard of care for the protection of others against harm, (2) that the defendant failed to conform to that specific standard of care, and (3) that the breach of the standard of care caused the harm to the plaintiff. There is no question that Dr. Becker owed a duty to Ms. Jacobs. The standard of care for physicians is to act with that degree of care, knowledge, and skill ordinarily possessed and exercised in similar situations by the average member of the profession practicing in the field.

Therefore, to succeed on a motion for summary judgment, the defendant must show that the plaintiff has failed to establish a factual basis for any of these elements. In ruling on summary judgment, the court must view the evidence in the light most favorable to the nonmoving party.

In addition, the Franklin Supreme Court has held that a Rule 56 motion for summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" should be granted. *Alexander v. ChemCo Ltd.* (Fr. Sup. Ct. 2003). In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Id*. A material fact is a fact that is essential to the establishment of an element of the case and determinative of the outcome. “The moving party is ‘entitled to a judgment as a matter of law’ because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.” *Id.* In other words, if a plaintiff fails to produce any evidence to prove an element of the case on which that plaintiff bears the burden of proof, then the defendant is entitled to summary judgment.

Expert testimony is required in medical malpractice cases because only expert testimony can demonstrate how the required standard of care was breached and how the breach caused the injury to the plaintiff. A party’s failure to provide any expert testimony on causation or the standard of care justifies an adverse ruling on summary judgment.

Because Ms. Jacobs failed to present expert testimony in support of her claim, the trial court properly granted summary judgment to Dr. Becker.

Affirmed.

Smith v. McGann
Franklin Court of Appeal (2004)

The only issue before us in this medical malpractice case is how to properly utilize a newly enacted statute, Franklin Civil Code § 233. This statute was enacted to clarify the law surrounding the introduction of expert testimony following the Franklin Supreme Court's determination that Franklin would adopt the United States Supreme Court's approach in *Daubert v. Merrell Dow Pharmaceuticals*, *Inc.*, 509 U.S. 579 (1993), in interpreting our own evidentiary rules*. Park v. Green* (Fr. Sup. Ct. 1999). In *Daubert,* the Supreme Court clarified that "general acceptance" was no longer the standard for determining the reliability of expert testimony. Instead, the trial court had broader latitude to determine whether an expert's "reasoning or methodology properly can be applied to the facts at issue." Under *Daubert*, the trial court is the "gatekeeper" to determine whether expert testimony is admissible.

Following the decision in *Park,* Franklin Rule of Evidence 702 was amended to be consistent with *Daubert*. Three years later, the legislature passed Franklin Code § 233, which echoed the *Daubert* criteria for determining the reliability of expert testimony.

In the case before us, the plaintiff, Manuel Smith, alleged that defendant Dr. Jenna McGann, an orthopedist, failed to diagnose a fracture of Smith's tibia, causing him great pain until the fracture was properly diagnosed. Smith went to Dr. McGann on June 1, 1999, claiming leg pain. Dr. McGann took one X-ray of his leg and found nothing wrong. Two months later, Smith saw another physician, who took further and more extensive X-rays and found the tibial fracture. Smith claimed that Dr. McGann's care fell below the standard of care in Franklin for this type of condition.

At the *Daubert* hearing, where the trial court determined whether each party's experts were sufficiently qualified to testify, the plaintiff proffered two physicians: Dr. Jeff Adams, an orthopedist who practiced medicine in the state of North Brunswick, which is over 800 miles from Franklin; and Dr. Sylvia Brown, an internal medicine specialist in the state of Franklin. Because the trial court refused to admit the testimony of either physician, the trial court dismissed the plaintiff's case. This appeal followed.

First, we turn to the testimony of Dr. Adams. Generally, experts can testify about the standard of care for a specialist only if the experts specialize in the same or a similar specialty that includes the performance of the procedure at issue. Although it is not necessary for the expert witness testifying to the standard of care to have practiced in the same community as the defendant, the witness must demonstrate familiarity with the standard of care where the injury occurred. Dr. Adams, an orthopedist, testified that he had studied the demographics of Franklin and of North Brunswick. His study demonstrated that the population and the availability of medical care were quite similar. He also testified that the standard of care in orthopedics was virtually the same in Franklin and in North Brunswick. He was properly qualified as an expert in orthopedics.

But what Franklin Code § 233 reminds us is that qualifications and reliability remain separate and independent prongs of the *Daubert* inquiry. A witness is *qualified* as an expert if he is the type of person who should be testifying on the matter at hand. An expert opinion is *reliable* if the opinion is based on a scientifically valid methodology. Conflating the inquiries is legal error.

Under *Daubert*, the question remains whether Dr. Adams's testimony was reliable. Dr. Adams testified that the fracture was not visible in the X-ray taken on June 1, 1999. He based that opinion on his many years of experience in orthopedics, the many articles he had read and conferences he had attended, and the fact that other physicians relied on his diagnoses of fractured bones. While these factors do not fit neatly into the categories listed in the statute, we must remember that the statute only provides examples and that courts are instructed to "utilize any other factors" we deem appropriate. We conclude that Dr. Adams was qualified and that his testimony was reliable. He should have been allowed to testify as an expert.

As for the plaintiff's second witness, Dr. Brown, her specialty was internal medicine, not orthopedics. We have held that a physician does not have to practice in, or be a specialist in, every area in which she offers an opinion, but the physician must demonstrate that she is "sufficiently familiar with the standards" in that area by her "knowledge, skill, experience, training, or education" to satisfy Rule 702.

Under Franklin Rule of Evidence 702, to be qualified as an expert the witness must possess scientific, technical, or specialized knowledge on all topics that form the basis of the witness's opinion testimony. Accordingly, in *Wyatt v. Dozier* (Fr. Sup. Ct. 2000), the Franklin Supreme Court held that the trial judge did not abuse his discretion by excluding the testimony of a pediatrician who attempted to testify about the standard of care for an obstetrician. Because the pediatrician was not sufficiently familiar with the standards of obstetrics by knowledge, skill, experience, training, or education, she was not qualified to give expert opinion testimony about that specialty. Similarly, here we agree with the trial court and find that Dr. Brown was not qualified as an expert in orthopedics.

Even though we find that Dr. Brown was not qualified and could end our analysis there, we feel that this case provides fertile ground for analyzing the reliability of expert testimony. Our cases recognize many different factors courts can use to assess the reliability of expert testimony. One of these factors is the degree to which the expert's opinion and its basis are generally accepted within the relevant community. We have also considered whether experts in that field would rely on the same evidence to reach the type of opinion being offered. *See Ridley v. St. Mark's Hospital* (Fr. Ct. App. 2002) (expert's opinions were based on sufficiently reliable methodology when he based his conclusions on medical records, CT scans, medical notes, and deposition testimony). Speculation about what might have occurred had the facts been different can never provide a sufficiently reliable basis for an expert opinion. The opposing party bears responsibility for examining the basis for the opinion in cross-examination. However, "if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury, it must be excluded." *Park v. Green*. An expert opinion is fundamentally unsupported when it "fails to consider the relevant facts of the case." *Id*.

Even when an expert is qualified and the expert's testimony is based on reliable methods, the trier of fact must still—as with any other witness—determine whether the witness is credible. The factual basis of an expert opinion in the particular case before the court goes to the credibility of the testimony, not its admissibility. Likewise, even if a court finds that an expert's qualifications satisfy the baseline for admissibility, the extent and substance of those qualifications can affect the credibility of that expert.

Here, Dr. Brown testified that, although not an orthopedist, she did treat many bone fractures. She said that, in her reading of the initial X-ray, there was the possibility of a fracture. She also testified that Dr. McGann fell below the standard of care in not ordering further X-rays on June 1. We affirm the finding of the trial court that Dr. Brown was not qualified as an expert in orthopedics. In addition, she did not demonstrate that her methods were reliable. Her testimony as to causation was both speculative and without reliable basis.

The decision of the trial court dismissing the case is reversed based on the trial court's erroneous exclusion of the testimony of Dr. Adams. We, however, affirm the decision of the trial court excluding the testimony of Dr. Brown.

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.

1)

I. Dr. Shulman should be qualified as an expert witness and the Court should admit her testimony because it is sufficient and reliable.

a. Dr. Shulman is a qualified expert.

Under Franklin Rule of Evidence 702, an expert witness should be qualified if they possess requisite "'scientific, technical, or specialized knowledge' on all topics that form the basis of the witness's opinion testimony." *Smith v. McGann*, Fr. Ct. App. 2004 ("*McGann*"). The proponent must demonstrate that this evidence is "more likely than not" helpful for the trier of fact "to understand the evidence or to determine a fact in issue." Fr. R. Evid. 702. This inquiry gets to whether the expert witness is the "type of person who should be testifying on the matter at hand." *McGann*. Specifically, expert witnesses should specialize in the same or a similar specialty that includes the "performance of the procedure at issue." McGann. Another requirement for an expert witness is that they are familiar with the standard of care in the area the incident occurred. But this does not mean that the expert practices there, just that they are able to testify to the population and availability of medical care. It is helpful if the expert witness has experience in a similar locality.

Here, Dr. Shulman possesses scientific, technical, or specialized knowledge relevant to the hip surgery and the standard of care. Dr. Shulman attended Franklin Medical School and completed a residency in Franklin from 2004 to 2009. That opportunity to be around Franklin demonstrates that Dr. Shulman has experience with the population and availability of medical care in Franklin. The plaintiff will argue, as was elicited in the cross-examination of Dr. Shulman, that because Dr. Shulman has not made a thorough comparison of the population and availability of medical care in Olympia and Franklin, she is not qualified to testify about the standard of care. But thorough examinations are not required, as long as the expert witness is aware of the comparative populations and availabilities of medical care.

While in residency in Franklin, and while in practice in Olympia, Dr. Shulman completed numerous hip surgeries. She is board-certified in Orthopedics. She also completed numerous knee surgeries, which is an adjacent specialty that may qualify her alone. But she does not only have the knee surgery expertise. Dr. Shulman also teaches hip and knee replacements, so although she is not currently performing the procedure at issue, she is teaching it, which should qualify her as to the standard of care relevant to the procedure. Dr. Shulman also reads the literature in *JAMA* and the *New Gland Journal of Medicine*, the most up-to-date and reliable sources of information. Dr. Shulman also presents lectures on joint replacements at conferences.

But a successful qualification alone does not mean the expert's opinion should be admitted. Their testimony must also hold up to scrutiny of reliability under *Daubert*.

b. Dr. Shulman's methodology is sufficient and reliable.

To be reliable, an expert witness's testimony must be based on sufficient facts or data, it must be the product of "reliable principles and methods," and the opinion must reflect "a reliable application of the principles and methods to the facts of the case." Fr. R. Evid.

702. The judge must determine whether each expert's methodology fits these requirements. In *McGann*, the Franklin Court of Appeal reversed the trial court's exclusion of an expert who had based his opinion on many years in orthopedics, the articles he had read and conferences he had attended, and the fact that other physicians relied on his diagnoses of fractured bones. Here, too, Dr. Shulman's qualifications do not fit "neatly" into the statute, but the statute simply provides examples and courts are instructed to "'utilitize any other factors' we deem appropriate." *McGann*. The Franklin Court of Appeal has held that basing an expert opinion on medidcal records, CT scans, medical notes, and deposition testimony, that is sufficient. *Ridley v. St. Mark's Hospital* 2002*.*

Here, Dr. Shulman has done more. She reviewed the notes, she described the procedure in the deposition, she reviewed the X-ray. She also reviewed all of Ms. Lowe's surgical and medical records, and also performed a physical examination of Ms. Lowe. This enabled her to opine on the cause of the injury. And it also allowed the judge to review her testimony, methodology, and records she based her opinion on.

For these reasons, Defendant requests that the Court qualify Dr. Shulman as an expert witness and admit her expert opinion.

II. Dr. Ajax's testimony is not sufficiently reliable to be admitted.

Although Dr. Ajax will be qualified as an expert witness, his testimony is not sufficiently reliable or thorough to be of any help to the jury, and should be excluded.

As outlined above, an expert witness's testimony must pass two bars: the qualification bar and the reliability bar. The qualification bar requires an expert witness to be the type of person who should testify on the issue at hand. Here, Dr. Ajax works in Franklin, which shows a general knowledge of the standard of care in Franklin. And Dr. Ajax is board-certified in orthopedics, and has done around fifty hip replacements since residency. This qualifies Dr. Ajax as the type of person who should testify.

However, to conflate reliability and qualification is legal error. *McGann*. Dr. Ajax's testimony consists of conclusory statements regarding what Dr. Jost should have done and what could have happened if Dr. Jost did what Dr. Ajax suggests. Namely, take another X-ray from a different position. Dr. Ajax's testimony asserts that a "second X-ray might have shown that the prosthesis was out of place or that there was a broken bone." This conclusion is not helpful to the fact finder, and when an opinion is so fundamentally unsupported, it should be excluded. *McGann* (quoting *Park v. Green*). Fundamental unsupport is considered when the opinion fails to consider the relevant facts of the case, which is true here because Dr. Ajax does not speak about the standard of care. Dr. Ajax may know the standard of care, but does not testify to it. Similar to *McGann*, Dr. Ajax's opinion as to causation is speculative and without reliable basis.

Further, Dr. Ajax's opinion, because of its curt and speculative nature, cannot be properly examined by the Court. An expert opinion must be of sufficiently reliable principles and methods, and the opinion must reflect a reliable application of those principles and methods. Here, Dr. Ajax's opinion is based on speculation about what an additional x-ray could show, not a medical principle that should be applied consistently.

For the above reasons, Defendant requests that the Court exclude Dr. Ajax's opinion.

III. The Court should grant our summary judgment motion because Plaintiff has failed to offer any admissible evidence on the standard of care.

For a negligence claim, the plaintiff must prove that a duty existed for the defendant to conform to a specific standard of care for the protection of others against harm, that the defendant breached that standard of care, and that the breach of the standard of care caused the harm to the plaintiff. *Jacobs v. Becker*. Physicians are required to act with the "degree of care, knowledge and skill ordinarily possessed and exercised in similar situations by the average member of the profession practicing in the field." *Id.* When a defendant shows that the plaintiff has failed to establish a factual basis for any of these elements, the Court should grant the summary judgment motion, even considering the evidence in the light most favorable to the nonmoving party. *Id.*

If the party that will have that burden has failed to prove an element essential to their case, the court should grant a summary judgment motion. *Id.* (quoting *Alexander v. ChemCo Ltd.* Specific to negligence in medical malpractice cases, failing to produce "any evidence to prove an element of the case on which that plaintiff bears the burden of proof" justifies an adverse ruling. When there are no genuine issues as to any material fact, and the movant is entitled to judgment as a matter of law, the court should grant the motion. If the nonmovant has failed on any of the elements, then the facts relevant to other elements are nonmaterial.

Here, there is an issue of fact. Contrasting Plaintiff's testimony in the complaint with Karen Baines's affidavit shows that there is a dispute as to whether Ms. Lowe dropped her purse first, or if the pain in her leg started randomly without her turning. If she pivoting first, then she will lose because that is breaching the agreement with Dr. Jost to not bend past 90 degrees. However, this fact is immaterial. It is not relevant to whether Dr. Jost breached the standard of care.

It is especially not relevant as to whether Dr. Jost breached the standard of care because Plaintiff has not produced any expert testimony establishing a standard of care or a breach of that standard of care. Dr. Ajax's testimony, which is open to credibility determinations by the fact finder, which is the Court at summary judgment, conclusorily stated that Dr. Jost's front-to-back X-ray did not comport with the standard of care in Franklin. But the Plaintiff cannot simply assert that a standard of care exists. The correct standard of care is that a physician is required to use the degree of care, knowledge, and sklil possessed and exercised in similar situations by the average member of the profession practicing in the field. Dr. Ajax's testimony suggests that he believes the standard of acre is "good and accepted medical practice," which is not the standard. *Daubert*. When a party fails to provide expert witness testimony on an essential element that they would have the burden of proof to prove at trial, summary judgment is proper to the other party.

For these reasons, Defendant respectfully requests that the Court grant our summary judgment motion.

END OF EXAM

Applicant Number

MPT-2
725

MPT®

Multistate Performance Test

In re Gourmet Pro

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In re Gourmet Pro

FILE

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Robinson Hernandez LLP
Attorneys at Law
30 South Point Plaza
Milton, Franklin 33705

MEMORANDUM

To: Examinee
From: Anita Hernandez, partner
Date: July 29, 2025
Re: Gourmet Pro response to CPSC

Our client Gourmet Professional Grilling Co. (Gourmet Pro) has been served with a subpoena by the Consumer Product Safety Commission (CPSC), a government agency. The subpoena seeks our client's business records related to the design, manufacture, and safety of certain of its products. Many of the documents within the broad scope of the subpoena involve communications between company employees and the company's lawyers, including its general counsel, Trisha Washington.

I have attached three representative documents (marked Documents One through Three) that are responsive to the subpoena. Please prepare a memorandum to me addressing how attorney-client privilege may apply to all three documents. For each document, indicate whether some or all of it is protected from disclosure by the attorney-client privilege. If the attorney-client privilege applies only to part of the document, be specific as to the paragraphs or individual sentences covered by the privilege protection.

Your memorandum should begin with a description of the legal standard to be applied. Do not repeat that standard as you apply it to the three documents; rather, for each document, focus on the pertinent aspects of that standard and explain how they support your conclusion as to whether the content is protected from disclosure by the attorney-client privilege.

Our client asked that we protect as many documents as possible from disclosure, but we need to take care to honor our professional responsibilities as attorneys and officers of the court. If there are close calls, clearly state your conclusion one way or the other and explain your reasoning.

You should confine your work to the application of the attorney-client privilege. Any other issues related to the subpoena will be handled by another associate.

Robinson Hernandez LLP
Attorneys at Law

File Memorandum

From: Anita Hernandez, partner
Date: July 15, 2025
Re: Gourmet Pro response to CPSC subpoena

Gourmet Professional Grilling Co. (Gourmet Pro), a leading manufacturer of state-of-the-art gas grills and accessories, has been a client since its founding as a family business 75 years ago. Gourmet Pro operates in all 50 states and in 22 countries. It prides itself on the high quality of its products and its strong safety record.

One of its principal competitors is Main Street Cookers Inc. (Main Street). Main Street has not had a good safety track record—it is in the middle of a class-action lawsuit over injuries caused by gas leaks from its grills. That litigation has led the Consumer Product Safety Commission (CPSC) to open a parallel administrative investigation of Main Street. The CPSC is a federal government agency that develops uniform safety standards and conducts research into product-related injuries; at times, it also conducts investigations to determine if it should order a product recall, impose penalties, or take other government action.

Gourmet Pro has been served with a subpoena from the CPSC seeking all of Gourmet Pro's business records related to the design, manufacture, and safety of its propane tank hoses and fittings, as well as its ignition system. We believe this is related to the investigation of Main Street. The CPSC investigator advised that Gourmet Pro is not a target of the investigation. The CPSC seeks Gourmet Pro's business records to gain information about the propane grill industry and its safety practices, and presumably to contrast the design and manufacture of Gourmet Pro products with those of Main Street.

Despite the CPSC assurances, our client wants to take care as it cooperates with the government investigation. If this investigation results in an enforcement action against Main Street, Main Street may have access to the records we produce to the CPSC. Also, despite Gourmet Pro's fine safety record, it has experienced some issues and has had its lawyers involved in assessing its practices. Gourmet Pro wants to cooperate in good faith in producing documents, but in doing so, it needs to make sure that it does not produce documents protected from disclosure by the attorney-client privilege.

We have identified around 20,000 documents potentially responsive to the CPSC subpoena. A significant number of them involve communications with lawyers—both Gourmet Pro's in-house legal team and the outside law firm of WatsonSmith that Gourmet Pro retained to conduct a safety audit, that is, a review of the safety of its products and business practices.

The line between what is a privileged communication with counsel and what is a nonprivileged business communication is complicated by the fact that Gourmet Pro's lead in-house lawyer—its general counsel, Trisha Washington—is a trusted member of the executive team, and she is often involved in high-level business discussions that are not limited to legal issues. Thus, she serves two functions—at times offering privileged legal counsel about business matters, and at times offering business advice without legal implications or privilege.

Document One: Email from general counsel to CEO of Gourmet Pro

To: Maria Johnson, CEO
From: Trisha Washington, General Counsel
Date: March 25, 2025
Re: Main Street class-action litigation

Good morning, Maria. I'm glad you are back from your vacation. As you requested, I have given some thought as to the implications for Gourmet Pro of the high-profile litigation against our competitor Main Street.

The complaint against Main Street is centered on Main Street's highly publicized problems with its propane tank hoses that are cracking prematurely and leading to potentially dangerous propane leaks. It is a class-action lawsuit. The plaintiff's counsel will be asking the court to certify a class that includes a large number of Main Street customers at risk due to the safety defects. You can expect that the media in Franklin and elsewhere will be reporting on the dangers of the Main Street defects and interviewing concerned customers. We should ask our marketing department to track those media reports.

Legal considerations also suggest that we redouble our efforts to ensure the safety of our products. The WatsonSmith safety audit identifies several concerns that, if made available in litigation, would create sources of liability. That would be especially true if we fail to take steps to implement the safety recommendations in the report. I recommend that I meet with the department heads to make sure they understand the risks.

To help insulate us from legal liability, we should also advertise our commitment to quality. Besides contrasting our practices to those of Main Street at this time for marketing purposes, informing the public about our emphasis on quality will serve us well in the event someone is thinking about Gourmet Pro as a target of a similar class-action lawsuit. It may also help us navigate the regulatory standards on quality set by the Federal Trade Commission. We can't afford any problems given that the spotlight is now on Main Street and the grill industry generally.

Trisha Washington
General Counsel
Gourmet Professional Grilling Co.

Document Two: Executive summary of report from outside law firm

“Embracing Safety as a Business Priority”
Executive Summary to a Privileged and Confidential Report
Prepared by the Law Firm of WatsonSmith
for the Management and Board of Directors of Gourmet Pro
June 30, 2024

Overview

1. Over the course of the past six months, WatsonSmith has undertaken an extensive review of the safety record and related policies and processes of Gourmet Pro to ensure that it maintains its reputation for safe, high-quality grills and grilling accessories. Our work has been prompted by the high-profile controversy over several accidents and related injuries associated with propane grills manufactured by one of Gourmet Pro’s competitors. While our law firm has not been hired in connection with any pending litigation or government investigation, we are always mindful that in the heavily regulated arena of consumer safety, the risk of liability looms large. Accordingly, we deem this report to be “privileged and confidential” and have so marked each page.

2. Our main goal is to learn the company’s processes and practices and develop business recommendations to make the company even better when it comes to dealing with safety concerns. What follows is a privileged and confidential assessment of the current state of the safety processes and procedures, including recommendations for operational improvements.

3. Gourmet Pro is the second-leading manufacturer of outdoor cooking products and accessories in the world. Gourmet Pro has sales approaching $1.5 billion per year and over 2,500 employees throughout the United States and in 22 other countries. By our measure, over 250 employees have duties dedicated to the company’s safety mission, such as safety inspectors, safety policymakers, engineering staff, assembly line supervisors, and in-house legal counsel.

4. Gourmet Pro’s manufacture and sale of propane gas grills finds it subject to the risks of claims due to design defects or faulty manufacturing practices. Our audit of the company’s safety record reveals that in the past three years, the company has received 52 reports from grill owners complaining of product defects, and the company has been the subject of seven lawsuits from grill owners seeking compensation for personal injuries. Most of the complaints center around the hoses, fittings, and ignition system for the company’s Happy Chef line of gas grills. In every case, the compliance department

reports confirm that the complained-of incidents involve consumer misuse, incorrect third-party assembly, improper maintenance, or faulty propane tanks. The company has not been found liable in any lawsuit that has gone to trial, and the company's public financial reports confirm that payments for legal settlements have not been substantial.

Business Recommendations

1. The company has much to be proud of with regard to its safety track record and its reputation for high-quality products. That performance should be the foundation for a concerted campaign by Gourmet Pro to develop and promote a culture of ethics and compliance. A Code of Business Conduct and Ethics should be adopted to promote good business practices and require all employees to report any actual or potential violations of law, rules, regulations, or ethics.

2. Training targeted to safety and corporate ethics should be provided to employees around the globe.

3. The company should maintain a hotline, maintained by a third party, which employees could use to anonymously raise concerns or ask questions about safety or business behavior.

4. The risks and liabilities stemming from the consumer safety laws in the United States, the European community, and elsewhere are substantial. Given that, we recommend that you have our firm conduct a survey of the safety laws and regulations of those jurisdictions and report back on their provisions and the steps Gourmet Pro can take to honor its legal responsibilities.

Document Three: Email from Gourmet Pro's chief auditor to general counsel

To: Trisha Washington, General Counsel
From: Lionel Alexander, Chief Auditor
Date: January 15, 2024
Re: Audit results, etc.

Hi, Trisha. The auditors in my department are running into some questions with regard to our employees in our neighboring State of Olympia. I am hoping you can help.

Issue One: I know you're the general counsel and not an accountant and auditor like me, but because I am new to my Gourmet Pro position, I would like your take on how best to present the five-year summary of our safety audit results in the company's next annual report that, as you know, we publish on our public website. Do you think a narrative summary or a mix of charts and graphs would be a better fit for the style of the company's annual report? I could also see a breakdown by product or by production unit of how many personnel perform safety compliance work. What's your opinion? FYI, if we build in graphics, that will slow down the completion of the report by a week or so. The audit staff would really appreciate your take on this.

Issue Two: Also, we're noticing an uptick in consumer complaints about products manufactured in our facility outside of Olympic City. We've been tracking them for a while now because of the potential exposure resulting from faulty products being shipped from that facility. We want to sit down and talk with a few select employees at the facility and see what we can learn. Since you used to work with some of the managers there, do you have any advice for us? I know that sitting down with employees to talk about this kind of thing can make them uncomfortable. You might also have some other thoughts for us.

Franklin Dep't of Labor v. ValueMart
Franklin Supreme Court (2019)

The underlying litigation in this case involves an enforcement action instituted by the Franklin Department of Labor (FDOL), alleging that ValueMart has routinely violated the state's workplace safety regulations with regard to fire exits in its stores.

In response to an FDOL media campaign over fire safety and other workplace practices, ValueMart retained outside counsel to conduct an audit of its facilities, documenting all the fire exits in each of the company's stores. After completing the audit, the lawyers provided the company with a 65-page report (the Middleton Report), which included an executive summary of their findings, as well as recommendations to improve compliance performance. The FDOL subsequently commenced the underlying enforcement action against ValueMart.

The FDOL moved the trial court to compel ValueMart to turn over the outside counsel report in discovery. ValueMart opposed the motion, contending that the report is protected by the attorney-client privilege. Finding that the predominant purpose of the report was business advice, not legal advice, the trial court granted the motion to compel and ordered the report to be produced. ValueMart appealed. The court of appeal affirmed, and ValueMart then sought further review from this court.

We conclude that the trial court did not err by finding that the predominant purpose of the report is business advice. Nevertheless, we remand to the trial court for its further consideration of whether certain portions of the report contain legal advice that should not be ordered disclosed.

<u>The Middleton Report</u>

After learning of the FDOL's safety campaign, ValueMart retained the law firm of Middleton & Lewis to conduct a compliance audit. The resulting report is titled "Promoting Workplace Safety." Each page of the report is marked "PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION." Middleton & Lewis was asked to interview key witnesses and review the fire exits in all the company stores. The bulk of the report analyzes the ingress and egress to all of these stores. The report includes recommendations in the areas of fire safety training, building modifications, and revisions to instructions to new employees and to supervisors. Additionally, portions of the report address the state's regulatory requirements, including the interpretation of certain FDOL regulations. The report was distributed to senior management and the board of directors.

<u>The Governing Law of Privilege</u>

In Franklin, the attorney-client privilege applies to "communications made between a client and their professional legal adviser, in confidence, for the purpose of seeking, obtaining, or providing legal assistance to the client." *Franklin Mut. Ins. Co. v. DJS Inc*. (Fr. Sup. Ct. 1982). In the corporate context, the privilege typically extends to such communications between the company's lawyers and its board of directors, executives, and managerial employees who seek legal advice on behalf of the company.

The purpose behind the attorney-client privilege is to "promote open and honest discussion between clients and their attorneys." *Moore v. Central Holdings, Inc*. (Fr. Ct. App. 2009). The threshold inquiry in a privilege analysis is determining whether the contested document embodies a communication in which legal advice is sought or rendered. "A document is not cloaked with privilege merely because it bears the label 'privileged' or 'confidential.'" *Id*. Because the attorney-client privilege is a barrier to disclosure and tends to suppress relevant facts, we strictly construe the privilege.

A key question is often whether legal advice is being sought. It is common for company executives to seek the advice of their counsel on matters of public relations, accounting, employee relations, and business policy. That nonlegal work does not become cloaked with the attorney-client privilege just because the communication is with a licensed lawyer. For example, the privilege does not typically extend to accounting work performed by a lawyer, such as preparing tax returns and financial statements and calculating accounts, or to occasions when a lawyer performs a financial audit or is advised of its results. *Peterson v. Xtech, Inc.* (Fr. Ct. App. 2007). However, the privilege typically extends to a lawyer's advice interpreting tax regulations or assessing the legal liabilities arising from the results of a tax audit. *See Franklin Dep't of Revenue v. Hewitt & Ross LLP* (Fr. Ct. App. 2017).

The advice given by corporate counsel can serve the dual purposes of (1) providing legal advice and (2) providing business information and advice. Here, there is no dispute that the Middleton Report contains both legal advice and business advice. When a report contains both business and legal advice, the protection of the attorney-client privilege "applies to the entire document only if the predominant purpose of the attorney-client consultation is to seek legal advice or assistance." *Federal Ry. v. Rotini* (Fr. Sup. Ct. 1998). If the predominant purpose is business advice, however, a more tailored assessment is required. In such cases, the attorney-client privilege will still protect any portions of the document that contain legal advice. *See Franklin Machine Co. v. Innovative Textiles LLC* (Fr. Sup. Ct. 2003) (legal advice regarding tax implications of business decision protected from disclosure despite being embedded in an otherwise nonprivileged business strategy document from a lawyer). Accordingly, when assessing a document where the predominant purpose is business, care must be taken to identify any distinct portions that are protected by privilege because they concern legal advice or information. *Id*. If such portions of legal advice are easily severable, they should be withheld from disclosure to preserve the protection of the attorney-client privilege.

<u>Application of the Law to the Middleton Report</u>

Determining the predominant purpose of a document is a "highly fact-specific" inquiry, which requires courts to consider the "totality of circumstances" surrounding each document. *See In re Grand Jury*, 116 F.3d 56 (D. Frank. 2016). Relevant factors are (1) the purpose of the communication, (2) the content of the communication, (3) the context of the communication, (4) the recipients of the communication, and (5) whether legal advice permeates the document or whether any privileged matters can be easily separated and removed from any disclosure. *See* J. Proskauer, *Privilege Law Applied to Factual Investigations,* 78 UNIV. OF FRANKLIN L. REV. 16 (Spring 2018). Applying the five-factor test of *In re Grand Jury*, we hold that the predominant purpose of the Middleton Report is business advice.

First, while the report looked into workplace safety practices driven by legal requirements, its stated purpose was to "gather information about ValueMart's facilities" and offer "business recommendations" to upper management to facilitate "provision of appropriate fire exits." By contrast, the report prepared by outside counsel in *Booker v.*

ChemCo, Inc. (Fr. Sup. Ct. 2002) was primarily intended to assist the company in complying with state tax regulations.

Second, the content of the Middleton Report was largely an analysis of each of ValueMart's facilities and other factual information. Again, this is distinguishable from *Booker,* where the report was predominantly a legal analysis of state tax statutes and regulations.

Third, with regard to the context, the FDOL enforcement action was not yet pending when the Middleton Report was written. While this is not dispositive, it is also significant that the Middleton firm does not represent ValueMart in the enforcement action itself, even though its report is likely relevant to it. A different result might be compelled if the enforcement action were pending when counsel was retained to produce the report and if counsel represented the client in the pending enforcement litigation.

Fourth, we look at the recipients of the communication. Here, even though the report was prepared for management and the company's board—typically the core privilege group for corporate legal advice—the focus of the report is on analysis of the facilities themselves, rather than on the legal implications of the facilities. The identity of the recipient does not determine the predominant purpose of the document.

Fifth, it is also significant that the legal portions of the report, such as those interpreting the applicable fire safety regulations, are not "intimately intertwined" with or "difficult to distinguish" from the nonlegal portions. It is often the case that legal recommendations are based on and mixed with business facts and considerations upon which the legal advice hinges. Indeed, Rule 2.1 of the Franklin Rules of Professional Conduct recognizes that, "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." In that case, courts take care to protect the "intertwined" content from disclosure. On the other hand, in some documents, the legal advice is in discrete sections or separate paragraphs of a lawyer-client communication that also covers business or other nonlegal issues in other parts of the document. In these situations, courts will order disclosure of the nonlegal portions and protect the legal portions from disclosure by allowing them to be redacted, that is, not disclosed.

Our conclusion from the application of the five-factor test that the Middleton Report is "predominantly business advice" is not the end of the matter, however. The respect for privileged advice requires that a second step be taken. Any paragraph or other portion of the document that carries distinct legal advice (such as identified when applying the fifth factor above) can be withheld from disclosure. Accordingly, on remand, the trial court must take care to identify those distinct portions of the report that provide legal advice and authorize ValueMart to produce the Middleton Report with those sections removed.

In reaching our conclusion, we are mindful that lawyers are often asked by clients for advice that reaches beyond the technicalities of the law. *See* Rule 2.1 of the Franklin Rules of Professional Conduct. Nevertheless, in this case, the Middleton firm's report was primarily focused on business advice to ValueMart, as opposed to gathering information for the primary purpose of providing legal advice in connection with representation in a pending government enforcement action or for purposes of other regulatory advice.

Remanded for further proceedings consistent with this opinion.

Powell County District Court
State of Franklin

Infusion Technologies Inc.,
Plaintiff,

v. **Order**
December 15, 2021

Spinex Therapies LLC,
Defendant.

This order addresses the motion of plaintiff Infusion Technologies Inc. (ITI) to compel production of documents. The plaintiff's complaint alleges that defendant Spinex Therapies LLC (Spinex) breached a contract to supply components for implantable pumps used to deliver pain medication. During discovery, Spinex's internal review identified over 100,000 records that might be subject to ITI's request for document production. On two prior occasions, Spinex refused to disclose certain documents, claiming attorney-client privilege. This Court reviewed 987 documents *in camera* and compelled disclosure of 686 documents not protected by attorney-client privilege.

This third motion concerns a new collection of 132 documents for which Spinex claims privilege. ITI again requested and the Court again performed an *in camera* review. These three motions address barely 1% of the 100,000 documents potentially subject to ITI's motion to produce. Review of these documents places a substantial burden on the Court and court staff. Accordingly, the time has come to provide guidance on how counsel should handle disclosure of potentially privileged documents.

Most of the documents reviewed so far represent so-called "dual purpose" documents, i.e., documents communicating both legal and business advice. The contours of the attorney-client privilege are governed by state law. This Court must apply the "predominant purpose" standard adopted by the Franklin Supreme Court in *Fr. Dep't of Labor v. ValueMart* (2019). In that case, the court applied the "predominant purpose" standard to the blending of business and legal advice in an integrated audit report and concluded that pure legal advice included within such a "predominantly business" report could still be entitled to protection if it could be easily separated.

Spinex has misinterpreted the *ValueMart* standard by suggesting that it allows an "all-or-nothing" conclusion: Spinex argues that if a document carries *any* legal advice from a lawyer, then Spinex need not disclose any part of that document. Spinex is incorrect. With dual-purpose documents, Spinex must apply the five-factor analysis of *ValueMart* and determine if the "predominant purpose" of the document is to provide legal advice. Only then can the entire document be withheld. On the other hand, if the "predominant purpose" is determined to be "business advice," Spinex should take the second step of examining each paragraph or other distinct portion of the document to determine if it is legal advice. If so, that distinct section of the document can be withheld, but only that distinct portion.

Here, one of the documents at issue (Item 77) contains a summary review by Spinex's corporate counsel of issues related to this litigation. Some issues entail little more than descriptions of Spinex's efforts to find buyers for an unrelated product, while others offer statistics on Spinex's economic performance. The document does contain two distinct paragraphs offering legal advice, but that does not mean that the entire document can be withheld. The document is "predominantly" for a business purpose, allowing only the two paragraphs of legal advice to be withheld.

Another example is Item 43, an email that addresses a mix of topics, each topic covered by a separate paragraph. In cases of pedestrian emails, unlike the formal report in the first example, counsel should address each paragraph separately to determine if it is "predominantly" legal or business. In short, the legal analysis should follow the practical reality that the author of the email wrote each paragraph to cover a separate topic.

ITI has requested that the Court impose sanctions on Spinex for its failure to properly apply these principles. While sympathetic, the Court declines to do so—this time. From now on, counsel for Spinex must tailor what is withheld to only those portions of a document deserving of protection from discovery. To be sure, privilege determinations entail difficult factual assessments. That said, defendant Spinex and its counsel are on notice that this Court will not countenance the misuse of the attorney-client privilege in a way that burdens the Court when judicial resources are thin.

So ordered.

June Fredrickson,
District Court Judge

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.

2)

From: Examinee

To: Anita Hernandez

Re: Gourmet Pro Response to CPSC

Issue: Whether Document One, Two, or Three are protected by the attorney-client privilege.

Standard:

"[T]he attorney client privilege applies to 'communications made between a client and their professional legal adviser, in confidence, for the purposes of seeking, obtaining, or providing legal assistance to the client. . . . In the corporate context, the privilege typically extends to such communications between the company's lawyers and its board of directors, executives, and managerial employees who seek legal advice on behalf of the company." *ValueMart*. The purpose of the privilege is to " 'promote open and honest discussion between clients and their attorneys." *ValueMart*. "A document is not cloaked with privilege merely because it bears the label 'privileged' or 'confidential.' " *ValueMart*. Due to the fact the privilege is used as an impediment to disclose relevant facts the privilege is strictly construed. *ValueMart.* A key inquiry into the analysis is whether legal advice is being sought. *ValueMart.* "Nonlegal work does not become cloaked with the attorney-client privilege merely because the communication is with a licensed lawyer." *ValueMart*.

When a report contains both business and legal advice, the problem of the attorney-client privilege 'applies to the entire document *only if* the predominant purpose of the attorney-client consultation is to seek legal advice or assistance. *ValueMart* (emphasis added). "If the predominant purpose is business advice, however, a more tailored assessment is required. In such cases, the attorney-client privilege will still protect any portions of the document that contain legal advice." *ValueMart.* If such portions of legal advice are easily severable, they should be withheld from disclosure to preserve the protection of the attorney-client privilege. *ValueMart*.

When determining the predominant purpose of a document courts consider the 'totality of the circumstances' with a 'highly fact-specific inquiry.' *ValueMart*. "Relevant factors are (1) the purpose of the communication, (2) the content of the communication, (3) the context of the communication, (4) the recipients of the communication, and (5) whether legal advice permeates the document or whether any privileged matters can be easily separated and removed from any disclosure. *ValueMart*. "The identity of the recipient does not determine the predominant purpose of the document" alone. *ValueMart*. Additionally, [i]n cases of pedestrian emails, . . . counsel should address each paragraph separately to determine if it is 'predominantly' legal or business." *Infusion*.

Document 1:

Document 1's purpose was to communicate legal advice from Trisha Washington (Washington), as general counsel, to Maria Johnson (Johnson), as CEO. This document concerned litigation involving Gourmet's main competitor Main Street. Johnson was seeking advice on the legal implications that litigation would have on Gourmet. The content of the communication included legal considerations for ensuring a similar action is not filed against Gourmet and ways to help insulate Gourmet from legal liability. However, under the *Infusion* Order, an email should be broken down separately into individual paragraphs to asses if they are predominantly legal. The opening paragraph to this email is certainly not legal advice as it is merely a greeting and reflects what the rest of the document concerns without giving any legal advice. Additionally, the second paragraph does not contain any legal advice. It merely reflects the facts on what is happening in the Main Street litigation and that Gourmet's marketing department should follow it. Therefore, under the *Infusion* Order, paragraph one and two of the e-mail likely will be subject to disclosure. Paragraphs three and four, on the other hand, addressing legal implications and ways to insulate legal liability do concern legal advice and should be protected by the privilege. Counsel should redact paragraph three and four, but disclose paragraphs one and two to comply with the relevant law regarding attorney-client privilege.

Document 2:

Document 2 is an executive summary regarding Gourmet's Safety from an outside law firm. The purpose of this document was to learn the company's processes and practices and develop business recommendations to make the company even better when it comes to dealing with safety concerns. The content of the communication largely includes facts regarding Gourmet's business and procedures. There is one paragraph that addresses complaints and legal disputes of Gourmet along with another paragraph stating risks and liabilities the company faces. These two paragraphs are not a substantial part of the document, however. This document was not prepared in connection with pending or anticipated litigation. It was done instead as an audit to ensure best practices were being followed. The recipients of the communication were the board of directors and management of Gourmet. Lastly, legal advice does not permeate the entire document, but instead is may be easily separated and removed from disclosure. Under this analysis, factors 1, 2, 3, and 5 suggest the predominant purpose of this communication was business advice. As stated factor four alone, recipient of the communication, is not enough to make something predominantly legal. Additionally, as stated in *ValueMart*, "[a] different result might be compelled if the enforcement action were pending when counsel was retained to produce the report and if counsel represented the client in the pending enforcement litigation." Here, however, no pending litigation was present. Therefore, this communication is predominantly for business advice.

The inquiry does not stop there, however. Since the predominant purpose of this communication is business advice, it must be addressed whether there is legal advice that must be protected and removed from disclosure. As set forth in the case law, the privilege does still protect any portions of the document that contain legal advice. The two paragraphs that contain legal advice are paragraph four of the Overview and paragraph four of the Business

Recommendations. Both of these paragraphs address the legal liability of Gourmet.

In the Overview paragraph, the communication discloses complaints and legal action taken against Gourmet. These complaints and legal action subject Gourmet to legal liability and are therefore in connection to legal advice. In the Business Recommendations paragraph, the communication address legal liability that is still looming due to consumer safety laws. These two paragraphs, having such legal legal implications and advice, should be protected by the attorney-client privilege and redacted from the document before disclosing the rest of the document.

The rest of the paragraphs in the document do not contain any legal implications or advice. Paragraph 1 and 2 give a summary of the document, which has already been stated as being predominantly for business advice. Paragraph 3 gives facts regarding the size and scope of the business. It, however, was not produced for legal advice and is, therefore, not subject to protection. Additionally, the first three paragraphs of the Business Recommendations are not in connection with any legal advice. Instead, they contain business advice to ensure safety and compliance. Therefore, these paragraphs are not protected by the attorney-client privilege either. Only paragraphs four of each section have a valid basis to be protected by attorney client privilege.

Document 3:

Document three is also an email and is therefore subject to the breakdown of individual paragraphs as set forth in the *Infusion* Order. Paragraph one, the introductory paragraph will be subject to disclosure because it does not provide any legal advice and the document is more likely seeking business advice.

The second paragraph marked as "Issue One" will not be protected by the attorney client privilege and will be subject to disclosure. This paragraph is seeking business advice on how to present a summary of safety audits. Further, it asks whether a narrative summary or mix of charts would be better. This is not seeking legal advice, but instead business advice. Washington is not being asked to interpret law or assess and legal liabilities stemming from the publication of the audits. Therefore, the main purpose of this paragraph is to seek business advice and is subject to disclosure.

The third paragraph marked as "Issue Two" is a closer call. This paragraph addresses complaints made about products. These complaints could lead to legal liability and therefore, could be asking for legal advice on how to best curb that liability. However, it does not appear that this is Lionel Alexander's main concern. Rather he is concerned about how to best question managers without placing undue pressure on them. This, on the other hand, is business advice on how to deal with management. Therefore, this document is a close call. As stated in *ValueMart*, the privilege is strictly construed to prevent the nondisclosure of relevant facts. With this is mind, it may be argued that the first two sentences of this paragraph should be protected by the attorney client privilege as they address complaints and legal liability. The following sentences, however, will likely need to be disclosed as they are not seeking legal advice, but rather, business advice. Overall, Document 3 will be be subject to disclosure, but Gourmet may have a valid argument to exclude the first two sentences of the third paragraph in the email.

END OF EXAM

2)

MEMORANDUM

From: Applicant

To: Anita Hernandez

Date: July 29, 2025

Re: Gourmet Pro Response to CPSC

Issue

Which documents, if any, and which portions of documents, if any, are protected by the attorney-client privilege, and which documents and/or portions of documents are not protected by the attorney-client privilege.

Rule

"In Franklin, the attorney-client privilege applies to 'communications made between a client and their professional legal adviser, in confidence, for the purpose of seeking, obtaining, or providing legal assistance to the client." ValueMart quoting Franklin Mutual Insurance. "In the corporate context, the privilege typically extends to such communications between the company's lawyers and its board of directors, executives, and managerial employees who seek legal advice on behalf of the company." ValueMart.

"The purpose behind the attorney-client privilege is to 'promote open and honest discussion between clients and their attorneys.'" ValueMart quoting Moore. "The threshold inquiry in a privilege analysis is determining whether the contested document embodies a communication in which legal advice is sought or rendered." ValueMart. "A document is not cloaked with privilege merely because it bears the label 'privileged' or 'confidential.'" Moore

Nonlegal work such as seeking "the advice of their counsel on matters of public relations, accounting, employee relations, and business policy. . . does not become cloaked with the attorney client privilege just because the communication is with a licensed lawyer." Advice given by a lawyer can serve two purposes, providing legal advice and providing business information and advice. If a report contains both purposes, "the protection of the attorney-client privilege 'applies to the entire document only if the predominant purpose of the attorney-client consultation is to seek legal advice or assistance." ValueMart quoting Federal Ry. If a document has a predominantly legal purpose, then the entire document can be withheld; If the predominant purpose is business, then one "should take the second step of examining each paragraph or other distinct portion of the document to determine if a distinct section is legal advice and thus can be withheld." Spinex. "When assessing a document where the predominant purpose is business, care must be taken to identify any distinct portions that are protected by privilege because they concern legal advice or information." Franklin Machine Co. "If such portions of legal advice are easily severable, they should be withheld from disclosure to preserve the protection of the attorney-client privilege." ValueMart. "In cases of pedestrian emails, unlike the formal report. . .counsel should address each paragraph separately to determine if it is 'predominantly' legal or business." Spinex.

The predominant purpose test is "a highly fact-specific inquiry, which requires courts to consider the 'totality of the circumstances' surrounding each document." ValueMart quoting In re Grand Jury. "Relevant factors are (1) the purpose of the communication, (2) the content of the communication, (3) the context of the communication, (4) the recipients of the communication, and (5) whether legal advice permeates the document or whether any privileged matters can be easily separated and removed from any disclosure. ValueMart citing Proskauer.

Document 1 -- Email form General Counsel to CEO

Document 1 is a pedestrian email, meaning each paragraph will be separately analyzed to determine if it is predominantly legal or business. Paragraph 1 is likely legal as it introduces the purpose of the email is to discuss implications of litigation for the competitor. But, because the paragraph does not concern actual legal implications, it might be non-legal work and not protected.

Paragraph 2 is likely legal advice because it discusses the Main Street lawsuit, the mechanics of the lawsuit, and how class actions work. Part of the paragraph ("you can expect that the media in Franklin and elsewhere will be reporting on the dangers of the Main Street defects and interviewing concerned customers. We should ask our marketing department to track those media reports") does discuss non-legal work like marketing, but it seems that the majority of the paragraph is discussing the Main Street lawsuit, thus predominantly legal advice.

Paragraph 3 is legal advice. Here, the general counsel is discussing areas of liability, interpreting audit results and its implications for liability, and meeting with department heads to ensure the safety recommendations are being adhered to so that the company does not open itself up to liability.

Paragraph 4 is a close call. A large part of the paragraph discusses marketing and public relations, which is not considered legal advice and protected by the attorney client privilege even though the advice was given by a licensed lawyer. ValueMart and Franklin Department of Revenue. But, we may be able to argue this advice is meant to insulate from liabilities/lawsuits and is thus legal advice and protected by the attorney-client privilege, but that argument does not seem successful.

Paragraphs 1-3 are likely legal advice and protected by the attorney client privilege, and paragraph 4 is likely business advice and not protected by the attorney-client privilege, although there are arguments both ways on each paragraph.

Document 2 -- Executive Summary of Report from Outside Law Firm

Document 2 is a report, so it goes through a more thorough analysis pursuant to the factors. The purpose of the document is more like the purpose in Booker than in ValueMart in that it is a review of the safety record and related policies to ensure the grills and accessories are safe and high-quality. Thus, these issues are more legal issues than just merely studying the facilities themselves. This study goes through policies and safety records, leaning the report towards legal advice.

The report is an analysis of the track record of the company, and does not contain legal analysis of statutes and regulations. Thus, according to Booker, this factor leans towards business advice.

The third factor is somewhat unclear, as the report was made in June 2024, but we are not told when the action was pending. But, there is no action pending with Gourmet Pro, so this leans toward business advice since the CPSC has no pending action with Gourmet Pro.

The fourth factor initially leans toward legal advice because it is given to the types of people that legal advice is give, management and board, but there is an argument that the report does not focus on legal implications. Merely it is just a review of past safety, and all recommendations are labeled as business recommendations and do not contain legal implications. Thus, this factor leans towards business advice.

The fifth factor is if nonlegal portions are intertwined with legal portions. Because the paragraphs are numbered, it is easier to untangle any possible entwinement between legal and business advice.

Thus, this report is predominantly business advice. Pursuant to Franklin, "when assessing a document where the predominant purpose is business, care must be taken to identify any distinct portions that are protected by privilege because they concern legal advice or information." Here, overview 4 is legal because it discusses claims and defects, and recommendations 1 and 2 are maybe legal because they describe policies and procedures to insulate against liability. Recommendation 3 is not legal because it is moreso an employee relations issue, and the report from recommendation 4 would be legal advice. The rest of the overview sections are not legal and are thus not protected. Even though overview 2 states the report is protected, that does not matter.

Document 3 -- Email from Chief Auditor to General Counsel

Document 3 is a pedestrian email, meaning each paragraph will be separately analyzed to determine if it is predominantly legal or business. Paragraph 1 is business advice because it contains no legal analysis and is only briefly introducing an employee issue. But, perhaps because employee issues can lead to legal advice, this would be protected under the attorney-client privilege.

Paragraph 2 is business advice because the auditor is asking the general counsel advice on how to present auditing figures, not a legal analysis of state or federal tax statutes and regulations like in Booker, nor advice interpreting the tax regulations or legal liabilities from the audit's results like in Franklin Department of Revenue. So, this advice would be accounting advice, which is not protected. ValueMart

Paragraph 3 is also business advice because it is seeking the general counsel's advice on how to approach/sit down with the managers, because she used to work with some of the managers. So, according to ValueMart, this advice is employee relations advice and is not protected. If the auditor had asked legal implications from disciplining, firing, etc. workers, then this paragraph may have been legal advice and have been protected.

Each paragraph is business advice and is not protected by the attorney-client privilege.

conclusion:

END OF EXAM

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MEE Question 1

Pete lives in the northern United States. In the winter months, he earns his living by clearing snow from driveways and parking lots.

One morning, following a particularly heavy snowfall, Debbie contacted Pete and asked him to come to her residence and clear the snow from her driveway. Debbie was not a regular customer of Pete's. They had the following exchange via email:

> Debbie: Hi, Pete. Can you come to my house and clear the snow from my driveway? I live at 10 Arbor Lane, right here in town. What would you charge?
>
> Pete: I'm pretty busy today clearing snow for all my regular customers. I'm not sure I could get to you at all today, but if things go well, I could be there around 4 p.m. I charge $300 for a normal-size driveway.
>
> Debbie: Well, I have a plane to catch tonight, and I must leave the house by 5 p.m. I'm desperate. If you can get the snow cleared from my driveway before 5 p.m., I'll pay a premium price of $500.
>
> Pete: I will do my best, but I can't make any promises.

Pete worked extra hard and fast that day to finish clearing snow for his regular customers. To further ensure that he got to Debbie's house in time to get her driveway cleared by 5 p.m., he passed up an opportunity to clear a parking lot for $400. He was able to finish all his work for regular customers by 3:30, which left him plenty of time to get to Debbie's house and clear her driveway.

However, when Pete arrived at Debbie's house at 4 p.m., he saw that the driveway had already been cleared.

Pete left his truck, went to the front door of Debbie's house, and rang the doorbell. When Debbie appeared, he said, "I'm Pete. I accept your offer to clear your driveway. I'll get started right away." Debbie said, "Sorry, someone came by and offered to do the job for $300, so I paid him to do it. As you can see, it's already done." Pete replied, "I still want my $500." Debbie told Pete that she owed him nothing, and she shut the door.

Pete believes that, in light of the email exchange with Debbie, the fact that he passed up the opportunity to clear the parking lot, and the fact that he showed up at Debbie's house in time to clear her driveway by 5 p.m., he was entitled to clear Debbie's driveway and be paid $500.

1. Did the exchange of emails form a contract? Explain.

2. When Pete traveled to Debbie's house and said to her, "I accept your offer to clear your driveway," did that form a contract? Explain.

3.. Assuming that no contract was formed under Question 1 or 2, does Pete have a claim based on his reliance on Debbie's statement that she would pay a premium price of $500 if he cleared the snow from her driveway by 5 p.m.? Explain.

4. Assuming that Pete has a valid claim against Debbie under Question 3, how much could he recover? Explain.

The Board of Bar Examiners did not select a representative passing answer for this question.

MEE Question 2

Testator was born in 1880 in a rural area of State A. At the age of 5, he was enrolled in the local one-room schoolhouse and remained in school there until he graduated at age 18. There were no more than 30 students in the school at any one time. All four students in Testator's graduating class attended State A University. In 1902, Testator graduated from State A University with a degree in business. Over the next 20 years, he was extremely successful financially.

In 1922, Testator died leaving a substantial estate. He had never married and had no children. His closest living relative at his death was his first cousin, with whom he'd had little contact since his childhood.

Under his probated will, Testator bequeathed a total of $500,000 to several art museums throughout the United States, $250,000 to Capital City Concert Hall, and $1,750,000 to the business college at State A University. He bequeathed the balance of his estate ($2,500,000) to a valid perpetual charitable trust, with Bank X in State A named as trustee. Under the terms of the trust, all trust income was distributable annually to pay the education expenses of any persons, as selected by the trustee, who had graduated from a one-room schoolhouse in State A and were attending State A University while under the age of 25.

For many years, the trustee had no difficulty identifying potential beneficiaries under the terms of the trust. Over time, however, there was a substantial decrease in the number of students graduating from one-room schoolhouses in State A. By 2010, there were no such students attending State A University, and the remaining one-room schoolhouse in State A permanently closed. There are now no longer any persons to whom the trustee can distribute trust income in accordance with the terms of the trust.

The value of the trust assets is $10 million, earning roughly $500,000 of trust income annually.

Bank X would like to resign as trustee and recommends that a court appoint Bank Y as trustee. Bank Y is a reputable bank with extensive experience in trust administration and is willing to assume the trusteeship but only if the terms of the trust are modified to allow it to distribute trust income to graduates of any rural public high school in State A attending State A University.

Fred, the closest relative of Testator now living and the sole surviving descendant of Testator's first cousin, believes that the trust can no longer continue and should be terminated, and that the principal should therefore be distributed to him.

Capital City Concert Hall, having recently learned of these facts, believes that the trust principal of $10 million should be held exclusively for its benefit with trust income payable only to it.

State A has adopted the Uniform Trust Code. There are no other applicable statutes.

1. Does Bank X need judicial approval to resign as trustee? Explain.

2. Does Fred have any interest in the trust? Explain.

3. Can the trust's terms be judicially modified? Explain.

4. Assuming that Bank Y has been appointed trustee and that the trust terms can be judicially modified, between the suggestions offered by Bank Y and Capital City Concert Hall, which suggestion would a court be more likely to adopt? Explain.

The Board of Bar Examiners did not select a representative passing answer for this question.

MEE Question 3

Last year, Congress passed the "Economic Incentive Act" (Act), which the President signed into law. The preamble of the Act states that it was passed pursuant to Congress's power to regulate interstate commerce, and no legislative history indicates any other purpose.

The Act contains two substantive provisions. First, the Notice Provision prohibits "any employer with more than 100 employees from terminating an employee's employment without cause on less than 30 days' notice." The Notice Provision states that it applies to employees of both private businesses and state and local governments.

Second, the Housing Provision of the Act creates a federal program that provides grants to private developers of new low-income housing projects meeting the Act's requirements. The Housing Provision directs designated municipalities to administer this federal grant program by accepting applications for grants, reviewing the applications, making decisions, and enforcing the Act's requirements. The Housing Provision authorizes the United States to impose monetary penalties on a municipality that does not administer the grant program.

The last section of the Act provides:

> Any person who is harmed by the failure of any state or municipality to adhere to any provision of this Act may recover actual damages suffered as a result of that failure and may bring an action to recover those damages in federal court. A state or municipality shall not be immune, under the United States Constitution, from suit in federal court under the Act.

A man worked for State A, which employs more than 100 people, and a woman worked for City, a municipality in State A, which employs more than 100 people. State A and City recently terminated the employment of the man and the woman due to budget cuts. The man and the woman each received only one week's notice from their employers.

The man and the woman have filed separate lawsuits in federal district court against State A and City seeking damages for violations of the Notice Provision of the Act. In the suits against them, State A and City have each moved to dismiss on two grounds: (1) sovereign immunity recognized by the United States Constitution bars the lawsuits, and (2) the Notice Provision of the Act commandeers state and local governments in violation of the Tenth Amendment. No provision of State A law indicates that State A consents to lawsuits in federal court.

County is a municipality in State A that has refused to accept grant applications for federal funding as required by the Housing Provision of the Act. The United States, therefore, recently applied that provision to impose a substantial monetary penalty on County. County has filed a federal lawsuit seeking a declaration that the Housing Provision of the Act is unconstitutional because it commandeers municipalities in violation of the Tenth Amendment.

1. Does sovereign immunity bar the man's lawsuit against State A? Explain.

2. Does sovereign immunity bar the woman's lawsuit against City? Explain.

3. Does the Notice Provision of the Act commandeer State A in violation of the Tenth Amendment? Explain.

4. Does the Housing Provision of the Act commandeer County in violation of the Tenth Amendment? Explain.

3)

1. The issue is whether the Act abrogated sovereign immunity.

Under the 11th Amendment of the Constitution, states enjoy sovereign immunity against lawsuits seeking damages unless sovereign immunity is waived or abrogated. A waiver must be unequivocal by the state. Further, Congress may pass legislation that abrogates a state's sovereign immunity. When it does so, it must speak clearly and unequivocally. However, Congress's power to abrogate comes from it's power to enforce the provisions of the 14th Amendment. The Supreme Court has held that Congress may not abrogate sovereign immunity in exercising its Commerce Clause powers under Article I.

Here, State A has not consented to suit, thus sovereign immunity must be abrogated by Congress in order to overcome immunity. The Act unequivocally abrogates sovereign immunity of states as made evident by the language Congress used. However, the Act was passed under Congress's Commerce Clause power. Congress cannot abrogate state sovereign immunity using its Commerce Clause power. Thus, sovereign immunity was not abrogated and man's suit for damages against State A is barred.

2.The issue is whether municipalities enjoy 11th Amendment sovereign immunity.

Sovereign immunity under the 11th Amendment expressly applies only to the states. Municipalities are not states and are not immune under the Constitution.

Here, woman was suing City. City is not a state. Therefore, City is not immune from suit.

3. The issue is whether the Notice provision violates anti-commandeering principles under the Tenth Amendment.

Under the Tenth Amendment's anti-commandeering doctrine, the federal government cannot compel states to enforce federal law or adopt and administer federal programs. Under the Spending Clause, Congress may condition the receipt of funds on certain conduct, but the federal government cannot unilaterally force adoption of programs. Underlying anti-commandeering doctrine is respect for the system of federalism whereby states are separate sovereigns from the federal government, and the federal government cannot unduly infringe on the states. However, when it comes to regulating state's conduct as an employer, rather than as a government, anti-commandeering principles do not apply.

Here, the Notice provision requires 30 days notice before termination. This provision is expressly applied to the states. Thus, the federal government is requiring a state to enforce federal law, conduct typically violative of anti-commandeering doctrine. However, the provision is directed at states in their capacity as employers. This is an appropriate exercise that does not implicate anti-commandeering. Accordingly, the notice provision does not violate the Tenth Amendment.

4. The issue is whether the Housing provision violates anti-commandeering principles under the Tenth Amendment.

Anti-commandeering under the Tenth Amendment applies to municipalities as well. Cities and counties cannot be compelled to administer a federal program.

Here, the Act sets up a housing grant program whereby municipalities must administer it or they risk a monetary penalties. Here, County is confronted with "substantial monetary penalties." This is not the case of Congress imposing conditions in order to receive grant monies. This is an example of the federal government compelling a County to administer a federal program. This is violative of anti-commandeering doctrine under the Tenth Amendment,

END OF EXAM

MEE Question 4

A public high school in City, State A, has a rule that prohibits students from going to the gas station across the street from the school during school hours because the police have identified that gas station as the site of frequent drug dealing. The school includes the rule in the student handbook that the school provides to all students and their parents at the beginning of each school year. The school's principal also orally informs all students of the rule.

On October 10, at 2:30 p.m., during the last class of the day, the school principal looked out a window of the school building and observed a student walking from the school toward the gas station across the street. Once at the gas station, the student walked close to a car, talked to the driver through the open driver's-side window, and handed something to the driver. The principal could not see whether the student took anything from the driver, but after the car drove away, the principal saw the student put his hands in the front pockets of the jacket he was wearing.

The student returned to the school. About 10 minutes later, the principal ordered the student into the principal’s office. When the student arrived, the principal reached into the front pockets of the student’s jacket, which he was still wearing, and removed three $20 bills and a small, clear plastic bag containing two white pills. As set forth in the student handbook, possession of any kind of medication in school is prohibited unless permission has been given by the school. The student did not have the school's permission to possess any medication. The principal informed the student that the money would be returned to him if it was not connected with a crime. The principal told the student to return to class.

The principal decided to search the student’s assigned locker. The school’s locker policy provides that lockers are the property of Local Public School District (LPSD), that an assigned locker may be searched at any time, and that the school administration has a master key to all lockers. This policy is written in the student handbook. In addition, on the outside of every locker is a sticker stating, "This locker is the property of LPSD and may be subject to search." The principal unlocked the student’s assigned locker with the master key. On the locker’s top shelf was a clear plastic bottle containing white pills that appeared to be identical to the pills found in the student’s jacket pocket. There was also a small, clear plastic bag containing a green, leafy material that looked and smelled like marijuana, possession of which is a crime in State A. The principal confiscated both the bottle of pills and the plastic bag of leafy material.

The principal phoned City police. An officer arrived at the school and took into custody the items seized by the principal from the student and the locker. Chemical testing of these items determined that the white pills were methamphetamine and the leafy material was marijuana.

That evening, City police obtained a valid warrant to arrest the student for possession of controlled substances in violation of State A law.

The next day, two City police officers arrived at the school during the school day and arrested the student, who was wearing his backpack. The officers searched the student and his backpack, from which an officer removed the student’s unlocked cell phone. One of the officers looked through the cell phone’s text messages and found a series of messages that set meeting times and places and listed "number of units" and "cost." A message from 10:00 a.m. on October 10 referred to a meeting in the gas station parking lot at 2:35 p.m. and mentioned a "cost" of $60.

State A charged the student with possession of controlled substances.

1. Did the principal's search of the student’s jacket pockets violate the student's rights under the Fourth Amendment? Explain.

2. Did the principal's search of the student's locker violate the student's rights under the Fourth Amendment? Explain.

3. Did the officer's search of the student’s text messages violate the student's rights under the Fourth Amendment? Explain.

4)

1. The principal's search of the student's jacket pockets did not violate the student's rights under the Fourth Amendment. At issue is whether a principal is allowed to search a student's pockets when the principal suspects that the student possesses an item that violates school rules.

The Fourth Amendment to the United States Constitution provides all persons have the right to be secure in their papers, persons, home, and effects from unreasonable searches and seizures. The Supreme Court has held that all searches without a warrant are per se unconstitutional subject to a few delineated and well defined exceptions. A search occurs when the government physically intrudes on a protected area with the intent to collect information or when a person has a reasonable expectation of privacy in an area and the government searches that area. Here, the principal's actions were a search because the principal physically invaded a constitutionally protected area. In other words, the principal invaded an area protected by the fourth amendment (the student's person).

The fourth amendment applies to public school officials because the Supreme has held that students do not shed their constitutional rights at the schoolhouse gate. The Supreme Court has held that one of the exceptions is that school officials may search students and their effects if the official has a reasonable suspicion that the student possesses evidence of a crime or items that violate school rules.

The search of the student must be reasonable based on the student's age and the crime or rule violation that the principal suspects the student committed. For example, the Supreme Court held that a search of a female student's underwear was not reasonable when the principal suspected the student of possessing pills and a search of her backpack did not turn up any evidence of the violation. The Supreme Court has held that a public official has reasonable suspicion when he can point to articulable facts that make it more likely than not that a person committed a crime or possesses a prohibited item. The finding of reasonable suspicion is based on a totality of the circumstances.

Here, the principal had a reasonable suspicion that the student violated school rules. The principal observed the student leave the campus during the last class of the day and visit a gas station that is known for selling drugs. The principal further saw the student speak to someone in a car at the gas station and then place his hands in his jacket pockets afterwards. These facts support a finding that the principal had a reasonable suspicion that the student possessed drugs in violation of the school's rules.

Additionally, the principal's search of the student was reasonable. The principal only reached into the student's jacket pockets and pulled out the pills and money in his pocket. The principal believed that the student had drugs and watched the student place his hands in his pockets afterwards. The principal did not search any other part of the student's body. Thus, the search was reasonable.

Because the principal has reasonable suspicion to believe that the student was violating school rules and because the search of the student was reasonable in scope, the search of the student's pockets did not violate the student's fourth amendment rights.

2. The search of the student's locker did not violate the student's fourth amendment rights. At issue is whether a school official can search a student's locker for evidence that the student was violating school rules.

The Fourth Amendment to the United States Constitution provides all persons have the right to be secure in their papers, persons, home, and effects from unreasonable search and seizure. The Supreme Court has held that all searches without a warrant are per se unconstitutional subject to a few delineated and well defined exceptions. A search occurs when the government physically intrudes on a protected area with the intent to collect information or when a person has a reasonable expectation of privacy in an area and the government searches that area. A person has a reasonable expectation of privacy in an area when that person has a subjective expectation of privacy and his expectation is one that society is prepared to recognize as reasonable. Here, the student does not have a subjective expectation of privacy in his locker. Thus, it could be argued that the principal's actions were not even a search. The principal did however, physically intrude on a constitutionally protected area. The fourth amendment protects persons, places, and things (secure in his effects). The student's personal possessions were thus a constitutionally protected area because they are his effects. Therefore, the principal did search the student's locker.

The fourth amendment applies to public school officials because the Supreme has held that students do not shed their constitutional rights at the schoolhouse gate. The Supreme Court has held that one of the exceptions is that school officials may search students and their effects if the official has a reasonable suspicion that the student possesses evidence of a crime or items that violate school rules.

The search of the student must be reasonable based on the student's age and the crime or rule violation that the principal suspects the student committed. For example, the Supreme Court held that a search of a female student's underwear was not reasonable when the principal suspected the student of possessing pills and a search of her backpack did not turn up any evidence of the violation. The Supreme Court has held that a public official has reasonable suspicion when he can point to articulable facts that make it more likely than not that a person committed a crime or possesses a prohibited item. The finding of reasonable suspicion is based on a totality of the circumstances.

Here, the principal had reasonable suspicion that the student was violating school rules because he left campus and when the student returned, he was found with pills in his pockets in violation of school rules. Because the principal found pills on the student, the principal then had reasonable suspicion to believe that the student might have more medications in his locker. Students who are violating school rules and have prohibited items on their person usually have the same items in their locker.

Additionally, the search of the locker was reasonable because the principal opened the locker and immediately found pills that looked identical to the one's found in the student's pockets. While searching the locker, the principal also found marijuana. The principal did not search more area than necessary to uncover the items that violated school rules. Thus, the search of the locker was reasonable.

Because the principal had reasonable suspicion to believe that the student had items that violated school rules and because the search was reasonable, the search of the student's locker did not violate his fourth amendment rights.

3. The officers search of the student's text messages violated the students fourth amendment rights. At issue is whether a police officer is allowed to search the electronic data on a suspect's cell phone when he is placed under arrest.

The Fourth Amendment to the United States Constitution provides all persons have the right to be secure in their papers, persons, home, and effects from unreasonable search and seizure. The Supreme Court has held that all searches without a warrant are per se unconstitutional subject to a few delineated and well defined exceptions. The Supreme Court has held that police officers are allowed to search a suspect without a warrant if the search occurs contemporaneous to a valid, constitutional arrest. The Supreme Court has that the police may search and observe the physical attributes of a suspect's cell phone but the officers may not search the digital data on the suspect's cell phone incident to arrest. To search the digital data, the officer must obtain a warrant.

Here, the officers had a valid arrest warrant and validly placed the student under arrest. Because the student was arrest, the police were allowed to search the student and his effects. The police were allowed to take all of the items out of his pockets and backpack and search those items as well. The officers were allowed to search the physical attributes of the student's cell phone. The officers were not allowed, however, to search the digital data on his phone. The officers did not have a warrant to go through the student's text messages. When the officer looked through the student's phone without a warrant, the officers committed an unreasonable search in violation of the fourth amendment.

Because the officers did not have a warrant to look through the digital data on the student's cell phone, the search of the student's text messages violated the student's fourth amendment rights.

END OF EXAM

MEE Question 5

After a homeowner's curbside mailbox was damaged, the homeowner phoned Quick Mailboxes, a small corporation that installs and repairs mailboxes. The homeowner told the Quick Mailboxes receptionist, "I don't care how you fix it; I just want it done by the end of the week." The receptionist said that the company would charge $220 for the repair, and the homeowner agreed to hire Quick Mailboxes to perform the job.

Quick Mailboxes has 10 local employees. It conducts background checks on all its employees, verifies that they have appropriate driver's licenses, and trains them as needed. After receiving the homeowner's call, Quick Mailboxes promptly sent Jane, one of its part-time employees, from its main office to the homeowner's property to perform the repair. Jane works 20 hours each week for Quick Mailboxes. She drives to work sites in a small, old pickup truck owned by Quick Mailboxes.

When Jane arrived at the homeowner's address, she stopped the pickup truck along the curb on the hilly street so that she could survey the mailbox's damage from her window. As she was about to exit the truck, she answered a personal call on her cell phone. The call lasted about three minutes. Distracted by the call, Jane left the truck without shifting it into "park" and did not engage the parking brake before she walked to the homeowner's front door to introduce herself and explain the work she planned to perform.

While Jane and the homeowner were talking at the front door, the Quick Mailboxes truck began rolling down the street. The homeowner saw it and stared in surprise but said nothing. Seconds later, the truck rolled partly off the pavement into a street sign. The post holding the street sign collapsed, sending the sign crashing onto a vintage luxury car worth $430,000 that a neighbor had parked on the public street.

The neighbor had the car repaired. Because of the special parts needed and the difficulty of finding them, the repairs cost $55,000. The neighbor also suffered serious emotional harm, requiring medical attention, because he had happened to look out his living room window just as the sign fell and damaged his car, which had significant sentimental value to him.

1. Is Jane directly liable to the neighbor in a negligence action? Explain.

2. Is Quick Mailboxes liable to the neighbor either directly or vicariously? Explain.

3. Is the homeowner liable to the neighbor because the homeowner hired Quick Mailboxes? Explain.

4. (a) Assuming that any of the parties is liable, can the neighbor recover the cost to repair the car even though the repairs were unusually expensive? Explain.
   (b) Assuming that any of the parties is liable, can the neighbor recover damages for emotional harm? Explain.

5)

1. Jane is directly liable to neighbor in a negligence action. At issue is whether an employee is liable for her own torts while on the job.

To prove a prima facie case of negligence, a plaintiff must prove that (1) the defendant had a duty to act according to the appropriate standard of care; (2) the defendant breached her duty of care by failing to act according to the standard of care; (3) the defendant's actions caused an injury to the plaintiff; and (4) the plaintiff suffered damages as a result of the breach.

All people have a duty to act as a reasonably prudent person would act in the same or similar circumstances. To prove causation, the plaintiff must actual and proximate cause. Actual causation exists if the plaintiff would not have been injured but for the defendant's breach. Proximate causation exists if the plaintiff proves that his injury was the natural consequence of the defendant's actions.

Here, Jane had a duty to act as a reasonably prudent person would act under the circumstances because she was engaged in human activity. Jane breached her duty when she left the truck on a hilly street and failed to put the truck in park or set the parking brake. A reasonable person would have made sure the truck was in park before exiting the truck and Jane did not do that. Thus, she breached her duty. Additionally, Jane's failure to set the brake caused neighbor's injuries. Actual causation can be proven because but for Jane's failure to set the parking brake, the neighbor's car would not have been damaged. Proximate cause can be proven because the natural consequence of failing to set the parking brake on the hill is that the truck would roll down the hill and hit whatever was at the bottom. In this case, the truck hit a sign. The natural consequences of a runaway truck hitting a sign is that the sign will fall over. The fact that the sign hit the neighbor's car does not brake the causal chain. Finally, the neighbor can prove damages because his car needed to be repaired.

Additionally, all persons are liable for their own torts even if the tort was committed in the scope of one's employment. Thus, the fact that Jane was on the job and that her employer might be liable for the damage does not relieve Jane of liability.

2. Quick Mailboxes is liable to the neighbor vicariously. At issue is whether Jane was an employee acting within the scope of her employment to give rise to liability.

An employer is vicariously liable for the negligence of its employees if the employee was negligent while acting in the scope of her employment. The employer is not liable for the torts committed by an independent contractor. To determine whether the agent was an employee, the court will determine whether the employer has the right to control the manner in which the agent works.

Here, Jane is an employee because the facts tell that she is an employee. Also, Quick

Mailboxes has the right to control the manner in which Jane works because Quick Mailboxes trains its employees on how to fix mailboxes. If an agent is an independent contractor, the principal usually will not train the agent. Additionally, Quick Mailboxes sent Jane out the homeowner's house. This proves that Quick Mailboxes has control over Jane's activities. If Quick Mailboxes did not control the manner in which Jane worked, the homeowner would have contacted Jane directly. Thus, Jane is an employee and Quick Mailboxes is vicariously liable for the torts committed within the scope of her employment.

Jane is expected to drive her truck to customer's homes to repair their mailboxes. Additionally, Jane was driving a truck owned by Quick Mailboxes and was acting at the direction of Quick Mailboxes. Thus, Jane was acting within the scope of her employment at the time of neighbor's injury and Quick Mailboxes will be vicariously liable for neighbor's injuries.

Quick Mailboxes cannot be directly liable to neighbor. To be directly liable, Quick Mailboxes would have had to act negligently. Quick Mailboxes had a duty to train its employees and ensure that they have valid driver's licenses. The facts tell us that Quick Mailboxes conducts background checks on employees, verifies they have the appropriate driver's licenses, and provided training as needed. Quick Mailboxes's actions meets its standard of care and there is no breach. Thus, Quick Mailboxes will not vicariously liable.

3. The homeowner is not liable to the neighbor because he hired Quick Mailboxes. At issue is whether a principal is liable for the torts of an independent contractor.

When a person employs another, they create an agency relationship. The employer is the principal and the person doing the work is the agent. A principal is not liable for the torts of his agent if the agent is an independent contractor. An agent is an independent contractor when the principal has not authority to control the manner and function of the agent's duties.

Here, homeowner hired Quick Mailboxes. Thus, homeowner is the principal and Quick Mailboxes is his agent. The homeowner does not have the power to control the manner and function of Quick Mailboxes's duties. When he hired Quick Mailboxes, the homeowner stated that he doesn't care they fix the mailbox and that he just wants it done. Thus, the homeowner did not control the manner in which Quick Mailboxes performed its duties and Quick Mailboxes is an independent contractor.

Because Quick Mailboxes is an independent contractor of the homeowner, the homeowner cannot be liable to the neighbor for his damages.

4a. The neighbor can recover the cost to repair the car even though the repairs are unusually expensive. At issue is whether the defendant is liable for severe injuries caused by her negligent conduct.

When a defendant is negligent, the defendant is liable for all of the damages actually and proximately caused by her actions. It is no defense that the plaintiff's injuries were unusually expensive or that the injury caused a bizarre injury to the plaintiff.

Here, Jane's actions caused damage to the neighbor's $430,000 car that needed special parts. It is no defense that the an ordinary car would not need such specialized parts and Jane is liable for the damages she caused even though the damages were extremely high.

Because it is no defense that the defendant's actions caused an unusual injury, the neighbor can recover all of his damages despite the fact that they were unusually expensive.

4b. If at least one of the parties is liable, the neighbor cannot recover damages for emotional harm. At issue here is whether a plaintiff can recover for emotional harm caused to his property.

Generally, a plaintiff can recover all of his damages caused by the defendant's negligence. The plaintiff cannot, however, recover damages for emotional harm when the only damages he suffered were to his property. Thus, the neighbor will not be able to recover for his emotional harm.

The neighbor may wish to argue that one of the parties is liable for negligent infliction of emotional distress (NIED). To prove his NIED claim, the neighbor would have to prove that he was in the zone of danger and the defendant's actions nearly missed him or that he observed a close family member get injured because of the defendant's negligence, and that he suffered severe emotional distress.

Here, neighbor cannot make out either NIED claim. The neighbor was not in the zone of danger because he was in his house when the truck rolled down the hill. The neighbor was not outside and thus could not be in the zone of danger. Additionally, he cannot recover under the other NIED theory because his car does not qualify as a close family member. Thus, even though he observed the car's damage as it happened and suffered severe emotional distress, the neighbor cannot sustain a claim for NIED.

Accordingly, the neighbor's claim for emotional harm is not recoverable.

END OF EXAM

5)

1)

The issue is whether Jane is directly liable in negligence even though she is an employee.

In a negligence action, the plaintiff must prove that the defendant had a duty of care, that they breached that duty of care, that they were the proximate and factual cause of the breach, and that the defendant suffered damages. The duty of care is typically that of a reasonably prudent person. The breach is determined in court, and is usually owed to those in the zone of danger. The defendant's actions must be the proximate cause, meaning that such damages were a foreseeable consequence of the negligent behavior. Further, they must be the "but for" or factual cause, meaning that but for the negligence, the injury would have occurred. Damages must be shown, and you must take the plaintiff as you get them.

Here, there was a breach of duty of care. Jane did not act as a reasonably prudent person in the circumstances. She did not put it into park, as one would in her position. Furthermore, the breach of care must occur to one in the zone of danger of said breach. A car down the street from Jane is in the zone of danger. Furthermore, it is clear that her actions are the proximate and factual cause. It is foreseeable that leaving your car in park on a tall hill would foreseeably cause an accident down the hill. Furthermore, but for her negligent action of leaving the car in drive, the car would not have been hit. Finally, the neighbor clearly suffered damages as the car was in deed of repair.

Another issue arises in vicarious liability. Typically a company will be liable to the torts of an employee if the tort was done during the scope of employment. Although this likely applies, regardless of vicarious liability, an employee is still liable for a tort that they commit. Rather if vicarious liability applies, they are both jointly and severally liable.

Because Jane was negligent in her operation of the vehicle, she is directly liable to the neighbor.

2)

The issue is whether Quick boxes is directly or vicariously liable for the negligent actions of its employee.

A court will find an employer vicariously liable if an employee commits a tort during and in scope of their employment. Employers are liable for frolic, or small deviation of an employee, but not for a large detour.

Here it is clear that Jane is an employee. She was acting under the scope of her employment by checking on the new assignment. Furthermore, the court will likely find that this is a frolic, as it was not a large deviation from the scope of her employment. Her 3 minute phone call will not be enough to create a detour.

Therefore, the Quickmailboxes is liable vicariously.

However, they are not liable directly. Quickmailboxes would need to have failed the four prongs of negligence laid out above to be directly liable. Rather they are jointly and severally liable. Quickmailboxes would have had to make a large deviation in standard practice to be found liable directly.

3)

The issue is whether the homeowner is liable because they hired the QuickMailboxes employee.

For the homeowner to have been found liable here they must show that they were an employee or an independent contractor. A person who hires an independent contractor is liable for any tort that occurs because of negligent hiring, nondelgable duties, or inherently dangerous acitivites. Independent contractors are usually less limited in scope.

This is an independent contractor based on the facts. This is not an inherently dangerous activity, non delegable duty, or negligent hire. They are trusted company and have good practices.

The homeowner will not he liable.

4)

a. The issue is whether the homeowner would be able to get full damages for his vehicle.

Damages do not need to be foreseen at the time of the accident. Damage awards that are large need to be taken as they are found. The only way a court would find otherwise is if the award given by the jury shocks the conscious. Here, they are allowed. The cost of the car is much higher, so he could get money for repairs.He could recover from all as they are jointly and severally liable.

Thus, he is entitled too full damages.

b.

No the neighbor cannot recover for NIED. Negligent infliction of emotional distress requires negligent conduct that would foreseeably cause extreme emotional distress.

It was not foreseeable that this negligent action would cause the amount of distress it would. One cannot foresee that the plaintiff would be so attached to his car. Sentimental harm is not enough to get NIED, as it is a tough burden.

Therefore, the neighbor is unlikely to recover for NIED.

END OF EXAM

Indian Law Question
July, 2025

Larry Two Two, an enrolled member of the Navajo Nation, camped on the Cheyenne Indian Reservation for two months as part of a cross-country vacation. After drinking too much one evening, he started driving back to his campsite. Tom Rederth, an enrolled member of the Cheyenne River Tribe, was walking through the campground back to his home.

Two Two's vehicle hit Rederth who suffered broken ribs and a broken leg as a result.
Two Two is charged with assault resulting in serious bodily injury. Which, if any, of these entities have jurisdiction? Cheyenne River Sioux Tribe, Navajo Tribe, State of South Dakota, U.S. Government? Explain why.

6)

The present issue is which governments have criminal jurisdiction over an Indian when he commits a criminal offense on a different reservation against an Indian of that different reservation.

The Major Crimes Act set out a number of serious crimes which the federal government has claimed jurisdiction over when they occur in Indian Country. Among these crimes is assault resulting in serious bodily injury. When one of the enumerated crimes is involved, the federal government can assert its jurisdiction if the crime occurred between two Indians.

The case at hand involved Two Two, an Indian, assaulting Rederth, who is also an Indian. Because one of the enumerated crimes is involved and this crime was between two Indians, the Federal Government has jurisdiction.

The Federal Government claiming jurisdiction does not necessarily mean that other jurisdictions cannot have concurrent jurisdiction over a crime. The basic principle of tribal sovereignty generally grants a tribe jurisdiction over an Indian defendant. This is the case whether the defendant is a member Indian (meaning a member of this specific tribe) or a non-member Indian (meaning a member of a different tribe) as of SCOTUS's recent decision in *U.S. v. Lara,* which overturned precedent in *U.S. v. Duro* which did not make this distinction. Because of this, the Cheyenne River Sioux Tribe can assert jurisdiction over Two Two, a Navajo.

The Navajo tribe, on the other hand, does not have jurisdiction in this case because it did not occur within its territory. In order for a tribe to have jurisdiction over a criminal case, the alleged crime must have occurred on its Indian Land. That is not the case here, even though its own member is being prosecuted, so the Navajo Nation does not have jurisdiction.

Generally, states do not have criminal jurisdiction over cases arising in Indian Country between two Indians. This, again, reinforces tribal sovereignty from the states. This is the case even when crimes occur on state right-of-ways, which this may have occurred on. Because this case is between two Indians in Indian Country, South Dakota does not have jurisdiction.

END OF EXAM

6)

Jurisdiction Generally

Generally, when determining criminal jurisdiction in relation to Indian law the location of the crime, the Indian classification of the defendant and victim, and type of crime must be determined. As a matter of location, Indian Country is any of the following locations: (1) within the exterior boundaries of a federally recognized tribal reservation, (2) dependent Indian Communities which are listed by the federal government, and (3) Indian land allotments. This includes right of ways within tribal reservations. If a crime occurs outside of these areas the Tribe does not have jurisdiction except in exceptionally rare circumstances where matters violating a tribes sovereignty were implication. To determine whether a person is an Indian for purposes of criminal jurisdiction the person must satisfy a two part test. First, they must meet a blood quantum requirement (commonly the mere presence of Indian blood). Second they must be (a) a member of a federally recognized tribe, (b) have the ability to receive benefits from the federal government reserved for Indian people, or (3) have the ability to receive benefits from a tribal while participating in tribal cultural events. Lastly, the type of crime must be determined. Under the Assimilated Crimes Act, also know as the Interracial Crimes Act, Congress granted the federal government the ability to prosecute certain crimes on federal enclaves. While the Major Crimes Act permits the federal government to prosecute a defendant based on the nature of the crime, regardless of their Indian classification. Further, whether the crime has been established in tribal code for the relevant jurisdiction. Under the Violence Against Women Act, Congress provided for tribal jurisdiction in certain cases. Lastly, because tribal communities are within states (separate sovereigns) states may have jurisdiction to punish crimes that occur within their state. Overarching these questions is the Dual Sovereigns Doctrine; this doctrine provides that double jeopardy does not apply between the tribes and federal/state prosecutions. Only when an Indian is punished by a tribe may the federal government not subsequently punish for the same crime.

Location of the Crime

First, we must examine the location of the crime. South Dakota contains nine federally recognized tribal reservations: Flandreau Santee Sioux, Sisseton-Wapheton, Oglalla Lakota, Standing Rock, Lower Brule, Crow Creek, Rosebud, Cheyenne River, and Yankton. Here, the crime occurred in a campsite within the Cheyenne River Indian Reservation. Thus the location is within South Dakota and Indian Country.

Classification of the Parties

Second, we examine the Indian classification of the parties. The defendant, Larry Two Two, is an enrolled member of the Navajo Nation. Although information about blood quantum is not present, that is typically a requirement for tribal membership. Thus, Larry Two Two is classified as an Indian. Next, the victim, Tom Rederth. Rederth is an enrolled member of the Cheyenne River Tribe. Once again because Rederth is a tribal member he is an Indian for this analysis.

Crime at Issue

Lastly, we must examine the crime at issue. Here, the crime charged was assault resulting in serious bodily injury. Although assault is not a major crime or a VAWA crime, it is classified as crime under the Major Crimes Act. Common other major crimes include murder, assault with a deadly weapon, or incest. Based upon the facts presented, it is unknown whether or not the Cheyenne River Tribe has penalized assault resulting in a serious bodily injury.

Appropriate Jurisdiction

After completing the classifications, the issue becomes whether the state of South Dakota, U.S. Government, Navajo Tribe, or Cheyenne River tribe has sole, concurrent, or joint jurisdiction. It is worth nothing that although the defendant is a member of the Navajo Tribe, that does not preclude punishment for conduct that occurred outside of the Navajo nation.

Here, there is an Indian defendant with an Indian victim that committed a Major Crime (and likely a crime under Cheyenne River Tribal law) within Indian Country. Under such a circumstance, the Cheyenne River Tribe has shall primary jurisdiction over the prosecution assuming the tribal code reflects such a charge. The federal government shall have concurrent jurisdiction under the Major Crimes Act. The State of South Dakota does not have jurisdiction over such a crime, nor shall the Navajo Tribe. If is worth nothing that the Navajo nation will likely not have jurisdiction because the crime was not committed against the tribe in such a way that threatens their tribal sovereignty.

END OF EXAM

MULTISTATE ESSAY EXAMINATION 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.

You may answer the questions in any order you wish. Do not answer more than one question in each answer booklet. If you make a mistake or wish to revise your answer, simply draw a line through the material you wish to delete.

If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions.

Read each fact situation very carefully, and do not assume facts that are not given in the question. Do not assume that each question covers only a single area of the law; some of the questions may cover more than one of the areas you are responsible for knowing.

Demonstrate your ability to reason and analyze. Each of your answers should show an understanding of the facts, a recognition of the issues included, a knowledge of the applicable principles of law, and the reasoning by which you arrive at your conclusions. The value of your answer depends not as much upon your conclusions as upon the presence and quality of the elements mentioned above.

Clarity and conciseness are important, but make your answer complete. Do not volunteer irrelevant or immaterial information.

Examinees testing in UBE jurisdictions must answer questions according to generally accepted fundamental legal principles. Examinees in non-UBE jurisdictions should answer according to generally accepted fundamental legal principles unless your testing jurisdiction has instructed you to answer according to local case or statutory law.