Representative Passing Answers

Below are the Multistate Performance Test (MPT), Multistate Essay Examination (MEE), and Indian Law Question (ILQ) questions for the listed South Dakota bar examination and a representative passing answer to each question.

The representative passing answers have been reprinted without change, except for minor formatting. They were written by examinees under time restraints and without access to legal materials. The examinees authorized the Board of Bar Examiners to publish the answers anonymously for the benefit of future South Dakota bar applicants.

The answers are not "model answers." They do not, in all respects, accurately reflect South Dakota law and/or its application to the facts. They do not always correctly identify or respond to the issues raised by the question and may contain extraneous or incorrect information. The answers demonstrate the general length and quality that earned an above average score. They are not intended to be used as a means of learning the law tested; their use for such purpose is strongly discouraged.

February 2019
MPT-1
219

Applicant Number

THE MPT®

MULTISTATE PERFORMANCE TEST

State of Franklin Department of Children and Families

v.

Little Tots Child Care Center

Read the directions on the back cover.
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State of Franklin Department of Children and Families v. Little Tots Child Care Center

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Fisher & Mason Law Office
953 N. Main St.
Evergreen Heights, Franklin 33720

MEMORANDUM

To: Examinee
From: Gale Fisher
Date: February 26, 2019
Re: Little Tots Child Care Center

We represent Ashley Baker, who became the owner and operator of the Little Tots Child Care Center eight months ago. She has received notice that, in seven days, the Franklin Department of Children and Families (FDCF) will revoke her license to operate the child care center. Because she has no administrative remedy, we have filed a complaint to challenge the license revocation and a motion seeking a preliminary injunction to prevent the revocation until a trial can be had on the merits. The court has set a date 90 days from today for a trial on the merits. The hearing on the preliminary injunction is this Friday.

At the hearing, I expect to call Ms. Baker and Jacob Robbins, a parent, as witnesses. I have attached a note Ms. Baker gave me outlining her proposed testimony. I have also attached recent communications concerning Little Tots and three Notice of Deficiency reports issued by FDCF within the last seven months. I expect that FDCF will oppose our motion and will call the inspectors to testify to what they found during the inspections.

Please prepare the argument section of our brief in support of the Motion for Preliminary Injunction to enjoin FDCF from revoking Ms. Baker's license to operate Little Tots. Follow our office guidelines in drafting your argument. Do not assume that we will have an opportunity to file a rebuttal brief; anticipate any arguments FDCF may make and address them. Be sure to address all the requirements for a preliminary injunction. Because judges must make specific findings as to the evidence relied upon in granting or denying motions for a preliminary injunction, you must marshal and discuss the evidence we have available in support of the requirements for a preliminary injunction. Do not include a separate statement of facts, but be sure to incorporate the relevant facts into your argument.

Fisher & Mason Law Office

OFFICE MEMORANDUM

To: All lawyers
From: Litigation supervisor
Date: August 14, 2016
Re: Guidelines for drafting persuasive briefs

All persuasive briefs in support of motions shall conform to the following guidelines:

Statement of the Case: [omitted]

Statement of Facts: [omitted]

Body of the Argument

Analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Supporting authority should be emphasized, but contrary authority should also be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefing. Be mindful that courts are not persuaded by exaggerated or unsupported arguments.

Organize the arguments into their major components and write carefully crafted subject headings that illustrate the arguments they cover. The argument headings should succinctly summarize the reasons the tribunal should take the position we are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, improper: "The plaintiff failed to exhaust remedies." Proper: "When the plaintiff failed to appear at the administrative hearing, after receiving notice of the hearing, and failed to request a continuance, the plaintiff failed to exhaust administrative remedies."

Do not prepare a table of contents, a table of cases, or an index.

Ashley Baker's Note on Proposed Testimony
February 25, 2019

Eight months ago, I took over the Little Tots Child Care Center to offer services no one else offered in our area. The former owner had a hard time meeting expenses because so many parents could not afford the fees. Little Tots is open more hours than most child care centers so that parents who go to work early or work late shifts can use the center. I applied for and received a government grant to subsidize the center. The grant allows me to charge reduced fees to parents whose income falls below a certain level. The grant also allowed me to hire more staff and expand the number of children Little Tots serves. Little Tots is the only child care center in this neighborhood that serves low-income families.

I have had to juggle this expansion while trying to meet all the state standards. Look at these Notice of Deficiency reports, and you will see that I have been improving all along. If I could have just a few more weeks, I would be able to comply with all the standards.

I understand the need to get completed enrollment forms so that no unauthorized persons pick up the children. We do not want predators or parents with restraining orders coming here. Most parents have completed the enrollment forms. I guess I was too patient with those five who did not complete them. I will have to sit down with these five parents and have them complete the forms when they pick up their children.

Child "A" has been with us for months. He's five; he knows he's allergic to milk and can't drink it. He's never tried to take the milk. But I will improve the supervision when food is out. I found an online education program for child care workers on food safety and will have the staff watch it.

The program we offer is excellent. In fact, since I became the owner and expanded the enrollment and improved the child care program, the State University Early Learning Center has been sending students to observe our program. The children are safe and are thriving, even if we've had some missteps while we expanded. For FDCF to come in now and close me down is too harsh.

Caring for children is my passion and my livelihood. If I'm forced to close, I will be without any income, will lose that grant, and will have to find a way to repay my business loans. I risk losing my clients if the court takes too long to resolve this. If my license is revoked, I don't know where these children are going to go or what I will do to make a living. I'm afraid that I would not be able to reopen the child care center even if I got the license back.

STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES
Northern Regional Office
830 Highway 17
Evergreen Heights, Franklin 33720

February 22, 2019

Ms. Ashley Baker
Little Tots Child Care Center
492 Oak Street
Evergreen Heights, Franklin 33705

NOTICE OF LICENSE REVOCATION

You are hereby notified that, effective March 5, 2019, the license issued to you to operate Little Tots Child Care Center will be revoked due to numerous and repeated instances of noncompliance with critical standards for the operation of a child care center as specified in the Franklin Administrative Code and as authorized by the Franklin Child Care Center Act, Fr. Civil Code § 35.1 *et seq*. You must cease operating the Little Tots Child Care Center on or before March 5, 2019.

The instances of noncompliance are specified in the attached NOTICES OF DEFICIENCIES.

Operating a child care center without a license is a violation of the Franklin Child Care Center Act.

Signed: Carla Ortiz

Carla Ortiz
Director, Department of Children and Families

Served by email and in person February 22, 2019, by Cynthia Wood.

STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES
July 16, 2018, Notice of Deficiencies: Little Tots Child Care Center

This report summarizes the noncompliance with critical standards observed during the July 16, 2018, inspection of the Little Tots Child Care Center, 492 Oak Street, Evergreen Heights, Franklin. This constitutes notice pursuant to § 3 of the Franklin Child Care Center Act.

Thirty days ago, Ashley Baker became the owner and operator of Little Tots Child Care Center. Upon assuming ownership, Ms. Baker expanded the number of children in the center and changed some of its operations. This is the first inspection since Ms. Baker became owner. Because of critical deficiencies observed during this inspection, Ms. Baker was warned of the need to improve and was told that, as a result, the center will be inspected every 90 days.

Little Tots has a maximum allowable enrollment of 96 children, in eight rooms: two rooms of 2-year-old children, two of 3-year-old children, two of 4-year-old children, and two of 5-year-old children. It employs 19 persons. Children may attend from 6:30 a.m. to 7:00 p.m., Monday through Friday.

Noncompliance with Critical Standards

Enrollment procedures. Enrollment forms for 37 children were incomplete in that they lacked information identifying those persons authorized to pick up those children. 34 FR. ADMIN. CODE § 3.06. Ms. Baker promised to correct this "very soon."

Staff qualifications. A review of the employee personnel files revealed that there was no documentation indicating that a background check had been conducted on four of the teachers—Anders, Dunn, Green, and Hanes. 34 FR. ADMIN. CODE § 3.12. Ms. Baker promised to "get to it soon."

Staffing. The staff/child ratios in the 2-year-old and 3-year-old rooms exceeded what is allowed. 34 FR. ADMIN. CODE § 3.13. There were nine children and one staff member in each of the 2-year-old rooms and 11 children and one staff member in each of the 3-year-old rooms. Ms. Baker indicated that this would be corrected "very soon."

Signed: Trent Banks

Trent Banks, FDCF Child Care Center Inspector

COPY OF NOTICE OF DEFICIENCY REPORT GIVEN TO OWNER/OPERATOR

STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES
October 19, 2018, Notice of Deficiencies: Little Tots Child Care Center

This report summarizes the noncompliance with critical standards observed during the October 19, 2018, inspection of the Little Tots Child Care Center, 492 Oak Street, Evergreen Heights, Franklin. This constitutes notice pursuant to § 3 of the Franklin Child Care Center Act.

Noncompliance with Critical Standards

Enrollment procedures. Enrollment forms for 16 children were incomplete in that they still lacked information identifying those persons authorized to pick up those children. 34 FR. ADMIN. CODE § 3.06. Ms. Baker again promised to correct this "right away."

Staff qualifications. A review of the employee personnel files revealed that there was no documentation showing that a background check had been conducted on two of the teachers, Anders and Dunn, or for newly hired teacher Kane. 34 FR. ADMIN. CODE § 3.12. Ms. Baker promised to "get to it soon." She also said that Anders is a holdover from the previous owner and should have had the background check done long ago.

Staffing. There were nine children in one of the 2-year-old rooms, with one staff member. This exceeds the allowable staff/child ratio. 34 FR. ADMIN. CODE § 3.13. Ms. Baker indicated that she was still organizing her staff.

Signed: Jerome Waters

Jerome Waters, FDCF Child Care Center Inspector

COPY OF NOTICE OF DEFICIENCY REPORT GIVEN TO OWNER/OPERATOR

STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES
January 23, 2019, Notice of Deficiencies: Little Tots Child Care Center

This report summarizes the noncompliance with critical standards observed during the January 23, 2019, inspection of the Little Tots Child Care Center, 492 Oak Street, Evergreen Heights, Franklin. This constitutes notice pursuant to § 3 of the Franklin Child Care Center Act.

Noncompliance with Critical Standards

Enrollment procedures. Enrollment forms for five children were incomplete in that they lacked information identifying those persons authorized to pick up those children. 34 FR. ADMIN. CODE § 3.06. Ms. Baker said that she had given the forms to these five parents but had not yet received them back.

Staff qualifications. A review of the employee personnel files revealed that there was no documentation indicating that a background check had been conducted on teacher Anders or newly hired teacher Marin. 34 FR. ADMIN. CODE § 3.12. Teacher Dunn is no longer employed at the center. Ms. Baker again said that Anders was hired by the previous owner and that the background check should have been done then.

Staffing. There were nine 2-year-old children in one room, with one staff member. 34 FR. ADMIN. CODE § 3.13. Ms. Baker said that one child was due to move out of town next week. In anticipation of that child's departure, she had enrolled another 2-year-old, but the parents needed the child to begin attending right away. The attendance of the two children overlapped by one week, putting nine children in the same room. Ms. Baker said that by next week, there will be only eight children in each 2-year-old room, and she will be in compliance with § 3.13.

Meals and nutrition. The inspector observed that as children entered the snack room, milk was available to be picked up. There was no supervision of the food area. 34 FR. ADMIN. CODE § 3.37. Child "A" is allergic to dairy products and should not have milk. The restriction is on the child's enrollment form, but teacher Kane said that she was unaware of any dietary restrictions for Child "A." Ms. Baker said that the teacher knew but must have forgotten on a busy morning.

Signed: Tiffany Hall

Tiffany Hall, FDCF Child Care Center Inspector

COPY OF NOTICE OF DEFICIENCY REPORT GIVEN TO OWNER/OPERATOR

Email Correspondence Regarding Little Tots Child Care Center

From: Jacob Robbins <jsdad@cmail.com>
To: Carla Ortiz <FDCFlicense@Franklin.gov>
Cc: Ashley Baker
Subject: Don't close Little Tots Child Care Center
Date: February 24, 2019, 1:15 pm

I just learned that Little Tots Child Care Center is going to close because you are revoking its license. I have talked with over a dozen parents who are upset. We do not know where to send our kids. My wife commutes to work in an office downtown, and I am a mechanic at the truck depot. The way our hours work out, we need Little Tots because it is the only child care center that meets our schedules. Plus, it is affordable.

I know families that used to rely on relatives to care for their children but were able to send them to Little Tots once Ms. Baker offered discounted rates for those who qualify. Little Tots is a better place for the children than relying on relatives who get sick or just have their own lives to live. It has a good program for the children. My kids love it there. One of my kids was really shy and hesitant to play with other kids but has overcome all that since he started attending Little Tots.

If Little Tots closes, my wife will have to quit her job. That would be bad because her job has the better health benefits. Plus, we need the money she earns to pay for the kids—their dentists' bills, their shoes, clothes, school expenses, extracurricular activities—and we save a bit for emergencies. I heard the same thing from several parents, and I promised them I would write and ask you to reconsider closing this center which we badly need.

I expect the government to care about our children. This is the only low-income child care center within 15 miles of our home. You should be advocating for us, not trying to close down such a wonderful day care.

I am going to get a petition for parents to sign to protest the closing of Little Tots, but I wanted to contact you right away.

Thank you,
Jacob Robbins

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Excerpts from the
FRANKLIN CHILD CARE CENTER ACT

§ 1. Findings and legislative purpose. The legislature of the State of Franklin finds the following:

(a) It is the policy of the State of Franklin to ensure the safety and well-being of preschool-age children of the State of Franklin through the establishment of minimum standards for child care centers.

(b) There is a need for affordable and safe child care centers for the care of preschool-age children whose parents are employed.

(c) There is a need for affordable and safe child care centers for low-income parents in underserved and economically depressed communities.

(d) By providing for affordable and safe child care centers, the State of Franklin encourages employment of parents who, without these child care centers, could not be employed.

* * *

§ 3. Licensing of child care centers.

(a) No person may operate any facility as a child care center without a license issued by the Department of Children and Families upon meeting the standards established for such licensing.

(b) The Director of the Department shall establish licensing standards relating to child care centers. The Director shall inspect each licensed facility at least once each year to determine that the facility is in compliance with the standards of the Department.

...

(f) If the operator of a child care center is in noncompliance with those standards deemed critical, the Director may, after notice, impose penalties including but not limited to a civil fine of at least $500 but not more than $10,000, or revocation of the license of the operator.

Excerpts from Franklin Administrative Code
Chapter 34. Child Care Centers

§ 3.01 General

The Department of Children and Families has determined that the standards listed in this Section apply to child care centers. Because of the actual or potential harm to children, noncompliance with the following regulations will be determined to be critical violations: Enrollment Procedures, Staff Qualifications, Staffing, Program, Structure and Safety, Meals and Nutrition, and Health.

* * *

§ 3.06 Enrollment procedures

. . .

(b) A written enrollment application with the signatures of the enrolling parents shall be on file for each child. The application shall contain the following information:

. . .

(8) Name, address, and telephone number of all persons authorized to pick up the child, which includes both

(i) a primary list of persons authorized to pick up the child regularly and

(ii) a contingency list of persons authorized to pick up the child occasionally, including conditions, if any, for releasing the child to such persons.

* * *

§ 3.12 Staff qualifications

(a) Each child care center shall subject all persons who work with children to criminal background checks and shall require them to authorize the background checks and to submit to fingerprinting. No person who has been convicted of a felony shall be employed at a child care center.

. . .

§ 3.13 Staffing

. . .

(d) The group sizes and ratio of staff to children present in any classroom at any one time shall be as follows:

Children's age	Ratio of staff to children
Two years	1 staff member to 8 children
Three years	1 staff member to 10 children
Four years	1 staff member to 10 children
Five years	1 staff member to 20 children

* * *

§ 3.37 Meals and nutrition

. . .

(g) A child requiring a special diet due to medical reasons, allergic reactions, or religious beliefs shall be provided with meals and snacks according to the written instructions of the child's parents or legal guardian.

Lang v. Lone Pine School District
Franklin Court of Appeal (2016)

Blake and Olivia Lang, parents of Michael, age seven, sued the Lone Pine School District (District) for violating Michael's rights as a child with disabilities and sought preliminary and permanent injunctive relief. The trial court conducted a hearing on the Langs' motion for a preliminary injunction to allow Michael to attend school with a service animal, and granted that motion. The trial court stayed the effective date of the order three weeks to permit the District time to prepare for the presence of the service animal. The District filed an interlocutory appeal from the trial court's grant of the preliminary injunction. This action was brought under the Franklin Education Act. The parties did not raise, nor do we address, the question whether the plaintiffs also have a claim under the Americans with Disabilities Act or the Individuals with Disabilities Education Act.

We review the trial court's decision under the abuse of discretion standard and affirm.

Background

At the hearing, Blake and Olivia testified that during kindergarten and first grade at Lone Pine Elementary School, Michael received various accommodations to address his learning disability, but he still struggled. Last winter, the Langs found a service dog program for children with disabilities. In late spring, Sandy, a service dog, went home with the Langs, after which the Langs noticed a significant improvement in Michael's ability to focus and remain attentive to tasks. In June, an educational specialist recommended that the service dog should accompany Michael to school. The Langs then asked the District to permit Michael to attend school with the service animal.

Cody Black, the educational specialist, testified that he observed Michael with Sandy and found that Sandy provides comfort to Michael and eases his anxieties. This permits Michael to better focus on tasks before him. Black offered the opinion that Michael would perform better in school if Sandy were with him. Specifically, when Michael is accompanied by Sandy, his behavior and social skills improve and he is therefore less likely to be disruptive. Black also testified that service animals provide a similar benefit to disabled students at all levels of education throughout the state, as well as a positive educational lesson for all students.

MacKenzie Downs, principal of Lone Pine Elementary School, testified that the District denied the Langs' request because (1) a district-wide policy prohibits animals in school buildings other than service animals for those with vision impairments, (2) the teachers and staff at Lone Pine are not trained to handle the dog, and (3) there are children at the school who are allergic to dogs. Downs agreed that Michael needs an accommodation and said that she stands ready to support Michael with other methods of assistance. Joe Ramirez, Michael's first-grade teacher, testified that Michael has improved over the course of the past school year despite not having a service animal with him at school. He also testified that the District has purchased several new computers designed for children with learning disabilities. He offered the opinion that using the new computers would help Michael continue to improve, and he saw no need for the service animal to be at school. He confirmed that he and his fellow teachers have received no training in handling service animals.

Preliminary Injunction Standard

Preliminary injunctive relief is an extraordinary remedy and is disfavored by the courts, but this relief may be granted in appropriate cases to preserve the status quo pending a decision on the merits. A party seeking a preliminary injunction must meet this four-factor test: (1) that the moving party is likely to succeed on the merits, (2) that the moving party will suffer irreparable harm if the injunction is not granted, (3) that the benefits of granting the injunction outweigh the possible hardships to the party opposing the injunction, and (4) that the issuance of a preliminary injunction serves the public interest.

(1) Likelihood of success on the merits

First, as to the likelihood of success on the merits, the moving party need not meet the standard of proof required at trial on the merits but must raise a fair question regarding the existence of the claimed right and the relief he will be entitled to if successful at trial on the complaint for permanent relief. A party seeking preliminary relief need only demonstrate that his chances to succeed on at least one of his claims are better than negligible. *Smith v. Pratt* (Fr. Ct. App. 2001). As the court ruled, if the movant shows that his chance of succeeding on his claim for relief is better than a mere possibility, the court should grant the motion for preliminary relief.

The trial court found that there was no dispute that Michael is a child with a disability and requires an accommodation. The trial court found that while there was a dispute as to the type of

accommodation needed and whether the service animal is a proper or necessary accommodation, this was an issue to be decided when the matter is tried on the merits. In the meantime, the Langs have established that the service animal may well be the sort of accommodation needed. Hence, the Langs have shown a fair question regarding the rights of their son and the likelihood of receiving a remedy at trial.

(2) Irreparable harm

An alleged harm or injury is irreparable when the injured party cannot be adequately compensated by damages or when damages cannot be measured by any certain pecuniary standard. In other words, if the moving party, the Langs, could be compensated through damages for the wrong suffered, they would not have suffered an irreparable injury. The alleged harm here is the harm to Michael of continuing to attend school without the accommodation that may be most helpful to him. While the trial court could award damages to the Langs after a trial on the merits, here it found that no amount of monetary damages could substitute for providing Michael the education he needs.

(3) Balance of benefits and hardships

The court must weigh the benefits of granting the injunction against the possible hardships to the party opposing the injunction. Put another way, the court must determine whether greater injury would result from refusing to grant the relief sought than from granting it. The District argues that the trial court failed to properly consider the costs of permitting the animal to accompany Michael.

The trial court acknowledged that the District would suffer hardships if the injunction were granted. The District's policy currently allows service animals for those with vision impairments but not for those with learning disabilities like Michael's. To permit the animal to accompany Michael, the District must expand its policy, prepare its staff for the presence of the animal, educate parents, and determine how to accommodate children with dog allergies. The trial court found that these steps would cost the District time and money---costs that may be substantial. The trial court weighed the harms cited by the District against those of Michael's loss of an accommodation that will help him overcome his learning disability. Michael is in second grade and has already experienced two years of schooling that has been stressful for him. The sooner Michael's needs are met, the better for him, the trial court concluded, especially given that Michael is in an early

formative period. In sum, the trial court weighed the hardships and found that the balance of harms favored the Langs.

(4) Public interest

Fourth, the trial court must consider whether issuance of the preliminary injunction serves the public interest. This criterion cuts both ways on the facts of this case. On the one hand, the District correctly notes that its need to conserve resources and to assure the well-being of all its students serves the public interest. On the other hand, the Langs are also correct that the injunction will serve the statutory purposes of the laws protecting disabled children by permitting the use of service animals in schools. Additionally, the presence of the service animal in Michael's classroom provides important educational lessons for his classmates and for children throughout the school. These children will learn about the important role of service animals in assisting persons with disabilities. The trial court did not err in concluding that issuance of the injunction served the public interest.

The District also argues that the injunction imposes a continuing duty of supervision on the court, which would be an improper use of judicial resources. "Courts should be reluctant to issue injunctions that transform the court into an ad hoc regulatory agency to supervise the activities of the parties." *Franklin Envt'l Prot. Agency v. Bronson Mfg., Inc.* (Fr. Ct. App. 1999). However, the District overstates the difficulty of enforcement. The trial court ordered the District to permit Michael to attend school with the animal. Compliance with this order is simple. If the District admits Michael with the service animal, it will be in compliance with the injunction. If the District refuses to admit Michael with the service animal, it will be in violation of the injunction.

The trial court issued a preliminary injunction effective until trial on the merits. The trial court did not abuse its discretion.

Affirmed.

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.

STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES v. LITTLE TOTS - BRIEF

I. STATEMENT OF THE CASE:

On February 22, 2019, the Franklin Department of Children and Families ("FDCF") notified our client, Ashley Baker, that they intended to revoke the license for her business, Little Tots Child Care Center ("LT"). FDCF cited several issues of non-compliance with the Franklin Child Care Center Act as the grounds for the license revocation. FDCF Letter. Between July 16, 2018 and January 23, 2019, FDCF conducted three inspections on LT and cited several issues. Between each period, Baker had improved the conditions at LT and remains active in attempting to remedy the issues. Baker has filed a motion for injunctive relief to prevent the closure of LT which will cause irreparable harm to numerous families and the local economy. This brief supports Baker's motion for injunctive relief.

II. STATEMENT OF FACTS (Omitted per instructions)

III. LEGAL ARGUMENT

The seminal case in Franklin dealing with the criteria for a preliminary injunction is Lang v. Lone Pine decided in 2016 by the Franklin Court of Appeals in which the family of Michael Lang, a disabled child, sought a preliminary injunction to permit him to bring a service animal to school to further his educational pursuits. Lang v. Lone Pine School District.

According to the Franklin Court of Appeal, "[p]reliminary injunctive relief is an extraordinary remedy and is disfavored by the courts, but this relief may be granted in appropriate cases to preserve the status quo pending a decision on the merits." Lang. A court evaluating a motion for a preliminary injunction must evaluate four criteria, each of which are broken down in the sections that follow.

(a) Baker is likely so to succeed on the merits as she can plainly demonstrate that she has

substantially improved compliance with Franklin code since taking over LT and that based on her demonstrated improvements, a jury or judge may decide that the Director should use their discretion to impose fines versus revocation.

The standard to demonstrate a likelihood of success on the merits is lower than the standard used at trial. In fact, "[t]he moving party need not meet the standard of proof required at trial on the merits but must raise a *fair question* regarding the existence of the claimed right and the relief he will be entitled to if successful at trial on the complaint for permanent relief." Lang. The party must only demonstrate that "chances to succeed are better than negligible" or better than "a mere possibility." Smith v. Pratt.

Here, Baker can plainly demonstrate that her chances of success are better than a "mere possibility." First and foremost, the Franklin Child Care Center Act (FCCA) does not mandate revocation upon violation of the administrative code. In fact, the act leaves sole discretion to the Director, stating that the Director "may" revoke the license. FCCA Section 3. The FCCA contemplates numerous other avenues to remedy issues, including penalties and civil fines. Id.

Of further importance is the overarching purpose of the FCCA. The FCCA was created to ensure the safety and well-being of Franklin's children and is primarily geared towards providing suitable childcare for low-income parents and economically depressed communities. FCCA. In doing so, Franklin seeks to encourage employment of parents. FCCA. It is under these auspices that Baker's claim must be evaluated.

i. Enrollment Procedures

The Franklin Administrative Code requires that certain information on persons authorized to pick up children must be maintained by the child care center. Franklin Admin. Code 3.06. The facts indicate that in the first inspection, Baker was missing information for 37 children. However, the second inspection revealed that 21 of these children now had information and the final inspection revealed that 32 of them had the proper information. Baker does not dispute the missing information, however, the facts indicate that she has collected information to remedy 32 of 37 violations in the span of less than 6 months. Baker has always been responsive to FDCF and has acknowledged the issues and attempted to resolve them. Baker recently took over the child care center from another individual just 8 months ago. In those short months, she has remedied over 90% of the issues she was faced with, demonstrating a respect for the Franklin Administrative Code and an attempt to abide. She has previously requested information for the missing five children and this request is in process. It is likely that a trial court would rule that Baker has substantially complied with the code and that as a result, the Director's discretion should err on the side of leniency. She has demonstrated much more than a mere possibility of success.

ii. Staff Qualifications

The issue is similar with respect to staff qualifications. When Baker started the center, four staff were missing background checks. Three months later, only three remained, including a newly hired teacher (Kane). In the third inspection, there were only two checks missing and again, one was on a newly hired teacher. The facts demonstrate, as above, that Baker has been incrementally improving conditions at LT. Furthermore, the Franklin Administrative Code (Section 3.12) does not provide any timelines for completing background checks. The code simply states that background checks will be completed and no felons will be employed. The code is vague and does not stipulate when such checks should occur. Given the incremental improvements and the absence of any timelines in the code, Baker can again demonstrate more than a mere possibility. Her chances at success are plainly "better than negligible."

iii. Staffing

Section 3.13 of the Franklin Administrative Code provides a ratio for staff sizes to number of children present. In the first inspection report, completed just two months after Baker took over LT, the only issues cited in this space were one additional child per teacher in the 2 and 3 year old classrooms. Baker was compliant will all other issues despite just taking over the operation but the presence of one additional child in two classrooms was cited by FDCF. In the second inspection, there was only one issue in one of the classrooms and again by a single child. Finally, in the last inspection, there was one additional child. However, Baker will testify that the addition of this child was an intent to accommodate a new child who had moved to the area and would be replacing a current child. The overlap was for one week and Baker's effort was an attempt to provide critical childcare to a new family in the community. Again, Baker has demonstrated continuing improvement and the court is likely to find that a jury may side with her as substantially complying with Franklin law such that the Director's discretion should be invoked.

iv. Meals and Nutrition

Franklin Code requires that a child shall be provided with meals and snacks according to the written instructions of the parents. Section 3.37. There was a single issue cited in the violation reports in which a child with a milk allergy had access but did not take milk. The code states only that a child "shall be provided" according to written instructions. Nowhere in the inspection report does it indicate that Baker or her staff actually provided the child with milk. The child is aware that he should not have milk and was never physically given milk, thus the plain language of the statute is not met and Baker will succeed in court.

In general, there is sufficient evidence to find that Baker may succeed on the merits and meet the low bar for a preliminary injunction. In Lang, the family demonstrated that there is a question as to the type of accommodation needed and that was sufficient to meet this prong. Lang. The Lang family simply raised the question as to the suitability of a type of accommodation. Here, Baker simply raises the question of the exercise of the Director's authority. The same result should arise in that the court should grant the preliminary injunction.

(b) Baker and dozens of hard-working local families will suffer irreparable harm if the injunction is not granted; jobs will be lost and families will be unable to afford the bare necessities due to the distance to other low income options.

According to Lang, Irreparable harm exists when "the injured party cannot be adequately compensated by damages or when damages cannot be measured by any certain pecuniary standard." Lang. In Lang, the court ruled that no amount of money could compensate Michael Lang for the education he missed. Lang.

Here, Baker and the community will suffer irreparable harm if the injunction is not granted. The facts indicate that Baker is providing an invaluable service to the community. If the injunction is not granted, she will testify that she will not have any income. Further, she will testify that she will lose a grant from the government to subsidize the center. The grant was given to allow Baker to charge families fees below standard levels so she can support low income families. Loss of the grant will mean that numerous families will lose their childcare option and the local economy will be irreparably harmed. Baker will also testify that she does not believe she will be able to reopen the center if it closes, thus, keeping the center open is critical.

Further, parent Jacob Robbins will testify that his family will personally suffer from employment issues and lost income if LT closes. Robbins wife will have to quit her job if the center clothes and they will lose valuable income to pay for basic necessities of the family, including healthcare and clothing. Robbins will also testify that numerous families are in the same situation and will suffer economically. Additionally, Robbins child, who is shy, has built bonds at the center and will regress.

Overall, if the injunction is not granted, the economy of the area will suffer. Baker will personally suffer as she will lose her business and lose the grant. Furthermore, dozens of families in the area will suffer as the next closest low income center is 15 miles away. Families will lose jobs and be unable to supply necessities for their children. With the loss of jobs will come a loss of spending and therefore other local businesses will suffer. Finally, individual children will lose educational opportunities. In Lang, the loss of educational opportunities was sufficient to meet this criteria and that factor exists here with significant other support.

(c) The benefits of granting the injunction to prevent revocation plainly outweigh the possible hardships to FDCF; the educational and economic detriment to countless families is not worth FDCF's interest in remedying minor violations that are already on their way to being resolved.

In Lang, the court stated that to determine this factor, "the court must determine whether greater injury would result from refusing to grant the relief sought than from granting it." Lang. There, the court weighed costs to the school to accommodate the service animal (training, staff expansion etc.) against the harm resulting to Michael from the lacking education and ruled that the balance favored Michael. Lang.

In this case, the impacts are described in the factor above and they are significant. FDCF will argue that the mission of the Act is to protect the well-being of children and that the failure to follow basic standards leaves them open to risk. They will argue that lacking enrollment exposes children to abduction, lacking staff qualifications exposes children to the risk of predators. They will also argue that disproportionate class sizes provide a low quality education. Finally, they will argue that children exposed to allergic substances may suffer dire health risks.

Here, the balance again favors Baker. While FDCF's concerns are valid, this is not a case where Baker has been egregiously violating standards. She opened this center just 8 months ago and in 6 months, has improved an obviously lacking business (from the former owners) into a pillar of the community that is beloved by families and children. The issues are minimal - an additional student here or there, a signature missing from a form. These issues do not outweigh the hardships families and Baker will face if the injunction is not granted. FDCR is proper to seek to enforce the laws but they must do so in keeping with the generally mission of the Act which is to support low income families. By closing down LT, some very minor violations may be addressed, however, the community as a whole will suffer grievous injury and economic damage as the testimony of Baker and Robbins will prove. The balance clearly favors Baker in this case. In Lang, the impacts to the school were much more significant than those to FDCF and the court still found for Lang. The message of Lang is that education for children is critical as is certainly the case here.

Of additional note is that the State University Early Learning Center has been sending students to observe the program at LT. By keeping LT open, the students from State University will not have a disruption in their education and will be able to complete their assignments observing LT. Closure would likely disrupt classes for several State University Students and the court will consider this impact in favor of Baker.

(d) The issuance of a preliminary injunction serves the public interest as it supports the overarching legislative purpose of the FCCA by promoting well-being and offering affordable child care to low income families.

In assessing this factor, the courts will balance interests of the parties and see which best serves the public. In Lang, the court balanced the school's interest to conserve resources versus the statutory purpose of supporting disabled children's right to an education. Lang. Furthermore, "courts should be reluctant to issue injunctions that transform the court into an ad hoc regulatory agency to supervise the activities of the parties. Franklin EPA v. Bronson.

Again, the public interest favors granting the injunction. As described above, there is a significant public interest to keeping the center open. The economy and educational status of numerous families and children will benefit greatly. FDCF seeks to serve the public interest stated in the Act of "ensuring the safety and well-being of preschool age children of Franklin." Act. However, FDCF focuses too heavily on the well-being at the expense of the other factors stated in the Act. The Act seeks to promote well-being but also to provide affordable child care for low income and economically depressed communities. Act. Baker's efforts clearly demonstrate that she cares about the well-being of the children and this is echoed by the families as Robbins will testify to in court. Furthermore, she promotes the other purposes of the Act by providing critical, low-income child care in the area. The court cannot singularly look to one portion of the legislative purpose and must consider the Act as a whole. When considering the Act as a whole, Baker's injunction request should be granted as being in the public interest. Additionally, the maintenance of the center as being in the public interest is demonstrated by the fact that State University values the center so much they send students to observe. So, not only does LT benefit pre-school children, the existence benefits college aged students as well, thus further amplifying the public interest benefits provided.

There is no indication, as found in Franklin EPA v. Bronson, that the court will need to supervise the activities of LT. While FDCF may argue this as a reason not to find this factor, the activities are being supervised by FDCF which exists for that sole purpose. There is no need for the court to assume that role since the agency already exists for that purpose.

IV. CONCLUSION

Overall, Baker will be able to meet the four factors of the test for a preliminary injunction. She has demonstrated an intent to remedy past issues of non-compliance from a prior owner, is beloved in the community by families and children, and the purpose of the Act will best be served by granting the injunction. Failure to do so will cause irreparable harm to Baker and countless families.

END OF EXAM

February 2019

MPT-2

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In re Remick

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In re Remick

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Daniels & Martin LLP
Attorneys at Law
3200 San Jacinto Blvd., Suite 270
Franklin City, Franklin 33075

MEMORANDUM

TO: Examinee
FROM: Susan Daniels
DATE: February 26, 2019
RE: Andrew Remick matter

Our client, Andrew Remick, was injured when his car stalled on a roadway and was struck by another vehicle. At the time of the accident, Remick was in the backseat of his car with a twisted ankle while a motorist, Larry Dunbar, attempted to jump-start the car with his truck's battery. Another motorist, Marsha Gibson, drove around a bend in the road, was unable to stop in time, and struck Remick's stalled car from behind. As a result of the collision, Remick was seriously injured and his car sustained significant damage.

Remick wants to know if he has any legal recourse. We talked about suing Marsha Gibson, and I suggested that there may also be a claim against Larry Dunbar. Remick told me that he thought the collision could have been avoided if Dunbar had either moved Remick's stalled car to the side of the road, set out emergency flares, or turned on the hazard lights on his truck.

Please draft a memorandum to me analyzing and evaluating whether Remick has a viable negligence claim against Dunbar. In addressing the element of duty, discuss the legal theories under sections 42 and 44 of the Restatement (Third) of Torts. Do not address either Gibson's liability or any defenses based on Remick's conduct.

Do not include a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis. I will ask another associate to assess the claim against Gibson.

Transcript of Interview of Andrew Remick
February 19, 2019

Attorney: Andrew, it's good to meet you. How are you doing?

Remick: I'm feeling better than I was a month ago, but I'm still on the mend.

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

Remick: Well, on January 20, I was driving my car on Highway 290 down by the coast. It's a two-lane road with small towns scattered here and there.

Attorney: Yes, I've been down that way before, and I recall that it's a pretty isolated stretch. How did the accident occur?

Remick: I was on my way back to Franklin City from a weekend trip. It was about 4:30 p.m., and all of a sudden my car stopped working. It just powered off and the dashboard display stopped working. I tried to start the car, but the engine wouldn't even turn over. I tried to turn on the hazard lights, but they didn't work either.

Attorney: Were you able to pull over to the side of the road?

Remick: No, the engine died while I was driving; I didn't have time to pull off the road.

Attorney: What did you do next?

Remick: First, I tried to use my cell phone to call for help, but I couldn't get a signal. I tried to push the car to the shoulder of the road. Since it's a stick shift, it can be moved, but when I tried to move it, I slipped and fell, badly twisting my right ankle. I was in excruciating pain and I could barely put any weight on it. I decided to get into the backseat to keep my ankle elevated and wait for somebody to drive by.

Attorney: And did that happen?

Remick: Yes, about 45 minutes later, a man named Larry Dunbar pulled up on the shoulder of the road next to my car, got out of his truck, and asked me if I needed help. I explained what had happened. Larry said that he was a mechanic and offered to help me.

Attorney: What did he do?

Remick: He went back to his truck, grabbed a toolbox, and began poking around under the hood of my car. I'm not very knowledgeable about cars, but I remember him

mentioning that he thought my car might have a bad alternator, which is part of the car's electrical system, so he was going to try to jump-start the car to see if the alternator was working.

Attorney: Where were you when all this was happening?

Remick: I was still sitting in the back of my car with my right foot elevated on the backseat. By this time, it was starting to get dark. My ankle had swelled up, and I was in a lot of pain. I told Larry I was worried about the fact that it was getting dark and my car was still parked on the road. I asked him if he could push the car off the road. He told me not to worry because he thought he could get the car started pretty quickly. I told him that I had emergency flares in the trunk; he said not to worry.

Attorney: Was he able to jump-start your car?

Remick: I never found out. Right after he attached the jumper cables, I heard another car coming around the bend behind my car and then I heard the screech of tires as the driver hit the brakes, but she couldn't stop in time. She hit my car, with me still in the backseat! The impact was so hard that it slammed me into the back of the driver's seat. I blacked out, and when I woke up, I was in the hospital.

Attorney: I can see a brace on your left shoulder, and your left arm is in a cast and a sling. Is that from the accident?

Remick: Yes, the impact of the collision dislocated my shoulder, broke my arm, and gave me a minor concussion. The ankle I initially twisted when I fell is nearly healed, and my doctor doesn't anticipate any long-term complications from the concussion. But the orthopedist thinks I will probably need surgery to repair the damage to my shoulder, and my broken arm will need to heal for at least another three to four weeks before the cast can be removed. I've been told that I'll have to undergo physical therapy for several months to regain full function in my left arm and shoulder. I'm really worried about my shoulder and my arm. I own a small landscaping business, and most of my work is very physical. Without full use of my shoulder and arm, I can't work.

Attorney: What about Larry Dunbar and the other driver, Marsha Gibson?

Remick: I don't know. I've never met or spoken to the other driver, Marsha Gibson, and I haven't seen or spoken to Larry Dunbar since the accident.

Attorney: What about your car? How badly was it damaged?

Remick: It turns out that my car stalled because of a bad alternator, which would have cost a few hundred dollars to fix. But now it's going to cost at least $4,500 to repair the damage caused by the collision.

Attorney: Was a police report generated for the accident?

Remick: I don't know. In the month since the accident, I've been focused on my recovery and trying to keep my landscaping business afloat. I think that the accident could have been avoided if Larry had taken the time to move my car to the side of the road or if he had at least turned on the hazard lights on his truck—you know, the "flashers"—or used my emergency flares. If he had done any of those things, I doubt that the other driver would have hit my car, and I would be nursing a sore ankle instead of facing shoulder surgery and months of rehabilitation.

Attorney: You may have a case against Larry Dunbar as well as against the driver who hit you. I'll get back to you as soon as we have completed our initial assessment of your case.

Remick: Thanks. I really appreciate your assistance.

Daniels & Martin LLP
Attorneys at Law
3200 San Jacinto Blvd., Suite 270
Franklin City, Franklin 33075

MEMORANDUM TO FILE

FROM: Peter Nelson, Private Investigator
DATE: February 22, 2019
RE: Andrew Remick matter

As requested, I have obtained a copy of the police report for the car accident that occurred on January 20, 2019. I also interviewed Marsha Gibson, the driver of the SUV that rear-ended Remick's stalled car, and gathered some initial background information about Larry Dunbar. Below is a summary of my findings.

Police Report:

- A two-car collision involving Remick's four-door passenger car and Gibson's SUV occurred at approximately 6:00 p.m. on January 20, 2019, on a relatively remote, two-lane stretch of Highway 290 between the towns of Castlerock and Highwater.
- At the time of the collision, Remick's car was stalled on the northbound lane of the highway, approximately 75 feet beyond a bend in the road.
- Remick was sitting in the backseat of his car at the time of impact.
- Dunbar's truck was parked on the shoulder of the northbound lane next to Remick's car.
- The hoods of Remick's car and Dunbar's truck were up, and Dunbar was in the process of jump-starting Remick's car battery.
- Gibson was driving northbound on Highway 290 at approximately 50 mph (the speed limit is 55 mph).
- Skid marks measured at the scene of the accident indicate that Gibson immediately applied the brakes on her vehicle but was unable to avoid hitting Remick's car. Her estimated speed at impact was 25 mph.
- The force of the collision caused Remick to slam into the driver's seat in front of him, as a result of which he suffered a concussion, a dislocated shoulder, and a broken arm. He was transported by ambulance to Castlerock Hospital for medical treatment.

- Neither Gibson nor Dunbar was injured by the collision.
- No persons were cited or ticketed for the accident, although the responding police officer noted that the accident occurred at dusk and that neither Remick's car nor Dunbar's truck had its hazard lights turned on.

Marsha Gibson's Statement to Police:

- Gibson claims that she was driving under the speed limit at the time of the collision.
- Gibson did not see Remick's unlit car until she was about 40 feet away from it because it was getting dark outside and Remick's car was parked just beyond a bend in the road.
- Gibson estimates that she was driving at about 25 to 30 mph when she collided with Remick's car.
- Gibson was not injured in the accident.

Larry Dunbar Background Information:

- Dunbar is 35 years old and currently works in cable TV sales.
- Dunbar is a former automotive mechanic, having spent three years working for Franklin City Automotive from 2012 to 2015.

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Excerpts from Restatement (Third) of Torts (2012)

§ 42 Duty Based on Undertaking

An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if:

(a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or

(b) the person to whom the services are rendered . . . relies on the actor's exercising reasonable care in the undertaking.

Comment:

* * *

c. . . . [A]ffirmative duty based on undertaking . . . The duty provided in this Section is one of reasonable care. It may be breached either by an act of commission (misfeasance) or by an act of omission (nonfeasance).

d. Threshold for an undertaking. An undertaking entails an actor voluntarily rendering a service . . . on behalf of another . . . . The actor's knowledge that the undertaking serves to reduce the risk of harm to another, or of circumstances that would lead a reasonable person to the same conclusion, is a prerequisite for an undertaking under this Section.

* * *

§ 44 Duty to Another Based on Taking Charge of the Other

An actor who, despite no duty to do so, takes charge of another who reasonably appears to be:

(1) imperiled; and

(2) helpless or unable to protect himself or herself

has a duty to exercise reasonable care while the other is within the actor's charge.

Comment:

* * *

c. Distinctive feature of rescuer affirmative duty. This Section is limited to instances in which an actor takes steps to engage in a rescue by taking charge of another who is imperiled and unable

adequately to protect himself or herself. The duty is limited in scope and duration to the peril to which the other is exposed and requires that the actor voluntarily undertake a rescue and actually take charge of the other.

* * *

g. Taking charge of one who is helpless. The rule stated in this Section is applicable whenever a rescuer takes charge of another who is imperiled and incapable of taking adequate care. The rule is equally applicable to one who is rendered helpless by his or her own conduct, including intoxication; by the tortious or innocent conduct of others; or by a force of nature. The rule, however, requires that the rescuer take charge of the helpless individual with the intent of providing assistance in confronting the then-existing peril.

Weiss v. McCann
Franklin Court of Appeal (2015)

Plaintiff David Weiss, individually and in his capacity as guardian for Janet Weiss, appeals the dismissal of his personal injury action against Sue McCann for serious injuries his wife sustained at a party hosted by McCann. The issue on appeal is whether the Restatement (Third) of Torts §§ 42 and 44, collectively referred to as the "affirmative duty" or "Good Samaritan" doctrine, should apply to a homeowner. We find that under the specific facts of this case the Good Samaritan doctrine does apply. Accordingly, we reverse the order of the trial court dismissing the action.

The relevant facts and procedural history are as follows: On December 29, 2013, McCann hosted a party at her home in her basement recreation room. Janet Weiss, a neighbor, was among the attendees. Both McCann and Weiss had been drinking alcoholic beverages that evening. When the party ended and everyone had left except Weiss and McCann, Weiss fell, struck her head on the concrete floor, and lost consciousness. McCann revived Weiss and placed her on a couch. The next morning Weiss awoke and walked home, without informing McCann that she was leaving. At 9:30 a.m., McCann called Weiss's home to see whether Weiss had arrived home safely. McCann spoke to Weiss's husband, David, who said that Weiss was home and asleep. During the call, McCann did not mention that Weiss had fallen and hit her head. McCann called again at 11:30 a.m. to check on Weiss and for the first time informed David of his wife's fall and injury. David checked on Weiss and was unable to wake her, so he immediately called 911. An ambulance took Weiss to the hospital, where she had emergency brain surgery for a subdural hematoma. As a result of the injury, she suffered permanent brain damage. David Weiss brought this personal injury action against McCann, alleging that McCann was negligent in caring for Weiss after her fall and injury. McCann moved to dismiss the complaint for failure to state a cause of action, and the trial court granted the motion.

On appeal, the plaintiff claims that his complaint properly stated a cause of action in negligence based on the common law "affirmative duty" or "Good Samaritan" doctrine set forth in Restatement (Third) of Torts §§ 42 and 44, which has been adopted by the Franklin courts. To determine whether the trial court properly granted McCann's motion to dismiss, this court must consider as true all of the well-pleaded material facts set forth in the complaint and all reasonable inferences that may be drawn from those facts. *Davis v. Humphries* (Franklin Sup. Ct. 1996).

As a preliminary matter, we note that to establish a viable cause of action in negligence, a plaintiff's complaint must allege the following four elements: (1) duty: a legal obligation requiring the actor to conform to a certain standard of conduct; (2) breach of duty: unreasonable conduct in light of foreseeable risks of harm; (3) causation: a reasonably close causal connection between the actor's conduct and the resulting harm; and (4) damages, including at least one of the following: lost wages, pain and suffering, medical expenses, or property loss or damage. *Fisher v. Brawn* (Franklin Sup. Ct. 1998).

On appeal, the plaintiff first claims that he presented facts establishing a duty under the Restatement (Third) of Torts § 42, which provides, "[a]n actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if: (a) the failure to exercise [reasonable] care increases the risk of harm beyond that which existed without the undertaking or (b) the person to whom the services are rendered . . . relies on the actor's exercising reasonable care in the undertaking."

We conclude that the language of § 42 envisions the assistance of a private person, such as McCann, to a person in need of aid. Based on the plain language of the Restatement, we will not, as a matter of law, preclude the application of § 42 to a homeowner such as McCann.

We now consider whether § 44 of the Restatement (Third) of Torts should apply as well. Section 44 provides that "[a]n actor who, despite no duty to do so, takes charge of another who reasonably appears to be: (1) imperiled; and (2) helpless or unable to protect himself or herself has a duty to exercise reasonable care while the other is within the actor's charge." Section 44 applies "whenever a rescuer takes charge of another who is imperiled and incapable of taking adequate care," including "one who is rendered helpless by his or her own conduct, including intoxication." § 44, comment g. Based on this language, it is clear that § 44 may apply to the homeowner McCann in this case.

The plaintiff's complaint alleges that McCann did not contact Weiss's family or seek medical assistance for Weiss after she fell and then failed to inform the plaintiff of Weiss's fall and injury until nearly noon the next day, at which point the plaintiff was unable to revive his wife. Based on our review of the language of the Restatement and the applicable case law, we cannot, as a matter of law, preclude the application of § 44 to McCann.

Reversed and remanded with instructions to the trial court to reinstate the complaint.

Thomas v. Baytown Golf Course
Franklin Court of Appeal (2016)

This interlocutory appeal stems from a wrongful death action brought by the surviving family members of Seth Thomas, who was killed in an automobile accident. Defendant Baytown Golf Course (Baytown) petitions for review of the trial court's order striking Baytown's notice that another individual, Glenn Parker, who was not named in this lawsuit, was a participating cause of the fatality and hence liable for comparative apportionment of damages under Franklin law. We conclude that Parker could be liable as a nonparty for the fatal accident after Parker assumed the duty of a "Good Samaritan" to use reasonable care for Thomas, but in fact placed Thomas in a worse position by giving his keys back to him and allowing him to drive away.

FACTS

On June 3, 2012, Thomas and Parker played golf and consumed alcoholic beverages at Baytown. Because Thomas appeared intoxicated, a Baytown employee took possession of Thomas's car keys. Parker then stepped forward and offered to drive Thomas home. With that assurance, and observing Parker's apparent lack of impairment, the employee gave Thomas's keys to Parker. Once in the parking lot, Parker returned the keys to Thomas. Thomas left the golf course in his own car and crashed into a tree. He died from his injuries.

The plaintiffs brought a wrongful death action against Baytown alleging that Baytown's sale of alcohol to Thomas was the cause of the accident. Baytown filed a notice of nonparty at fault, alleging that Parker was at least partially at fault because he volunteered to drive Thomas home and then gave the car keys back to Thomas. The plaintiffs filed a motion seeking to strike Baytown's notice of nonparty at fault. The trial court granted the motion, and this interlocutory appeal followed. For the reasons set forth below, we agree with Baytown that the trial court erred, and so reverse and remand.

DISCUSSION

Rule 28 of the Franklin Rules of Civil Procedure provides that a defendant can give notice that a person or entity not a party to the action is allegedly wholly or partially at fault for the purpose of determining the respective liability of all actors under Franklin's comparative negligence laws. The jury is required to consider the fault of all persons who contributed to the alleged injury, regardless of whether the person was, or could have been, named as a party to the

suit. Once a defendant designates a person as a nonparty at fault by filing the appropriate notice with the trial court, the defendant can offer evidence of the nonparty's negligence and argue that the jury should attribute some or all fault to the nonparty, thereby reducing the defendant's percentage of fault and consequent liability.

The issue, then, is whether Parker's actions contributed to Thomas's death, rendering Parker wholly or partially at fault. To find a person at fault in a negligence action, four elements must be shown: (1) duty, (2) breach of duty, (3) causation, and (4) damages. *See Fisher v. Brawn* (Franklin Sup. Ct. 1998). A duty must be recognized by law and must obligate a defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. *Id.*

Baytown argues that Parker had a duty to Thomas under the Good Samaritan doctrine set forth in the Restatement (Third) of Torts §§ 42 and 44. In its docket entry striking Baytown's notice of nonparty at fault, the trial court stated, "Mr. Thomas was not . . . 'helpless' as that term is used in § 44. He was simply too drunk to drive." We disagree. The determination of whether an individual is "imperiled" and "helpless" must be made within the context of each case. A person who is drunk and slumped in a chair at home in front of the television may not be considered imperiled and helpless. However, we reach the opposite conclusion if the same person is put behind the wheel of an automobile and sent down the road. Moreover, comment g to § 44 specifically provides that § 44 applies where a person "is rendered helpless by his or her own conduct, including intoxication."

Although the trial court's order focused on § 44, we find that both sections of the Restatement are applicable to the facts of this case. The major difference between the sections is the requirement of § 44 that the person be in an imperiled, helpless position. Section 42 has no such requirement, but does require either that the actor's actions increased the risk of harm or that the victim relied on the actor. In either event, we believe that the Good Samaritan doctrine applies when an actor, otherwise without any duty to do so, voluntarily takes charge of an intoxicated person who is attempting to drive a vehicle and, because of the actor's failure to exercise reasonable care, changes the other person's position for the worse. The rule applies here because if Parker had not said that he would see that Thomas got home safely, Baytown might have taken steps that would have avoided the accident.

The plaintiffs argue that Parker did not have a duty to Thomas because it was Baytown

that first provided Thomas with the alcohol that rendered him too drunk to drive. The plaintiffs contend that the duty of care that Baytown owed to Thomas as a patron in its bar is not one that can be delegated. We agree that Baytown's duty cannot be delegated. Baytown, however, is not trying to delegate its responsibilities to Parker. Rather, Baytown argues, and we agree, that the duties owed by Baytown and Parker are independent of each other.

When Parker took charge of Thomas for reasons of safety, he thereby assumed a duty to use reasonable care. Thomas was too drunk to drive. Baytown's employees had taken charge of Thomas and effectively stopped him from driving. Parker's offer deterred the employees from their efforts to keep Thomas out of his automobile. Rather than use reasonable care to drive Thomas home or make other arrangements, Parker discontinued his assistance and put Thomas in a worse position than he had been in when Baytown's employees had possession of his keys. A reasonable fact-finder could conclude that Parker's actions contributed to Thomas's death, rendering Parker wholly or partially at fault.

We conclude that the trial court erred in striking Parker as a nonparty at fault and therefore reverse and remand for further proceedings.

Boxer v. Shaw
Franklin Court of Appeal (2017)

Plaintiff Karen Boxer, as personal representative of the estate of Tim Boxer, appeals the dismissal of her wrongful death action against defendant Harry Shaw. Tim Boxer was struck and killed by a truck after exiting Shaw's car on the side of a highway. The trial court granted Shaw's motion for a directed verdict. We affirm.

At trial, Shaw testified that he and Boxer were coworkers who often socialized together. On the day of the accident, he and Boxer finished work early, around 3 p.m., and decided to go fishing. Shaw offered to drive because Boxer's car was in the shop. The two men fished for about three hours. They then went to a marina, watched the boats, and played pool until about 10 p.m., at which time they decided to go to a nightclub. They were driving on Highway 101 to the club when they got into a heated argument. Boxer started cursing and demanded that Shaw stop the car. Shaw pulled onto the shoulder of the road, and Boxer exited the car and lit a cigarette. Shaw has stated that he thought Boxer would get back in the car after smoking his cigarette, but Boxer refused to do so. Shaw decided to briefly drive away to allow Boxer to "cool off." Shaw drove one mile down the road and then returned. In the meantime, Boxer attempted to cross the highway and was struck by a truck.

Shaw testified that, although the two men had consumed a few beers while playing pool, Boxer did not appear to have had too much to drink. The toxicology and autopsy reports confirmed that Boxer's blood alcohol level was under the legal limit. It is undisputed that the accident occurred around 10:30 p.m., it was dark with misting rain, there were no lights on the highway, and Boxer was wearing dark clothing. The investigating police officer testified that the shoulder of the highway was "extremely wide" and agreed that there was ample room for a pedestrian to walk there.

On appeal, the plaintiff argues that the trial court erred by directing a verdict for Shaw on the issue of duty. The plaintiff contends that she presented evidence that Boxer was "helpless" and that Shaw had "taken charge of" Boxer after the two men left work to go fishing and thereby had assumed a duty to leave Boxer in no worse a position than when he took charge of him. We must determine whether the trial court erred in finding that Shaw owed no duty of care to Boxer because Boxer was not "helpless" and Shaw did not "take charge of" him.

In reviewing a ruling granting a directed verdict, the evidence and all reasonable

inferences therefrom must be viewed in the light most favorable to the party against whom the verdict was directed. *Ellis v. Dowd* (Franklin Sup. Ct. 1995). In a negligence action, if there is no duty, then the defendant is entitled to a directed verdict. *Id.*

An affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. The common law ordinarily imposes no duty on a person to act; however, where an act is voluntarily undertaken, the actor assumes the duty to use reasonable care. *Id.*

The Restatement (Third) of Torts § 44 provides that an actor who, despite no duty to do so, takes charge of another who reasonably appears to be imperiled and helpless or unable to protect himself or herself has a duty to exercise reasonable care while the other is within the actor's charge.

Under the Restatement, an intoxicated person is considered helpless. § 44 comment g. However, the undisputed evidence in this case indicates that Boxer was not "helpless." The mere fact that Boxer's car was being repaired did not render him helpless, and his blood alcohol level was below the legal limit. There was testimony from a family member that Boxer was in the midst of a nasty divorce and that he was very upset about the breakup of his marriage. However, the fact that a person may be distraught about a situation does not render that person "helpless" without additional evidence of actual impairment.

Even if we assume that Boxer was "helpless" under the circumstances, to show that Shaw "took charge" of Boxer, the plaintiff would have to show that Shaw through affirmative action assumed an obligation or intended to render services for Boxer's benefit. *See, e.g., Thomas v. Baytown Golf Course* (Franklin Ct. App. 2016) (golfer assumed duty by telling golf course employee who had taken car keys from an intoxicated man that the golfer would drive the man home); *Sargent v. Howard* (Franklin Ct. App. 2013) (driver could be held liable for injuries sustained by ill passenger who was attacked after being left in an unlocked, running vehicle at night while driver used a convenience store restroom).

Viewing the evidence in the light most favorable to the plaintiff, the facts do not indicate that Shaw, through affirmative action, assumed an obligation or intended to render services for Boxer's benefit. We disagree with the plaintiff's claim that Shaw "took charge of" Boxer when the two men left work to socialize on the day of the accident, nor did he do so at any point throughout the remainder of the day. Boxer was not legally intoxicated and he was not helpless.

Accordingly, Shaw could not have assumed an obligation to render services for Boxer's benefit. Granted, on the day of the accident, Shaw drove. However, Shaw's driving is not evidence of the assumption of an affirmative obligation by Shaw to take care of Boxer. It is undisputed that both men mutually agreed to go fishing, visit the marina, and head to the nightclub. There is no suggestion that Shaw directed when and where he and Boxer would go, or that he intended to "take charge of" Boxer.

Because the plaintiff presented no evidence from which a jury could find that Boxer was "helpless" or that Shaw "took charge of" him, the trial court correctly concluded that Shaw had no duty to Boxer and properly directed the verdict for Shaw.

Affirmed.

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.

TO: Susan Daniels

FROM: Examinee

DATE: February 26, 2019

RE: Andrew Remick matter - negligence claim against Dunbar

I. Task Requested

You have asked that I draft a memorandum analyzing and evaluating whether Andrew Remick has a viable negligence claim against Larry Dunbar. Specifically, when addressing the element of duty, you have asked that I discuss the legal theories under sections 42 and 44 of the Restatement (Third) of Torts. You have further instructed me not to address either Marsha Gibson's liability or any defenses based on Mr. Remick's conduct.

II. Question Presented

Whether Andrew Remick has a viable negligence claim against Larry Dunbar.

III. Answer

A. Duty

1. Duty under Restatement of Torts (Third) section 42

Section 42 of the Restatement of Torts (Third) states that "an actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other conducting the undertaking if: (a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or (2) the person to whom the services are rendered...relies on the actor's exercising reasonable care in the undertaking." Comment c states "the duty provided in this section is one of reasonable care. It may be breached either by an act of commission or by an act of omission." Moreover, comment d indicates that "an undertaking entails an actor voluntarily rendering a service...on behalf of another...The actor's knowledge that the

undertaking serves to reduce the risk of harm to the other, or of circumstances that would lead a reasonable person to the same conclusion, is a prerequisite for an undertaking under this section." The Franklin Court of Appeals has provided guidance on section 42. In *Weiss*, the Franklin Court of appeals concluded that "the language of section 42 envisions the assistance of a private person...to a person in need of aid. In *Thomas*, the Franklin Court of appears pointed out that section 42 has no requirement that the person be in an imperiled, helpless position. Instead, section 42 requires either that the actor's actions increased the risk of harm or that the victim relied on the actor. (Thomas). Under section 42, to show that Dunbar took charge of Remick, Remick would have to show that Dunbar through affirmative action assumed an obligation or intended to render services for Dunbar's benefit. (Boxer citing Sargent and Howard).

Here, Remick can establish that Dunbar rendered services to Remick and that Dunbar knew or should have known that the services would reduce the risk of physical harm to Remick. In Remick's matter, Dunbar was an auto mechanic who had worked at Franklin City Automotive for 3 years. Remick was stranded on the side of the road because his car was having mechanical issues (Remick statement). Remick was in the back seat of his car because he had seriously injured his ankle trying to move his car off the road (Remick statement). When Dunbar stopped and was attempting to voluntarily aid Remick, Remick told Dunbar that he was worried that it was getting dark and that his car was still stuck out on the road (Remick statement). Even though Remick told Dunbar this, rather than attempt to get Remick's car off the roadway, Dunbar continued to try and fix the mechanical problem with the car (Reick statement). Additionally, Remick told Dunbar that he thought his alternator was going out because all his lights had shut off and his engine wouldn't turn over. (Remick statement). However, even with his experience being an auto mechanic and knowing that if the alternator was out the car likely couldn't be jumped, Dunbar continued to attempt to jump Remick's car. Based on these facts, section 42 of the Restatement (Third) is likely satisfied because once Dunbar began helping Remick and due to the fact Remick was injured and of no help himself, Remick relied on Dunbar to get his vehicle in a safe position. Therefore, Remick possesses a strong argument that Dunbar owed him a duty.

2. Duty under Restatement of Torts (Third) section 44

Section 44 of the Restatement of Torts (Third) states: "an actor who, despite no duty to do so, takes charge of another who reasonably appears to be: (1) imperiled; and, (2) helpless or unable to protect himself or herself has a duty to exercise reasonable care while the other is within the actor's charge." Comment C states that "this section is limited to instances in which an actor takes steps to engage in a rescue by taking charge of another who is imperiled and unable adequately to protect himself or herself. The duty is limited in scope and duration to the

peril to which the other is exposed and requires that the actor voluntarily undertake a rescue and actually take charge of the other." Additionally, comment g states "the rule stated in this section is applicable whenever a rescuer takes charge of another who is imperiled and incapable of taking adequate care. The rule is equally applicable to one who is rendered helpless by his or her own conduct...or by a force of nature. The rule, however, requires that the rescuer take charge of the helpless individual with the intent of providing assistance in confronting the then-existing peril." In *Thomas*, the Franklin Court of Appeals found that "the determination of whether an individual is "imperiled" and "helpless" must be made within the context of each case." The Court opined that if a person who is drunk in vehicle is sent down the road, that person would be considered imperiled and helpless." (Thomas).

Here, Mr. Remick could likely successfully argue that Mr. Dunbar owed him a duty of care arising from Section 44 of the Restatement. The following facts would support this argument: (1) According to the police report, the accident occurred on a relatively remote stretch of two-lane highway; (2) Also according to the police report, Mr. Remick's vehicle was stalled in the northbound lane about 75 feet from a bend in the road; (3) Dunbar's truck was parked on the shoulder next to Remick's truck (police report); (4) Dunbar undertook the action of jump starting Remick's vehicle (police report); (5) Remick was in his back seat at the time of the accident (police report); (6) The accident occurred around dusk; however, neither Dunbar's truck nor Remick's car had its hazard lights turned on (police report); (7) Remick's car died on him, and he was unable to turn the engine over or turn on his flashers (Remick statement); (8) The engine died while Remick was driving so he could not pull over onto the side of the road (Remick statement); (9) Remick could not get cell service where he was stalled (Remick interview); (10) Remick tried to move the vehicle on his own, but while doing so, he seriously injured his ankle (Remick statement); (11) Because of his ankle injury, Remick climbed into his back seat and elevated his ankle since he was in excruciating pain (Reick statement); (12) Dunbar pulled up by Remich 45 minutes after Remick's car had stalled and asked if Remick needed help (Remick statement); and, (13) Dunbar tried to jump start the car even though Remick asked Dunbar to try and push the car off the road since it was getting dark (Remick statement). Based on these facts, Remick can establish that even though Dunbar had no duty to do so, he took charge of Remick because Remick appeared to be imperiled (his car was stalled and he was injured), and Remick was helpless (he had injured his ankle so severely that he could not attempt to move his car, he could not attempt to walk for help, and he could not attempt to walk somewhere else for cell phone service). Additionally, as required on section 44, Dunbar voluntarily undertook aiding Remick. Dunbar stopped and asked Remick if he needed help. Remick did not flag Dunbar down and instruct him to help him. Moreover, as section 44 requires, without question, Dunbar's intent in stopping and trying to jump start Remick's car was to provide Remick assistance with the then-existing peril of Remick's car being stalled on

the highway at or near dark very near to a bend in the road. Therefore, an analysis of the facts of Remick's accident and the case law in Franklin finds that Dunbar would have owed Remick a duty of care under section 44.

B. Breach

Under both section 42 and 44 of the Restatement, the applicable standard of care is that of a reasonable person. Here, based on the facts, Remick has a strong argument that Dunbar did not act as a reasonable person would have in the situation. First, even though Dunbar knew it was getting dark out, Remick's vehicle was sitting on the road near a curve, and Remick was helpless, Dunbar failed to place an flashing lights on his vehicle. Second, even though Remick informed Dunbar that he thought his car needed to get moved off the road and that he thought the alternator was the problem, Dunbar continued to try and jumpstart the car rather than take any other measures to get the car off the road. Because of this, Remick will have a strong argument that Dunbar breached his duty of reasonable care.

C. Causation

In order to establish causation, Remick will have to show a "reasonably close causal connection between [Dunbar's] conduct and the resulting harm." (Weiss). Here, Remick can establish causation because there is a reasonably close causal connecting between Dunbar's conduct or misconduct and the harm that resulted to Remick. Had Dunbar placed his flashing lights on his vehicle, the driver who crashed into Dunbar would have likely seen Remick's vehicle on the road and avoided the collision. Additionally, had Dunbar attempted to move the vehicle rather than jump starting it when he likely knew through his training and education that Remick's car could not be jump started since it had an alternator issue, then Gibson would not have crashed into Remick and caused him injury since Remick's car would have been off the road. Finally, Dunbar could have moved closer to the corner and could have warned motorists of Remick's stalled car on the road. Had he done this, Gibson would not have struck Remick, and Remick would not have sustained injury. As such, Remick will have a strong argument that Dunbar's actions were the cause of his injury.

D. Damages

Remick will be able to meet the damages requirement since he dislocated his shoulder, broke his arm, and suffered a concussion as a result of the accident (Remick Statement). Additionally, because of Remick's injuries, he will not be able to run his landscaping business, so he will lose income (Remick statement). Finally, since Remick's vehicle was damaged in the accident, he will be able to claims those damages as well (Police report). Therefore, Remick will be able to satisfy the damages element of negligence.

IV. Conclusion

In conclusion, Remick has a viable claim of negligence against Dunbar based on the above. Specifically, he will be able to establish that Dunbar owed him a duty under both sections 42 and 44 of the Restatement (Third) of Torts.

END OF EXAM

February 2019

MEE Question 1

One year ago, a man was injured when the car in which he and a woman were traveling slid off an icy highway during a winter storm and overturned. At the time of the accident, the woman was driving the car. The man was sitting in the front passenger seat, wearing his seat belt. The woman was driving 40 mph at the time of the accident, although the posted speed limit was 50 mph.

The man and the woman were rushed to a local hospital in its ambulance. There, hospital surgeons performed emergency surgery on the man. The man remained in the hospital for 10 days following his admission. Numerous medical instruments were used during his surgery and subsequent hospitalization, including needles, clamps, and surgical tools. However, he did not receive a blood transfusion or any blood products.

Three days after the man was released from the hospital, he developed a fever and visited his personal physician, who is not affiliated with the hospital. The physician ordered routine blood tests. The tests revealed that the man had a serious infection that is transmitted in nearly all cases through exposure to either contaminated blood products or improperly sterilized medical instruments (needles, clamps, surgical tools, etc.) that come into contact with a patient's blood. There are, however, other possible sources of the infection in a hospital environment, such as a failure of staff to follow proper handwashing techniques to avoid transmitting infection from one patient to another and staff failure to properly identify and discard certain used medical instruments that cannot safely be sterilized.

Infections occurring in individuals who have not received a blood product and have not been hospitalized during the period of likely exposure are possible but rare. The physician told the man that he "must have contracted this infection at the hospital" because the period between infection and symptom development is 10 to 13 days and the man was a patient at the hospital during the entire relevant period. The physician also stated that "at hospitals that have adopted medical-instrument sterilization procedures recommended by experts, cases of this infection have been almost completely eliminated." The man has no history of intravenous drug use, and he did not receive any medical treatment for several months before his hospital stay. All sterilization procedures at the hospital are performed by hospital employees. However, the particular sterilization procedure used while the man was hospitalized cannot be determined because, while the hospital now uses the sterilization procedure recommended by experts, there is no record of when it started using that procedure.

The man has sued the woman and the hospital, alleging negligence. Neither defendant is judgment-proof, and this jurisdiction has no automobile-guest statute. The parties have stipulated that the man's damages for the injuries he suffered in the accident are $100,000 and his damages from the infection he contracted are $250,000.

1. Could a court properly find that the woman was negligent even though she was driving below the posted speed limit? Explain.

2. Could a court properly find that the woman is liable for the man's damages resulting from the infection? Explain.

3. Could a court properly find that the hospital is liable for the man's damages resulting from the infection? Explain.

4. If a court found that both the woman's negligence and the hospital's negligence caused the man's infection, could the woman's liability be limited to $100,000 for injuries the man suffered in the accident? Explain.

1. Woman's Negligence

Here, the issue is whether a court could properly find that the woman was negligent even though she was driving below the posted speed limit.

Negligence requires an analysis of duty, breach, causation (both actual and proximate), and damages. To prove there is a duty, a plaintiff must show that a defendant acted as a reasonable person would in the same or similar circumstances and that duty was breached when the plaintiff did not adhere her conduct to that of a reasonable person, thus causing injury. From the duty and breach, a plaintiff must show the duty and breach caused the injury, and that the injury was foreseeable outgrowth. Finally, damages must be proven.

Here, the woman was driving 40 mph at the time of the accident, which was 10 miles below the posted speed limit. The woman was driving in a snowstorm, and the roads were icy. Although there is not automobile-guest statute in this jurisdiction (which would have placed a heightened duty on the woman to prevent injury), the man may still be able to prove the woman was negligent. In order to prove there was a duty, the man must show that a reasonable person in the same or similar circumstances would not have been driving 40 mph in the middle of a snowstorm on a highway. If this was an unreasonable speed or an objective person would not have been driving that speed, the man may be able to prove that the woman had a duty, that she breached the duty by driving 40mph (even though it was under the posted speed limit), and that he suffered injuries as a result.

Thus, a court could properly find that the woman was negligent, even though she was driving below the posted speed limit.

2. Woman's Liability

Here, the issue is whether the court could properly find that the woman is liable for damages resulting from the infection.

If a person can establish duty and breach, they must also prove that the defendant is the cause in fact and proximate cause of the damages sustained. Cause in fact looks at whether the damages were caused by the defendant's negligence (but for a defendant's negligence the person would not have been injured). Proximate cause looks at whether the damages were foreseeable outgrowth of the negligence. A tortfeasor must take a plaintiff as they find him (the eggshell plaintiff)--so even if the damages were unexpected because of a unique condition of

the plaintiff, the defendant is liable for all of the damages.

Here, the woman was the cause of the man's injuries. But-for her driving (and negligence in speeding in icy conditions), the car would not have flipped and the man would not have been injured. It was foreseeable that the man would end up in the hospital as a result of a car crash--car crashes have a tendancy for these kind of injuries. Additionally, medical malpractice is generally a foreseeable outgrowth of any sort of injury that occurs requiring hospitalization. Even if the man was particularly susceptible to contracting the infection the woman could still be found liable, because of the eggshell plaintiff rule (she must take him as she finds him).

Thus, the man could show cause and proximate cause, and a court could properly find the woman liable the man's damages resulting from the infection.

3. Hospital Liability for Damages

Here, the issue is whether the hospital can be liable for the damages the man sustained as a result of the infection he contracted.

a. Res Ipsa Loquitor

Res Ipsa Loquitor is a legal theory of negligence for when a person is unable to prove the source of the negligence but suffers an injury as a result of negligence. The elements for res ipsa loquitor require that (1) the injury does not generally occur in the absence of negligence; (2) the source of the injury was in the defendant's control; and (3) the plaintiff did not contribute to the negligence.

Here, the man can prove that this type of injury occurs through contaminated blood products or improperly sterilized medical instruments that come into contact with a patient's blood, or it can be transmitted from one patient to another because of improper handwashing or staff failure to identify and discard certain used medical instruments. All of this ways of contracting the infection would not occur if the hospital was not negligent in its processes. The man likely contacted the infection at the hospital, because the period between infection and symptom development is 10-13 days, which was the entirety of the time the man spent in the hospital. He did not come into anything that would have caused the infection after he was released from the hospital. This type of infection generally does not occur outside hospitals because of the way it is contract, unless there is a history of intravenous or drug use. The man does not have a history of IV drug use. Although the hospital uses the sterilization procedures used by experts, the hospital does not have a record of when they began using the recommended procedure.

Thus, a court could properly find the hospital liable for the man's damages resulting from the infection.

b. Alternative Theory of Negligence

The alternative theory of negligence requires that a plaintiff show there are (1) multiple defendants; (2) the defendants are known and are a small class; and (3) that the defendants caused the injury suffered.

Here, the man is not likely to prove that the hospital was negligent through this theory. Although there are multiple defendants (doctors, nurses, hospital staff), the source of the negligence is not actually known. The man does not know who, if any person, caused him to come into contact with a contaminated instrument or other way. He cannot prove how he contracted the infection, other than the fact that he probably got it at the hospital. Additionally, hospitals are generally not the right class of defendants for this type of claim.

Thus, the court could not properly find the hospital liable for the damages under the alternative theory of negligence, because the man cannot prove which defendant caused the infection.

4. Limiting Woman's Liability

Here, the issue is whether the woman's liability could be limited to $100,000 (just the injuries sustained in the car accident).

Joint and several liability allows a plaintiff to collect the full amount of damages from one defendant even if there are multiple defendants. In order for joint and several liability to apply, there must be multiple defendants and injuries stemming from the same claim. If a plaintiff collects the entirety of the claim against one defendant, the defendant can sue for the proportional share against the other tortfeasors. This rule is to protect injured plaintiff.

Here, if the court found both the woman and the hospital's negligence caused the infection, the woman would not likely be able to limit her damages to $100,000. As stated previously, medical malpractice is generally foreseeable, and joint and several liability would allow the man to collect against one defendant rather than trying to collect the full amount against multiple defendants. Thus, even if the woman tried to limit her liability, the infection was a foreseeable outgrowth and although liability will likely be assessed proportionally, the woman is not the one who chooses how to limit the liability.

Thus, because of joint and several liability, the woman would not be able to limit her liability.

END OF EXAM

February 2019

MEE Question 2

Five years ago, three radiologists—Carol, Jean, and Pat—opened a radiology practice together. They agreed to call their business "Radiology Services," to split the profits equally, and to run the practice together in a manner that would be competitive. Toward that end, they purchased state-of-the-art radiology imaging equipment comparable to that of other radiology practices in the community.

Shortly after opening the practice, Carol, Jean, and Pat retained an attorney to organize the practice as a limited liability company. The attorney prepared all the necessary documents and forwarded the documents to Carol, Jean, and Pat for signature. However, they were so involved in their radiology practice that they forgot to sign the documents, and they have never done so.

Four months ago, Carol suggested to Jean and Pat that the practice replace some of the imaging equipment. Jean was worried about overspending on imaging equipment, but she did not express her concern to Carol and Pat.

Three months ago, Carol, without discussing the matter further with either Jean or Pat or obtaining their consent, purchased for the practice a $400,000 state-of-the-art imaging machine like those recently acquired by other radiology practices in the community.

After the purchase but prior to delivery, Jean learned what Carol had done and was furious. Jean did not believe the practice could afford such an expensive machine. When Jean confronted Carol, Carol said, "Too bad, it's a done deal—get over it." At that, Jean responded, "That's it. I've had enough. This machine was purchased without my consent. It's a terrible idea. I'm out of here and never coming back. Just give me my share of the value of the practice." Carol responded, "Fine with me." Carol and Pat subsequently agreed to continue their participation in Radiology Services without Jean.

Radiology Services is in a jurisdiction that has adopted both the Revised Uniform Partnership Act (1997, as amended) and the Uniform Limited Liability Company Act (2006, as amended).

1. What type of business entity is Radiology Services? Explain.

2. Did Carol have the authority to purchase the imaging machine without the consent of Jean and Pat? Explain.

3. Did Jean's statements to Carol constitute a withdrawal from Radiology Services? Explain.

4. Were Jean's statements sufficient to entitle her to receive a buyout payment from Radiology Services for her interest in the practice? Explain.

1. What type of business entity is Radiology Services?

Because Carol, Jean, and Pat never filed the necessary LLC paperwork with the secretary of states office to form a PLLC, and because they have purchased a number of equipment to be used in providing that service, they have agreed to run the practice together, and they have spit profits equally, Carol, Jean, and Pat operate as a general partnership.

A general partnership (GP) is formed where a group of people organize for the purpose of carrying out a business for profit. Unless otherwise indicated by written agreement, members of a GP share equally in the direction and oversight of the partnership, can make decisions for the GP, can bind the GP without consent of the other partners, and have a right to share equally in the profits of the GP.

Here, the facts indicate Carol, Gene, and Pat, have organized "Radiology Services," for the purpose of providing radiology services, they have purchased state of the art equipment to be used in providing that service, they have agreed to run the practice together, and they have spit profits equally.

Because Carol, Jean, and Pat never filed the necessary LLC paperwork with the secretary of states office to form a PLLC, and because they have purchased a number of equipment to be used in providing that service, they have agreed to run the practice together, and they have spit profits equally, Carol, Jean, and Pat operate as a general partnership.

2. Did Carol have the authority to purchase the imaging machine without the consent of Jean and Pat?

Because there was no written agreement proscribing the authority of the partners in binding the corporation, Carol had authority to purchase the equipment?

A general partnership (GP) is formed where a group of people organize for the purpose of carrying out a business for profit. Unless otherwise indicated by written agreement, members of a GP share equally in the direction and oversight of the partnership, can make decisions for the GP, can bind the GP without consent of the other partners, and have a right to share equally in the profits of the GP.

As stated above, in a GP, unless otherwise indicated by written agreement, all members have

authority to bind the partnership through instruments such as the purchase of equipment used in the business to which the GP is engaged.

Here, the facts do not indicate there is a written agreement proscribing the authority of the partners of the GP to bind the GP, and therefore Carol did have authority to buy purchase the equipment without the consent of Jean and Pat.

Because there was no written agreement proscribing the authority of the partners in binding the corporation, Carol had authority to purchase the equipment?

3. Did Jean's statements to Carol, constitute a withdrawal from Radiology Services?

Because Jean's statement "I'm out of here...just give me my share of the practice," may be taken as a clear expression of Jean's intent to dissociate from the GP, that intent was communicated to the GP, the statement by Jean may constitute a dissociation from Radiology Services.

A general partnership (GP) is formed where a group of people organize for the purpose of carrying out a business for profit. Unless otherwise indicated by written agreement, members of a GP share equally in the direction and oversight of the partnership, can make decisions for the GP, can bind the GP without consent of the other partners, and have a right to share equally in the profits of the GP. Dissociation form a GP may be completed where any partner clearly expresses a present intent to dissociate from the partnership and notifies the partnership of such intent.

Here, though the facts state that Jean is "furious," Jean's statements "I'm out of here...just give me my share of the practice," may be taken as a clear expression of Jean's intent to dissociate from the GP. Jean wants out of the GP and Jean has explicitly requested she be compensated for her portion of the GP. This intent was directly communicated to the GP as it was stated to Carol, and indirectly communicated to Pat. In addition, Carol and Pat have agreed to proceed without Jean.

Because Jean's statement "I'm out of here...just give me my share of the practice," may be taken as a clear expression of Jean's intent to dissociate from the GP, that intent was communicated to the GP, the statement by Jean may constitute a dissociation from Radiology Services.

4. Were Jean's statements sufficient to entitle her to receive a buyout payment from radiology

services for her interest in the practice?

A general partnership (GP) is formed where a group of people organize for the purpose of carrying out a business for profit. Unless otherwise indicated by written agreement, members of a GP share equally in the direction and oversight of the partnership, can make decisions for the GP, can bind the GP without consent of the other partners, and have a right to share equally in the profits of the GP. Where a partner manifest a present intention to dissociate from the GP and communicates that intent to the GP, that partner dissociates from the GP. And a dissociating GP is entitled to their proportional value of the GP.

Here, as discussed above, Jean's statements "I'm out of here...just give me my share of the practice," may be taken as a clear expression of Jean's intent to dissociate from the GP. Jean wants out of the GP and Jean has explicitly requested she be compensated for her portion of the GP. This intent was directly communicated to the GP as it was stated to Carol, and indirectly communicated to Pat. In addition, Carol and Pat have agreed to proceed without Jean. Because Jean has clearly expressed her intent to dissociate,and Carol and Pat have expressed and intent to operate without Jean, the GP must compensate Jean for her portion of the GP.

END OF EXAM

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MEE Question 3

An airline is incorporated in State A, where its corporate headquarters are located. The facility where it receives and processes online and telephone reservation requests is located in State B. It employs 150 people at that facility. The airline's base of physical operations, including its transport hub and major maintenance facility, is in State C, where more than 12,000 of its 15,000 employees are located. The airline serves States A and C but not State B.

In August, a woman who lived in State C called the reservation center in State B to obtain a round-trip ticket for the woman to fly between State C and State A in early September.

In early September, the woman used the ticket to fly to State A. The purpose of her trip was to hunt for an apartment in State A, where she was planning to start working at a new job that was set to begin in December. The woman found an apartment and signed an agreement to rent the apartment for one year, starting on December 1.

On the woman's return flight from State A to State C, a mechanical failure forced the plane to make an emergency landing in State A. The woman suffered serious and permanent injuries during the emergency landing and was hospitalized for three weeks in State A. Upon leaving the hospital, she returned to her home in State C. Because of the injuries she suffered, the woman has been unable to work, and she has received an indefinite deferral of the starting date for her job in State A. She continues to live in State C, where she has lived her entire life, although she hopes one day soon to move to the apartment in State A and begin working at her new job.

The woman has retained an attorney, who recommended filing a personal injury claim against the airline in State B because of the larger awards that State B juries tend to give in such cases. Accordingly, the woman sued the airline in federal court in State B, making a state-law tort claim for damages in excess of $1 million for the injuries she suffered during the plane's emergency landing.

The airline promptly filed a motion to dismiss for lack of subject-matter and personal jurisdiction.

State B's long-arm statute allows its courts to exercise personal jurisdiction to "the maximum extent allowed by the Fourteenth Amendment of the United States Constitution."

How should the federal district court rule on the motion to dismiss? Explain.

In order to present a claim in federal court, a plaintiff must establish both subject matter jurisdiction over the controversy and personal jurisdiction over the defendant.

A. Subject Matter Jurisdiction: There are two avenues to assert the federal court has subject matter jurisdiction over a given claim. One option is where a federal question is involved. Our facts indicate the only claim is a state-law tort claim, and therefore federal question jurisdiction is not applicable. However, the court may hear the matter if the plaintiff establishes diversity jurisdiction.

Diversity Jurisdiction

Diversity jurisdiction requires a claim for damages in excess of $75,000 where there is diversity of citizenship.

In order to meet the threshold for the damage claim, the amount must be specifically asserted in the complaint. The damages must be legally cognizable, but it is possible to have diversity even if the recovery does not amount to more than $75,000 at trial - a legally justifiable assertion of damages in the complaint will suffice. Here, damages were claimed of over $1 million so this prong of the test for diversity jurisdiction is met on these facts.

However, here the bigger issue is whether or not there is complete diversity of citizenship. In order to have complete diversity of citizenship, no plaintiff may have the same citizenship as any defendant. For individuals, citizenship is determined based on their domicile. For corporations, citizenship exists both in their state of incorporation and in the state where they have their principal place of business.

Citizenship of Woman

The question presented in this fact pattern is whether the woman's domicile is State C, where she lived in August when she bought the ticket and still lived when she traveled to State A, or if it is State A where she hopes one day soon to move. The answer turns on whether woman's domicile ever changed from State C to State A by (1) intent to make the jurisdiction her domicile; and (2) physical presence with intent to remain for foreseeable future.

Although woman traveled to State A in September, she signed a lease for an apartment to begin her residence in State A *in December,* specifically to begin December 1. She found the apartment before the crash, but physical presence in State A was still only temporary as there was no intent to make State A her home at that point, again intending instead to commence that

residence in the future, on December 1.

Because the woman had not yet established her physical presence in State A such that she began her domicile there, State C is her domicile for purposes of this action.

Citizenship of Airline

Airline is incorporated and therefore will have only up to two citizenship states for purposes of diversity jurisdiction - where it is incorporated and where its principal place of business is.

Airline is incorporated in State A. Therefore, State A will be one state where the corporation is considered domiciled. The closer question is whether it has a second state of domicile in either State B or State C. In State B, airline has its facility where it receives and processes online and telephone reservation requests. It employs 150 people there, and so it has significant contacts. Still, the fact that it does business, even a large amount of business in another state is not enough to make that state its principal place of business for diversity jurisdiction purposes. It arguably does even more business in State C, where its transport hub and major maintenance facility is and where it employs upwards of $12,000 people.

Notwithstanding the above, airline is a citizen only of State A. That is because that is the state not only where it is incorporated, but also where its corporate headquarters are located. That is more likely to be the state the company considers its principal place of business for the corporation than any other operations component of the business because that is where the management and control of the business is arguably centered.

Diversity Exists for Subject Matter Jurisdiction

Since there is complete diversity of citizenship between the parties, with plaintiff woman as citizen of State C and defendant airline a resident of State A, and the amount in controversy exceeds $75,000, woman can bring her action in federal Court.

B. Personal Jurisdiction

The second inquiry is whether or not the State B Court has in personam jurisdiction over the defendant, airline.

There is no general personal jurisdiction over airline. If woman had brought this or any other claim against the airline in State A, it could be heard there, but that is the only jurisdiction that has general personal jurisdiction over airline. Therefore, we need to evaluate whether a specific contacts approach applies under a long arm statute of the jurisdiction in which the suit is brought and whether that complies with the constitutional limitations for exercising such

jurisdiction.

The first question is whether a long-arm statute will apply to allow State B to exercise jurisdiction over airline. Here we are told there is one and that it allows the maximum reach in accordance with the Fourteenth Amendment.

To be constitutionally permissible to take action against a defendant, the court must find that the defendant has availed itself of the jurisdiction by significant contacts and those contacts must be related to the defendant's conduct at issue such that it is fair to hold defendant to account in that jurisdiction. State B may well find that since Airline operated its reservation center that it availed itself of State B law for purposes of this action, particularly if this was about a mistake with the reservation. However, this issue was more about the performance of the airlines physical operations than its reservations desk.

Since the reservations aspect of the airline's business is where contacts relevant to this cause of action end, the minimum contacts necessary to file against airline in State B have not been met. By contract, the factors the Court would note other facts make it obvious where the claim could properly be met, including where the type of action (tort), where the injury occurred (State A) where the plaintiff resides (State C, although she has contacts in State A that may not make this an inconvenient forum for her), where the defendant resides (State A), where the contract was to be performed (flight was between States A and C only) and where the evidence and witnesses relevant to the action are more likely to be (State A).

Therefore, based on the above, the Court will grant the motion to dismiss not for lack of subject matter jurisdiction, but for lack of personal jurisdiction. .

END OF EXAM

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MEE Question 4

Eight years ago, a settlor created a $300,000 irrevocable trust. The settlor's brother is the sole trustee of the trust. The trust's primary beneficiaries are the settlor's son and daughter. The trust instrument provides, in relevant part:

> During the term of this trust, the trustee shall pay to and between my two children so much, if any, of trust income and principal as he deems advisable, in his sole discretion, for each child's support. Upon the death of the survivor of my children, the trustee shall distribute any remaining undistributed trust principal and income equally among my surviving grandchildren.

The trust contains a spendthrift clause that prohibits the voluntary assignment of a beneficiary's interest and does not allow a beneficiary's creditors to reach that interest.

Two months after creating the trust, the settlor died. Both the settlor's son, now age 35, and the settlor's daughter, now age 32, survived the settlor and are still alive. The settlor's son has three living children, now 9, 11, and 14 years of age. These children currently live with their mother, from whom the settlor's son was divorced seven years ago. The settlor's daughter is unmarried and has no children. Both the son (employed as a waiter) and the daughter (employed as a bookkeeper) have earned, on average, less than $35,000 per year during the past seven years.

Over the past eight years, the son has incurred and has not paid the following debts:

> (a) $10,000 to a hospital for the son's emergency-room care
> (b) $35,000 to his former wife in unpaid, judicially ordered child support, and
> (c) $5,000 to a friend for repayment of a loan, five years ago, to purchase a high-end computer-gaming system for recreational use.
>
> Repayment of the debt to the friend was due last year, but the son defaulted on the loan.

During the first year of the trust, the trustee distributed $9,000 of trust income to each of the settlor's two children for their support. Thereafter, relations between the settlor's son and the trustee deteriorated. After the son and his wife divorced, the trustee frequently told others, behind the son's back and without any direct basis, that the son was an "adulterer" and a "terrible father." The trustee often referred to the son as a "bum," and he told the settlor's daughter, without any explanation, "Your brother is rude to me."

Over the last seven years, although the son's and daughter's financial needs were similar, the trustee has distributed $80,000 from trust income and principal to the settlor's daughter and nothing to the settlor's son, despite the son's repeated requests for trust distributions to help him pay his hospital bill, child support, and loan.

1. Given the terms of the trust the settlor created, could the trustee have properly distributed trust assets to the son to enable him to pay (a) his hospital bill, (b) child support, and (c) the loan to purchase the computer-gaming system? Explain.

2. Did the trustee abuse his discretion in refusing to make any distributions to the son during the past seven years? Explain.

3. In light of both the discretion granted the trustee and the spendthrift clause in the trust, may the son's three creditors obtain orders requiring the trustee to pay their claims against the son from trust assets? Explain.

1. The trustee could have properly distributed the trust assets to the son to enable him to pay his hospital bill and child support, but not the loan to purchase the computer gaming system.

The main issue here is whether the distributions might be permitted, despite the trust language, based upon overriding policy concerns present. The trustee has a fiduciary duty to act in the interests of the beneficiaries. Protection of the trust benefits from creditors within the trust language is not enough on its own to determine that creditors may not be paid by the trustee. The trustee, in his fiduciary capacity to mobilize the trust for the benefit of the two children, could properly pay the hospital bill and the child support in arrears. The son makes limited income each year, and may be unable to pay the debts. Neither expense is incurred with frivolity that might encourage a trustee to refuse payment of the debt. The debt incurred at the hospital is most likely a necessity sought out with no alternatives, which ought to be payed by the trustee on behalf of the son. The child support payments, if left unpaid long enough, could subject the son to jail time and is a different societal necessity without alternatives (aside from evidence that the son refuses to work). The debt to the friend for the computer system will be properly left unpaid by the trustee.

2. The trustee abused his discretion in refusing to make any distributions to the son during the past seven years.

The trustee owes a fiduciary duty to the beneficiaries of the trust, which requires him to manage the trust finances and payments to beneficiaries as if it was his own money. This does not entitle him to act as though the fund is his to distribute in any way he chooses. The hospital debt payment would be challenging to pay back with his $35,000 yearly income, and the trustee objectively abused his discretion in failing to consider those circumstances. In addition, as previously noted, the child support in arrears is a serious debt which the trustee should have paid for the benefit of the son's children and the children's mother. His entire refusal to pay the son the same amounts that he pays the daughter is an objective indication that the trustee abused his discretion, absent circumstances that would dictate a basis for that decision.

3. In light of both the discretion granted the trustee and spendthrift clause in the trust, the son's hospital and child support creditors may obtain orders requiring the trustee to pay their claims against the son from trust assets.

A court empowered to make this determination conclusively for the parties is not bound entirely to the trust document language and intent, particularly where the trust would require the violation

of public policy concerns. A judge analyzing this particular issue would likely consider the type of debt being repaid as part of the factors consulted in her determination. The hospital bill and child support payments are subject to successful orders for payment from the son's trust assets and proceeds, especially in the circumstances that the son was not paid for seven years while his sister received payments. The creditor friend who has not yet been paid for the gaming system loan he extended will not be part of this determination requiring payment.

The friend may have an action in quasi contract for detrimental reliance in extending the loan, since he was aware of the vested interest of the son in the trust and the high likelihood of financial support the son would regularly realize (absent the abuse of discretion that the trustee exercised). It is unclear if the creditor friend would have a viable action against trustee for a third party beneficiary action in this jurisdiction's contract laws.

END OF EXAM

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MEE Question 5

One evening, Ben received a visit from his neighbor. Hanging on Ben's living room wall was a painting by a famous artist. "I love that artist," the neighbor said. "I've collected several of her paintings." Ben remarked that the famous artist was his ex-wife's mother and that whenever his new girlfriend visited, the fact that the painting still hung in his house made her jealous. The neighbor said, "I have a solution. Why don't you give the painting to me for safekeeping? I have an unsigned print by the same artist that you can hang in its place. The print is not in the artist's usual style, so your girlfriend will not get jealous and your living room will still have great art."

Ben thought this was a good idea. He and his neighbor carried the painting to the neighbor's house and hung it in the neighbor's dining room. Ben then took the neighbor's unsigned print home and hung it in his living room.

The next day, Ben decided that he really didn't like the print, and he took it off the wall. Then, around 10:00 p.m., he decided to retrieve the painting from his neighbor.

Ben went to his neighbor's house and knocked on the door, but there was no answer. Just as he was about to leave, he noticed that a ground-floor window was ajar. Ben pushed the window fully open and began to climb into the house to retrieve the painting. The neighbor, who had been asleep upstairs, was awakened by the noise and ran downstairs to find Ben halfway through the window. The neighbor became enraged. Ben tried to explain, but the neighbor would not stop yelling. Ben decided that it would be better to return to his home and retrieve the painting later, after the neighbor had a chance to cool off. But the neighbor followed him outside and across the lawn, yelling, "How dare you sneak into my house!" The yelling attracted the attention of a police officer who was passing in her patrol car. The officer stopped to investigate, and Ben was arrested, questioned, and released.

Two days later, the neighbor returned the painting to Ben, saying "Here's your painting. Give me back the print that I loaned you and we'll forget the whole thing." However, the previous day Ben had been so angry with the neighbor about his arrest that he had contacted an art dealer and had sold her the print. Ben did not tell the art dealer that the unsigned print was by the famous artist. Ben simply offered to sell the print at a very low price and told the art dealer, "I can sell this print to you at such a good price only because I shouldn't have it at all." Although the art dealer often investigated the ownership history of her purchases, she bought the print without further discussion. An hour after the sale, the art dealer contacted a foreign art collector famously uninterested in exploring the ownership history of his acquisitions, and sold him the print for 10 times what she had paid for it.

The prosecutor is considering bringing the following charges: (i) a charge of burglary against Ben in connection with the incident at the neighbor's house, (ii) a charge of larceny or embezzlement against Ben for his actions involving the unsigned print, and (iii) a charge of receiving stolen property against the art dealer for her actions involving the print.

The jurisdiction where these events occurred has a criminal code that defines burglary, larceny, embezzlement, and receiving stolen property in a manner consistent with traditional definitions of these crimes.

With what crimes listed above, if any, should Ben and the art dealer be charged? Explain.

Ben's crimes:

Ben should be charged with embezzlement only, not larceny or burglary.

The elements of embezzlement are that the defendant has control over someone's property and misappropriates it in such a way to permanently deprive the owner of that property. The elements of larceny are the carrying or taking away of the personal property of another with the intent to permanently deprive the person of that property. Burglary is the breaking and entering of a dwelling with the intent to commit a felony therein. Under common law, burglary had to occur at night.

Firstly, Ben should not be charged with burglary for entering his neighbor's house. Ben did break and enter his neighbor's home (breaking something is not actually a necessity) that night. However, he did not intend to commit a felony in his neighbor's house. Ben intended to go into the neighbor's house, leave the neighbor's painting for him, and take back his own painting. Notably, both Ben and the neighbor did not agree to *trade* paintings, they agreed to *hold* each other's paintings for "safekeeping." Because Ben's only intent was to switch out the paintings and to leave his neighbor's house with his own property, he should not be charged with burglary. He should be charged with trespassing, certainly, and possible criminal entry of a home.

Ben's later actions warrant a charge of embezzlement, not larceny. The critical difference is that Ben was rightfully holding the painting for his neighbor. His neighbor gave him the painting the evening before the break in, intending that it should stay on Ben's wall, at least for a time. Until the neighbor came over to retrieve the painting (which was after Ben sold it), Ben still had permission to hold the painting. Ben certainly sold the painting with the intent to permanently deprive his neighbor of it, so his actions meet all the elements for embezzlement. However, his actions did not include the taking and carrying away of an object as described in larceny. Ben had rightful possession of the painting at the time he sold it.

The art dealer's crimes:

The art dealer should be charged with receiving stolen property. The elements of receiving stolen property are the possession of property which has been stolen, either with the knowledge that it has been stolen or some knowledge that the person who provided the property may not

have proper title to it. Here, the art dealer was on notice at the time she purchased the print that Ben may not have had proper title to it. He specifically said, "I can sell this print to you at such a good price only because I shouldn't have it at all." She could have done her due diligence, as she usually did, to determine whether the seller actually had title to the print, but she knowingly chose not to do so. She also quickly resold the painting to a buyer whom she knew would not investigation the print's ownership history. Thus, the art dealer should be charged with receipt of stolen property.

END OF EXAM

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Indian Law Question

Alex Johnson, a non-Indian, opened a hardware store on the Rosebud Sioux Reservation in South Dakota. He signed a lease with the Rosebud Sioux Tribe to construct and operate the store on Tribal trust land and also obtained a Tribal business license which requires that "all disputes" be resolved in Tribal court.

Mr. Johnson entered into a written construction contract with Robert Blue Thunder who is a Tribal member, roofing contractor, and life-long resident of the Rosebud Sioux Reservation. A dispute arose about the quality of Mr. Blue Thunder's work and Mr. Johnson withheld $2,000.00 of the contract amount. Mr. Blue Thunder brought a contract action against Mr. Johnson in the Rosebud Sioux Tribal Court.

Even though he was not pleased with the condition of his roof, Mr. Johnson opened his store for business and one of his first customers was a non-Indian resident of the reservation Edna Jones. While perusing Mr. Johnson's merchandise, Ms. Jones slipped and fell, breaking her femur in two places. Ms. Jones discovered that her fall was likely caused by a puddle of water on the floor which was created by a hole in the roof. Ms. Jones brought a tort action against Mr. Johnson in Rosebud Sioux Tribal Court seeking recovery for her injuries.

Mr. Johnson has moved to dismiss both cases claiming the Tribal Court lacks subject matter jurisdiction. How should these motions be decided?

In general, Indian tribes have exclusive jurisdiction over suits against Indians for activities occurring in Indian country. However, as it relates to suits against non-Indians, jurisdiction is more limited. Indian civil jurisdiction over non-Indians runs somewhat parallel to criminal jurisdiction in that more protections exist to prevent non-Indians from being tried in tribal courts. In the Oliphant case, protections over non-Indian criminal defendants were extended to eliminate tribal jurisdiction for most cases. The Oliphant case has since been broadened to civil jurisdiction matters. In general, a tribe does not have subject matter jurisdiction over a non-Indian defendant in a civil matter. There are only two exceptions to this general rule and these were defined in the case of Montana v. United States. Montana carves out two exceptions in which a tribal court may have civil jurisdiction over a non-Indian. First, when the non-Indian has engaged in consensual arrangements with the tribe in the form of commercial dealings, contracts or leases. The second Montana exception holds that a tribe may have civil jurisdiction over a non-Indian when the activity of the non-Indian on fee land threatens to harm the (1) political integrity, (2) economic security, or the (3) health and welfare of the tribe. This second Montana exception has been narrowed, however. In the case of A1 Contracting v. Strate which involved a motor vehicle accident on a right of way through the reservation, the court held that this exception applies only when necessary for tribal self-government of internal control.

It is also important to understand the definitions of Indian, Indian Tribe and Indian Country. An Indian is typically defined as an enrolled member of a tribe with a specific blood quantum. An Indian Tribe is more loosely defined and is defined via statutes and treaties. Indian Country is either (1) the reservation including all rights of way, (2) dependent Indian communities,(3) allotments still held by the tribe whether or not they are on the reservation.

Also noteworthy is that Congress has plenary power over the Indian tribes. The Marshall Trilogy of cases largely defined the scope of federal power over the tribes. In Johnson v. McIntosh, the court held that the right of discovery granted exclusive title to Indian country and the Indians had a right of occupancy that could be taken away via purchase or conquest. Under Cherokee Nation v. Georgia, Indians were declared dependent domestic communities and not foreign nations and the relationship was like a "ward to a guardian." Finally, in Worcester v. Georgia, the court held that the federal government had exclusive control over the tribes and not the states. It is with this understanding that Indian jurisdiction over civil issues has been defined and the courts have been wary to grant control over non-Indians given the tradition of plenary power over tribal affairs and the desire to "protect" non-Indians from tribal jurisdiction.

(1) Blue Thunder's contract action against Johnson

Johnson's motion to dismiss for lack of subject matter jurisdiction should be denied. The issue is whether Johnson's entrance into a consensual contract with Blue Thunder for roofing work exposes him to tribal jurisdiction under the Montana exceptions.

The facts indicate that Johnson is a non-Indian. As a non-Indian, Johnson opened a hardware store on the Rosebud Sioux Reservation and in doing so, signed a lease with the tribe to operate the store on trust land. As part of the opening of his store, Johnson engaged Robert Blue Thunder, a tribal member and resident of the reservation for work. The facts indicate that Johnson "entered into a written construction contract" with Blue Thunder for roofing work. Subsequently, Johnson has refused some payment to Blue Thunder based on the perceived quality of his work. Blue Thunder has sued Johnson in Tribal Court.

Under these facts, Johnson is a non-Indian and Blue Thunder is an Indian. The case is a civil case as it involves a contract dispute. The question then is whether or not the Rosebud Sioux Tribal Court has civil jurisdiction over the non-Indian Johnson. Under the first Montana exception, jurisdiction is proper. While it is clear that Johnson has engaged in a commercial lease with the tribe for the purposes of the store, he has also engaged in a contract with Blue Thunder. There is no indication that the contract was not consensual or was not entered into freely. As Johnson has entered a consensual contract with a tribal member, he has availed himself to the jurisdiction of the tribe and falls under the first Montana exception. As such, the tribal court has civil jurisdiction over Blue Thunder's claim.

(2) Jones' tort action against Johnson

Johnson's motion to dismiss for lack of subject matter jurisdiction should be granted. The issue is whether a dangerous condition which injured a single non-Indian threatens the health and welfare of the Rosebud Sioux Tribe in such a manner that the second Montana exception can be invoked to provide subject matter jurisdiction.

The question again is whether either of the Montana exceptions apply. The first Montana exception is inapplicable. Both Jones and Johnson are non-Indians. Despite the fact that Jones is a resident of the reservation, she is a non-Indian. Thus, the fact that she entered Johnson's store to purchase merchandise does not avail herself to the Montana exception in that doing so did not entail a consensual relationship with the tribe for some commercial, lease or contract purpose. Secondly, the second Montana exception does not apply either. The facts indicate that Jones was in the store and fell based on a puddle of water on the floor. Jones may argue that the fact that a merchant/business owner on reservation property is keeping unsafe conditions at their store poses a risk to the health and welfare of the tribe but the court will not likely find validity to this argument. As stated above, the court has narrowed this exception in A1

Contracting v. Strate and even in that case they did not find that a serious vehicular accident impacted the health and welfare of the tribe as a whole. The question is not whether the behavior may have been individually dangerous to one person's health or welfare, the question is whether or not the self-government or internal control of the tribe is threatened. Here, it is not. Puddling water on the floor of a hardware store does not jeopardize the tribe. As such, the tribe cannot exert civil jurisdiction over Johnson in this suit as there is no subject matter jurisdiction.

Further, there is no indication that the puddle on the floor threatened the political integrity or economic security of the tribe. Jones may argue that a poorly run store may cause economic damage to the community but the court is unlikely to find that a puddle could have such a ripple effect into the overall economic security of the tribe as a whole. As such, the other aspects of the second Montana exception are inapplicable.

END OF EXAM