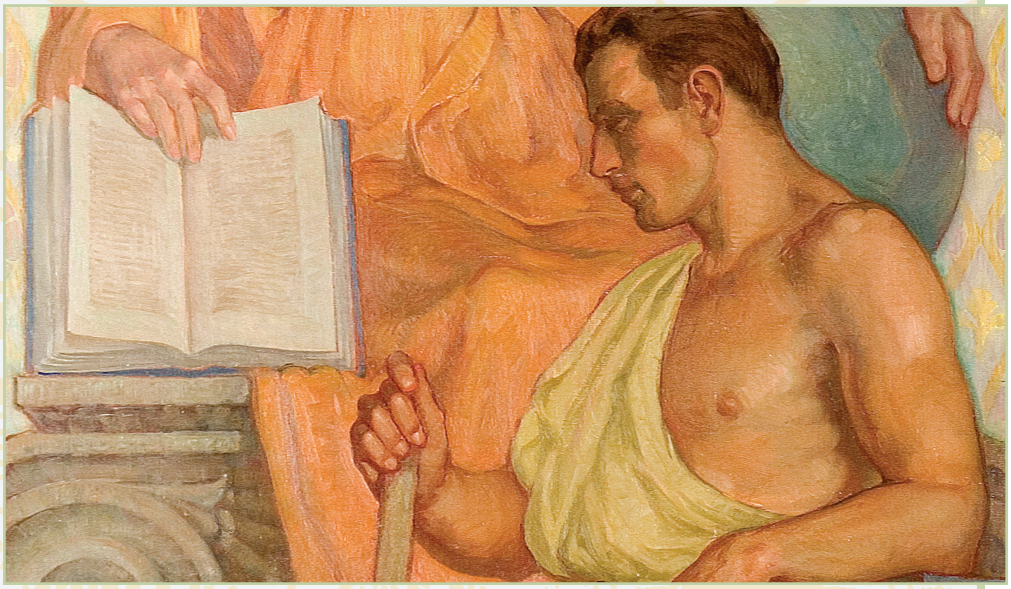
THE SUPREME COURT *of* OHIO

February 2019 Ohio Bar Examination

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers



The Supreme Court *of* Ohio

FEBRUARY 2019 OHIO BAR EXAMINATION

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers

Board of Bar Examiners

Tiffany Kline, Secretary

Michael M. Briley

Lisa Weekley Coulter

Jennifer E. Day

Patricia A. Gajda

Julie A. Jones

Kevin J. Kenney

Edward F. Kozelek

Robert M. Morrow, *Vice-Chair*

Michael E. Murman

William J. O'Neill

Thomas J. Scanlon

Adam Seibel

John W. Waddy Jr.

Suzanne M. Waldron

C. Michael Walsh

Hon. Mark K. Wiest, *Chair*

OHIO BAR EXAMINATION

FEBRUARY 2019 OHIO BAR EXAMINATION

Essay Questions and Selected Answers

MPT Summaries and Selected Answers

The February 2019 Ohio Bar Examination contained 12 essay questions. Applicants were given three hours to answer each set of six essay questions. The length of each handwritten answer was restricted to the front and back of an answer sheet. The length of a typed answer was restricted to 3,900 characters.

The exam also contained two Multistate Performance Test (MPT) items. These items were prepared by the National Conference of Bar Examiners (NCBE). Applicants were given 90 minutes to answer each MPT item.

The following pages contain the essay questions given during the February 2019 exam, along with the NCBE's summaries of the two MPT items given on the exam. This booklet also contains actual applicant answers to the essay and MPT questions.

The essay and MPT answers published in this booklet merely illustrate above-average performance by their authors and, therefore, are not necessarily complete or correct in every respect. They were written by applicants who passed the exam and consented to the publication of their answers. See Gov. Bar R. (I)(5)(C). The answers selected for publication were transcribed as written by the applicants. To facilitate review of the answers, the bar examiners may have made minor changes in spelling, punctuation, and grammar to some answers.

Copies of the complete February 2019 MPTs and their corresponding point sheets are available from the NCBE. Check the NCBE's website at ncbex.org for information about ordering.

QUESTION 1

Driver makes her sole income by making pizza deliveries for Pizza Shop in Anytown, Ohio. Her schedule varies but she usually works several evening shifts a week. Driver uses her own car, pays for her own gas, and uses a GPS app on her phone to determine the best route between Pizza Shop and each customer's home. Pizza Shop takes the orders, prepares the pizzas, and assigns specific deliveries to the next available driver. While delivering for Pizza Shop, Driver is required to display an illuminated Pizza Shop sign on the top of her car. Because Driver has been delivering more pizzas than other drivers during her shifts, Pizza Shop gave her a raise in her hourly pay rate, and her picture is displayed in the shop as the current Driver of the Month.

One January evening during an eight-inch snowfall in Anytown, Driver completed several pizza deliveries and realized that her car needed gasoline. She stopped and filled her gas tank at a station that was on her way back to Pizza Shop. As she often did, Driver took a short-cut through the parking lot of Therapist's office, which was closed for the evening.

As Driver drove through the parking lot, she sent a text message to Pizza Shop that she was almost there and ready to pick up more pizzas to deliver. As Driver looked up from her phone, she noticed Therapist exiting the building and trudging through the snow toward his car, directly in her path. Driver swerved to avoid hitting Therapist.

Just then, a man in a pick-up truck with a snow plow attached (Plow Guy) pulled into the parking lot to begin plowing the snow and did not see Driver's car. Plow Guy had contracted with Therapist to plow the parking lot, but was running behind his usual schedule due to the ongoing snow. Plow Guy opened his truck window, turned his head, and yelled, "Hey, sorry I'm late." He continued driving his truck forward, looking at Therapist, and did not notice that he was heading directly toward Driver. Driver swerved to avoid a collision with Plow Guy, slid on a patch of icy snow, and collided with Therapist, causing him physical injuries.

Therapist has filed a negligence action against Pizza Shop in the appropriate Ohio court. Pizza Shop asserts the following defenses in the lawsuit:

1. That Driver is an independent contractor;
2. That even if Driver is its employee, she was acting outside the scope of her employment; and
3. That Plow Guy's action was a superseding/intervening cause of Therapist's damages.

How should the court rule on each of Pizza Shop's defenses? Discuss each answer fully.

A

1) Pizza Shop will likely not succeed in its defense that Driver is an independent contractor. Under negligence law, an employer is generally not liable for the torts of its independent contractors; however, an employer is liable under respondent superior for the torts of its employees. When determining whether an agent is an independent contractor or an employee "servant," Ohio courts analyze a variety of factors based around control, such as: who provided the location of the employment, who directed how the job was to be completed, how was the agent paid, and whether there are any indicia of employment. Here, factors that point toward the existence of an independent contractor arrangement include the fact that Driver uses her own car and not a company car, that Driver pays for her own gas, and that Driver utilizes a GPS to determine how the pizza is delivered. However, the factors that indicate an employer-employee relationship are much stronger. Here, an indicia of employment exists in that Driver is required to display an illuminated Pizza Shop sign on the top of her car and the fact that Driver was displayed as the current Driver of the Month. Additionally, Pizza Shop controls the assignment of specific deliveries to the available drivers. Moreover, and likely most importantly, Driver is paid on a per-hour basis rather than a per-job basis, which is typically the most important factor for courts analyzing the status of an agent as an employee or independent contractor. Therefore, Pizza Shop will not succeed in its defense that Driver is an independent contractor.

2) Pizza Shop will likely not succeed in its defense that Driver was outside the scope of her employment when she struck Therapist. Under negligence law, when an employee is on a minor detour from her job, she is deemed still to be acting within the scope of her employment; however, if she were to take a frolic, or major detour, courts find that she would not be acting within the scope of her employment. Here, Driver will very likely be deemed to have been on a minor detour from her job because she only made the stop to fill her gas tank, which is often necessary when driving for extended distances as is part of her job duties, and was taking a short-cut through the parking lot to get back to Pizza Shop to pick up more pizzas to deliver. Had Driver traveled an extended distance for a personal reason, a court would not likely find a minor detour, but here the purpose was related to the work and was only minimally off-track from the route she would have had to take in the course of delivering pizzas. Therefore, Pizza Shop will likely not succeed using this defense.

3) Pizza Shop will likely not succeed in its defense that Plow Guy was an intervening/superseding cause of Therapist's damages. Under negligence law, an indirect-cause case can still result in the finding that an actor is negligent when the intervening cause, which occurs after the actor's negligence, as long as that intervening cause was foreseeable. Here, there is an indirect-cause case because Plow Guy was not paying attention to what was going on in front of him and did not realize he was heading toward Driver. This occurred after Driver's negligence in using her phone to text while she was driving during an eight-inch snowfall. Pizza Shop, via Driver, will still be responsible for Driver's negligence because it was foreseeable that another driver, not to mention a snow plow, would be present in the parking lot and that she would need to safely maneuver around both pedestrians and other motorists and that she could hit a pedestrian if she did not utilize reasonable care. Therefore, Pizza Shop will likely not succeed in its defense that Plow Guy was an intervening/superseding cause of Therapist's damages.

QUESTION 2

Karen is an attorney licensed in Ohio. About a year ago she opened a sole practice, and she shares offices with other lawyers in Anytown, Ohio. Her officemates are all former assistant county prosecutors, as is Karen. Prior to this arrangement, they had all worked together in the criminal division. Each has her or his own practice, but they enjoy the proximity to other lawyers with whom they frequently discuss their cases and often cover for each other at court when faced with scheduling conflicts. They also share a receptionist who answers their phones and takes messages. Karen does not have personal staff.

One of Karen's clients, Client, has recently begun to make significant demands on her time. His matter concerns a complicated real estate transaction with multiple parties that is in litigation and has spawned substantial discovery and commensurate legal expense for all parties. The matter is scheduled for pretrial at which a trial date will probably be set. Client's phone calls demanding prompt resolution of the lawsuit and complaining about his legal expenses are beginning to interfere with Karen's ability to serve her other clients. Client insists on speaking to Karen at least daily and sends text messages and emails all day long to which he expects instantaneous responses.

Karen is concerned that continuing the way she conducts her practice may be placing her at risk of professional discipline.

What Ohio Rules of Professional Conduct, if any, does Karen risk violating? Explain fully.

You need not cite rule numbers to receive full credit.

Karen Risks Violating the Duty of Confidentiality Owed to Her Clients

A lawyer owes the duty of confidentiality to any current or former client. The duty of confidentiality requires lawyers in Ohio to refrain from sharing details about clients or their respective cases to third parties outside of a lawyer's firm, unless compelled by a court to reveal such information to the court. However, a client may consent to an attorney's sharing of confidential information, if such consent is informed.

Here, Karen frequently discusses her cases with other lawyers who are not in practice with her. While Karen's fellow attorneys share an office space and a receptionist, Karen is a sole practitioner. She has formed no firm or partnership with any of the attorneys who share office space in the same building. Therefore, Karen is likely making unauthorized disclosures when she discusses her cases with her fellow attorneys.

Karen May Be at Risk for Violating Her Duty of Communication with Client, but Such Violation Is Unlikely

An attorney in Ohio owes his or her clients a duty of communication. Attorneys should reasonably engage in regular communication with clients concerning updates in the status of their cases. However, an attorney is under no duty to communicate with a client on a daily basis, even if a client demands such. Furthermore, if circumstances arise where an attorney deems a delayed communication with a client is advisable because of the potential poor reaction of the client, an attorney may reasonably delay such communication.

Here, Client insists on speaking with Karen on a daily basis, and sends text messages and emails all day long, to which he expects instant responses. Client's demand for communication in this manner is unreasonable, and Karen is under no obligation to communicate with Client on an instantaneous basis While Karen must reasonably and regularly keep Client updated on the status of his case, Karen need not do so on a daily basis.

Karen Risks Violating Her Duty of Care to Client and Her Other Current Clients

Lawyers in Ohio are required to represent their clients with the skill, knowledge, and diligence common in the legal profession. If a lawyer determines that representation of a client is beyond the lawyer's capacity, such lawyer should communicate with the client, and seek permission to consult with lawyers proficient in the subject matter at issue. Moreover, an attorney should apportion his or her workload such as to not have a negative impact on the lawyer's performance of his or her duties. When a lawyer allows the representation of his or her clients to be negatively affected due to poor caseload management, a lawyer may be subject to discipline.

Here, Client's matter concerns a complicated real estate transaction, and has spawned substantial discovery. Karen is a former assistant prosecutor and may not have the breadth of knowledge in real estate matters as an attorney who regularly practices in this area. If the demands of Client's matter continue to accrue substantial litigation costs, and Karen does not feel equipped to resolve Client's matter on her own, she should seek Client's permission to consult with other attorneys who are knowledgeable in real estate matters. Karen's failure to do so may subject her to discipline.

Furthermore, Client's matter has begun to make significant demands on Karen's time. If Karen continues to allow her representation of Client to interfere with her ability to serve her other clients, she may be subject to discipline for violation of her duty of care to her other clients.

QUESTION 3

At a lawfully called Annual Meeting of the Shareholders of Ace, Inc., an Ohio corporation (Ace), the Shareholders elected Consultant, Investor, Accountant, Insurance Agent, and Student as the members of the Board of Directors. Consultant, Investor, Accountant, and Insurance Agent owned no shares of Ace, and Student, who was 19 years old, owned 500 shares.

Banker, who owned 10 percent of Ace's shares, objected to the election and stated that he had a right to be a Director since he owned 10 percent of Ace's shares.

Following the meeting of the Shareholders, the Directors convened a board meeting, and all Directors were present. The Board unanimously elected the following officers: Consultant as President; Insurance Agent as Vice President; and Investor as Secretary/Treasurer. Before the election, Consultant informed the Board that he intended to continue his consulting business and that he would continue to provide consulting services to competitors of Ace.

Insurance Agent proposed insurance for Ace's business. Ace later purchased a policy of fire insurance from Insurance Agent, after the Board ascertained that the policy terms and premium were the best available.

The real property adjoining Ace's plant became available for sale, and while the Board determined that it would be ideal for the expansion of Ace's business, Ace was financially unable to purchase the property. Without advising the rest of the Board, Investor individually purchased the property for speculative purposes and shortly thereafter resold it for a significant profit.

Ace's plant required major restorations, and Consultant obtained a proposal for major restorations from Builder for $1,000,000. Consultant properly called a meeting of the Board, but only Consultant, Investor, and Insurance Agent attended the meeting. Consultant and Investor voted to accept Builder's proposal, but Insurance Agent voted not to accept it. Consultant then signed an agreement on behalf of Ace with Builder based on the proposal. Accountant and Student, although not in attendance at the meeting, objected to the contract on the basis that it was too expensive.

After serious problems arose with the restoration work at Ace's plant, Consultant hired Law Firm to review the performance of Builder. Based upon Law Firm's recommendation, Consultant directed Law Firm to file a suit against Builder. Investor objected to Consultant's acts on the basis that Consultant was not authorized to hire Law Firm or file suit.

At a properly called meeting of the Board of Directors, all of the Directors except Student were present. The purpose of the meeting was to consider a proposed settlement between Ace and Builder. Prior to the meeting, Consultant had sent to each Director a report and recommendation of Law Firm recommending settlement of the claim. A resolution was properly proposed that the settlement be accepted. In reliance upon the Law Firm's recommendation, Consultant voted in favor of the resolution. Insurance Agent and Accountant voted against the resolution. Investor was present, but did not vote.

The following issues require resolution:

1. **Were all of the elected Directors properly qualified?**
2. **Does Banker have a right to be a Director?**
3. **Did Consultant breach any duties by continuing his separate consulting business?**
4. **Did Insurance Agent breach any duties by selling the insurance policy to Ace?**
5. **Did Investor breach any duties by purchasing the property adjacent to Ace's plant?**
6. **Was the contract with Builder validly authorized?**
7. **Were Investor's objections to Consultant's hiring Law Firm and filing suit valid?**
8. **Was the Board's vote to approve the resolution regarding the settlement between Ace and Builder properly adopted?**

Discuss each answer fully.

1) All of the elected Directors were properly qualified. Directors do not have to be shareholders of the corporation, only elected by them. The only requirement for a director is that the person elected as director be 18 years of age or older. In this case, the Directors were elected by the Shareholders and are all above the age of 18 years old. Therefore, all the Directors elected by the Shareholders are properly qualified.

2) Banker does not have a right to be a Director. As mentioned earlier, Directors do not have to be shareholders of a corporation to be a Director. Here, it is irrelevant that Banker owned 10 percent of Ace's shares. There is no right to being a Director.

3) Consultant did not breach any duties by continuing his separate consulting business. A director owes the corporation a duty of loyalty and care. Under the duty of loyalty, a director may not do business that is adverse to the corporation's interests, unless non-interested board members are notified at a board meeting and a majority of the board members approve. In this case, Consultant intended to continue his consulting business and provide consulting services to competitors. This would go against Consultant's duty of loyalty. However, Consultant informed the Board at a board meeting where all Directors were present. The Board unanimously elected Consultant as President, approving of Consultant to continue his consulting business.

4) Insurance Agent did not breach any duties by selling the insurance policy to Ace. Generally, a director may not profit by selling products to the corporation that the corporation needs, unless it is best for the corporation to do so. Here, Ace needed insurance for the business. However, in this case, the Board purchased the fire insurance policy from Insurance Agent after the Board ascertained that the policy terms and premium were the best available. Therefore, Insurance Agent did not breach any duties.

5) Investor did not breach any duties by purchasing the property adjacent to Ace's plant. Under the duty of loyalty, a director may also not usurp business from the corporation that the corporation can take advantage of. Here, the Board determined that it would be ideal for the expansion of Ace's business to purchase the real property adjoining Ace's plant. However, Ace was financially unable to purchase the property. Because Ace could not purchase the property, the property could be bought by someone else, including Investor.

6) The contract with Builder was validly authorized. To adopt a proposal, there must be a quorum of directors (more than half) and a majority vote of the directors present. Here, there were three out of the five Directors present, with two voting in favor of the proposal. Thus, the elements were met and the contract was validly authorized.

7) Investor's objections to Consultant's hiring Law Firm and filing suit were not valid. A president of a company is allowed to enter contracts and make deals on behalf of the corporation as long as these deals are commercially reasonable. Directors may rely on committees and others well-versed in a subject (lawyers, accountants, etc.) when making decisions. Here, Consultant hired Law Firm to review the performance of Builder. Based upon Law Firm's recommendation, Consultant directed Law Firm to file a suit against Builder. This is commercially reasonable and falls within the Consultant's authority.

8) The Board's vote to approve the resolution regarding the settlement between Ace and Builder was not properly adopted. For this settlement to be properly adopted, there must be a quorum of the directors, and the majority vote in favor of the adoption. In this case, there is a quorum because four out of the five Directors were present. However, there was not a majority vote in favor of the adoption, since only one vote was in favor. Therefore, the resolution was not adopted.

QUESTION 4

The following lawsuits involving challenges under the United States Constitution were filed in the appropriate federal courts by parties having proper standing:

1. Club vs. State: Every year, the American Golfers Association (AGA) has its most prestigious tournament at the Magusta National Golf Club (Club) in the State of Eorgia (State). Recently it was reported that Club has no female members and does not accept membership applications from women.

   The revelation that Club did not allow female members caused a significant amount of negative press at the local, state, and national levels. In response, the State legislature enacted the Sports and Recreational Facility Inclusive Act (Act), which prohibits all private sports and recreational facilities in State from discriminating against any prospective members based on race, gender, ethnicity, or religion. A private sports and recreational facility is defined as any private facility where members are provided the opportunity to engage in golf, tennis, basketball, aerobics, strength training, or other similar athletic activity on the premises. Club sued State claiming that the Act violates Club's First Amendment rights.

2. Businesses vs. FCRNA: Franklin Civil Rights Now Association (FCRNA) was formed to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination. Upon learning that several businesses (Businesses) in Franklin were not complying with federal civil rights laws, FCRNA organized a boycott of those businesses. The boycott lasted for quite some time and had a negative economic impact on those businesses that were subject to the boycott. Businesses sued FCRNA for malicious interference with their businesses.

   In preparation for the trial, Businesses requested that FCRNA provide a list of the names and addresses of all of its members. Businesses alleged that all such documents were necessary for adequate preparation for the hearing. FCRNA refused to provide this list. Businesses filed a motion to compel production of the list, which the court granted over FCRNA's objections. FCRNA did not comply with the production order, and, for this failure, was adjudged in civil contempt and fined $100,000. FCRNA filed a motion to vacate the contempt judgment on the grounds that the court could not constitutionally compel disclosure.

3. Don vs. State of Dakota: The State of Dakota has recently experienced several terrorist attacks in government office buildings. After each attack, anonymous tweets, emails, and Facebook posts appear claiming that a group calling itself Dakota Secession (DS) carried out these attacks. DS is an organization dedicated to seceding from the United States of America. Its Mission Statement states that it will "use any means necessary" to accomplish its stated goal. It is believed that DS has been successful in carrying out these attacks through members and sympathizers working in the government buildings who are providing DS with vital information necessary to gain access to the buildings and carry out these attacks. In response, the State of Dakota has imposed a requirement that all Dakota government employees sign an oath stating the following: "I am not a member of DS or of any group advocating the use of force to achieve secession from the United States of America." Don, a clerical worker for the State of Dakota declined to sign the oath, without giving a reason for not signing it. Don was fired from his job because he declined to sign the oath. Don sued the State of Dakota for unlawful termination.

How should the federal court rule in each of the following cases?

A. The lawsuit filed by Club against State.

B. The lawsuit filed by Businesses against FCRNA.

C. The motion filed by FCRNA to vacate the contempt judgment.

D. The lawsuit filed by Don against the State of Dakota.

Discuss each answer fully. You may assume that in each case there is the requisite state action.

A. The court should rule that Act is unconstitutional. The United States Constitutions applies to only governmental acts and not private party acts. Moreover, under the due process clause, the scrutiny levels apply. Strict scrutiny applies to race, ethnicity and religion, whereas intermediate scrutiny applies to gender. Under strict scrutiny, the state must show that the law is necessary for a compelling governmental interest. Under intermediate scrutiny, the state must show that the law substantially serves an important governmental interest. Moreover, this must be achieved with the least restrictive means. Here, Act is not necessary for a compelling governmental interest or substantially serves an important state interest because it is restricting the membership of a private club on the basis of race, gender, ethnicity and religion where there were a few incidental reports that Club does not allow women members. Moreover, there are other less restrictive means to achieve the goal of having Club open for more women members. Therefore, Act is unconstitutional.

B. The court should rule in favor of FCRNA. When a governmental entity interferes with a private business, strict scrutiny applies. Here, the boycott by FCRNA was necessary to achieve a compelling state interest by protecting the civil liberties of people within the state. There was not a less restrictive mean. Therefore, the court should rule in favor of FCRNA.

C. The court should grant the motion. Freedom of disclosure and association is protected by the First Amendment. The government cannot compel an organization to disclose the organization's members when doing so would have a chilling effect on the members. Here, members of FCRNA are there to ensure political, educational, social and economic rights and those members participated in the boycott against Business. If FCRNA was compelled to disclose its members, there would be a chilling effect because it would potentially harm the civil rights of the community because members of an association have a right to associate in an organization without having their identities disclosed. Therefore, compelling the disclosure would be unconstitutional.

D. The court should rule in favor of Don. Freedom of Association is protected by the First Amendment. Under this right, a person has the freedom to associate and belong to a group of their choosing as long as the group's purpose is not illegal and the person does not engage with the intent of committing illegal acts and furthering those illegal acts. Moreover, one cannot be penalized for failing to disclose their membership in a group. Moreover, one cannot be compelled to disclose their association with any one particular group. The government can penalize a person for participating in a group when the group has an illegal purpose, the person specifically knows of the illegal purpose, and acts with the intent to engage in illegal conduct in furtherance of the illegal purpose. Here, the facts do not indicated that Don is actually a member of DS, nor does he have knowledge of DS's illegal purpose. Moreover, Don has not engaged in any illegal act that would further DS' illegal purpose. Don simply refused to sign the oath and, therefore, cannot be penalized by being fired from his job for failure to sign the oath.

QUESTION 5

Mary is a resident of Anywhere, Ohio, where the following events have occurred:

1. Mary purchased a commercial lawnmower for her business from Bill and wrote a personal check to him dated March 1, 2018, in the amount of $5,000 to pay for the mower. On July 10, 2018, Bill indorsed Mary's check over to Sam for work that he had done for Bill. On July 15, 2018, Mary placed a stop-payment order on the check and refused to pay Sam the $5,000 because, in her opinion, the lawnmower did not operate properly.
2. Mary hired ABC Landscaping (ABC) for a landscaping project for her business. She agreed to a total project cost of $10,000. She paid $2,000 down in cash and signed a fully negotiable promissory note in favor of ABC, whereby she agreed to pay the balance of $8,000. ABC began work on the project, but as things progressed, ABC began to experience some financial difficulties. Ultimately, ABC closed its business, having completed only one-half of Mary's project. ABC now wants to collect $8,000 from Mary on the note.
3. Mary purchased a delivery van for her business from Dealer and gave Dealer a fully negotiable promissory note for $10,000 due and payable on September 1, 2018, to pay for the van. Dealer, in turn, transferred the note to its Landlord (Landlord) to pay a $2,000 debt that Dealer owed to Landlord for improvements that Landlord had made to Dealer's showroom. When Landlord presented the $10,000 note to Mary, with a demand for payment on September 2, 2018, Mary refused to pay Landlord more than $5,000 because the van turned out to be a "lemon" and she was forced to sell the van for only $5,000.

In each of the following disputes, explain who should prevail and in what amount, if any, and whether any defenses might apply:

1. Sam v. Mary;

2. ABC v. Mary; and

3. Landlord v. Mary.

Discuss each answer fully.

1. Sam should prevail because he is a holder in due course. A holder in due course is one who takes possession of a facially valid (i.e., not obviously forged or manipulated) note or draft for reasonable value, without knowledge of any defenses or issues that would prevent the original holder from enforcing the instrument. "Value" can take the form of past consideration – e.g., as here, the payment of a pre-existing debt. Here, Sam became a holder in due course because he took possession of Mary's check from Bill without knowledge of Mary's issues with her lawnmower. He gave value for the check (payment for the work Sam had done for Bill). And the facts do not indicate that anything was obviously wrong with the check to put a reasonable person on notice that the check is invalid. Once a person becomes a holder in due course, they are no longer subject to "personal" defenses, such as breach of contract or breach of a merchant's warranties. They remain subject to various "real" defenses, such as fraud-in-the-factum, forgery, incapacity, infancy, illegality, etc. In this case, Mary is attempting to avoid payment because she believes Bill breached a contract or warranty with her. This is a personal defense, to which Sam is immune owing to his holder in due course status. Mary must pay. She may seek recoupment as damages in a breach of contract or warranty action against Bill.

2. Mary will prevail against ABC, at least in part, because as the initial holder of the note, ABC is not a holder in due course, and, therefore remains subject to the full panoply of personal defenses Mary might raise. Here, Mary can raise breach of contract: Mary and ABC contracted for landscaping, and ABC breached by only completing 50 percent of the work. That does not mean that Mary must not pay anything. Under quasi-contract, ABC may recover for the reasonable value of the work it has already completed; to deny it recovery would be to unjustly enrich Mary, especially considering that ABC has completed a substantial portion (50 percent) of the work. Thus, Mary will likely have to pay $3,000 on the note, which will result in $5,000 to ABC – 50 percent payment for 50 percent work.

3. Mary will likely have to pay the full value of the $10,000 note owing to Landlord's status as a holder in due course. The same test applies for becoming a HDC for a promissory note as for checks (see #1 above). As in #1, the "value" given here takes the form of past consideration – the $2,000 debt. The only wrinkle here is that the face value of the note ($10,000) far exceeds the debt Dealer transferred the note to Landlord to pay ($2,000). Consideration paid for an instrument must be "reasonable" in order to entitle one to HDC status. Nominal consideration will not suffice. But courts are liberal with this term, and it is unlikely to pose an impediment here. For example, dealer and landlord could have reckoned – correctly – that Mary would loath to pay on the note, warranting a substantial discount from its face value. $2,000 is still a lot of money, so the consideration paid is likely to be "reasonable." Landlord is thus likely a holder in due course of the note. (One further wrinkle: it is not clear whether the note is order paper or bearer paper. If it is bearer paper, no indorsement is required; if order paper, then Dealer would need to indorse the note over to Landlord to properly transfer it.) As a holder in due course, Landlord is immune from Mary's contract-based personal defense that her van was a lemon. She must pay the full amount. She may seek recovery from Dealer in a separate action.

QUESTION 6

Dan, a detective in the Any County, Ohio, Sex Crimes Unit was assigned to investigate an attempted rape that occurred near a local college campus. He interviewed the victim, Vicki, a student at the school. Vicki explained that on the day in question, she was running errands close to campus. Prior to entering a restaurant where she intended to have lunch, she was approached by a young man in his 20s who was wearing a long trench coat and holding a large satchel containing numerous CDs. He introduced himself as Riley, an aspiring musician, who inquired whether Vicki would like to purchase one of his CDs. Vicki politely declined and shortly thereafter entered the restaurant. Vicki recalled that Riley had a distinctive low "gravelly voice."

Vicki entered the women's restroom in the corridor of the restaurant. A few seconds after entering, Vicki heard someone enter the room behind her and the light went off. She heard a man's voice say, "don't say a word." She felt someone grab her shoulder at which time she screamed and the man fled. Due to the darkness of the room, Vicki could not see the man; however, upon hearing his voice, she felt certain it was Riley.

Over the next few weeks, Dan was able to develop information about Riley, his suspect. Several store owners were able to identify Riley as someone who frequently attempted to sell CDs, always wearing the distinctive trench coat. He also was able to obtain video surveillance which, although grainy, captured footage of a woman Vicki identified as herself, entering the restaurant followed by a man in a trench coat. Seven minutes later, the video showed the man exiting the restaurant very quickly and disappearing down a nearby alley. Due to the camera angle, the video did not capture the initial encounter described between Vicki and the man in the trench coat.

Dan began investigating Riley's background. He was able to obtain YouTube footage of Riley's performance where he addressed the audience with his distinctive low voice. He also noted in his report that Riley's song lyrics were often explicit in nature, occasionally bragging of physical aggression toward women. He also learned that Riley had been expelled as a student from the college three years earlier, due to an incident that contained several similarities to what Vicki had claimed. Allegedly, Riley entered a female's dorm room and uttered the words "don't say a word." Fortunately, the student's roommate returned home at the time and Riley fled from the dorm. He was never formally charged with a crime; however, school authorities expelled Riley through the disciplinary process.

Dan arrested Riley on suspicion of attempted rape. After waiving his Miranda rights, Riley agreed to provide Dan with a statement. He admitted that he was selling CDs in the shopping complex on the day in question; however, he denied ever having any encounter with Vicki or ever entering the restaurant where the alleged attack took place. Dan presented all the facts in his report to a grand jury, which indicted Riley on one count of attempted rape. Riley entered a plea of not guilty.

1. **What direct and circumstantial evidence is relevant to the criminal dispute in this case? Explain fully.**
2. **Riley's defense counsel filed a motion in limine requesting that the State be prohibited from introducing any of the following evidence:**
   a. **The YouTube video highlighting Riley's distinctive low voice;**
   b. **The lyrics to Riley's songs; and**
   c. **Any reference to the dorm room incident three years prior.**

How should the court rule as to each item of evidence? Discuss each answer fully.

1. For evidence to be admissible, it must be relevant. Relevant evidence tends to make a fact in consequence more or less probable with than without. However, under certain circumstances, relevant evidence may be inadmissible for public policy reasons or other exclusionary evidence rules. Direct evidence is evidence that directly proves an element of the crime, whereas circumstantial evidence requires inferences that a reasonable jury may find has probative value to conclude the defendant was the perpetrator. In some cases, circumstantial evidence is more effective. Lastly, relevancy is distinct from admissibility; that is, otherwise relevant evidence may be excluded and inadmissible.

   Direct evidence here is Riley's own admission as an opposing party statement to Dan that he was selling CDs in the shopping complex on the day in question, Vicki's own statements with personal knowledge regarding the encounter with Riley on the day in question, and the fact that Riley on the YouTube video says "don't say a word." Circumstantial evidence is the videotape that indicates a person with a trench coat entered, but does not indicate whether it was Riley who attempted to rape Vicki, the gravelly voice similarities, and the fact that both say "don't say a word," which a jury may infer was made by Riley. Further circumstantial evidence is the prior pattern of Riley being expelled for attempted rape, the manner in which he encountered his victims, and the song lyrics that imply a specific aggression toward women consistent with the non-consensual crime of rape.

   As stated, not all these may be admissible.

2. The Court should deny the defense counsel's motions regarding the YouTube video and the dorm incident only, and grant on the song lyrics.

   Generally, character evidence to prove a defendant's conduct acted in conformity on a particular occasion is inadmissible. Further, specific prior bad acts of a criminal defendant are generally inadmissible unless the defendant first opens the door by alleging attacking the victim's character, or defendant's own character. However, the prosecutor may first introduce specific instances of propensity evidence when the claim or defense involves rape or child molestation. These propensity evidences must be relevant and the court must exclude probative evidence if the probative value is substantially outweighed by the unfair prejudice, confusion of issues, or if the evidence may mislead the jury. The court may exclude on grounds of duplicative evidence or undue delay.

   Here, the YouTube video provided is authenticated and is relevant to highlight Riley's distinctive low voice. Provided Defendant asserts his Fifth Amendment right against self-incrimination, this is highly relevant circumstantial evidence to have a jury, based on the circumstances, Riley was the perpetrator.

   Further, the song lyrics, although violent, are likely impermissible character evidence to prove he acted in conformity with those lyrics on the day. Although this is a rape case, the song lyrics themselves may unfairly prejudice the defendant and the court must exclude them as they are not relevant to the act of rape but rather his song interests. Although the judge may allow this evidence since the lyrics may contain prior motive or plan indicative of the events that occurred, it is likely unfairly prejudicial.

   As stated above, specific prior bad acts are generally inadmissible with the exception of sexual misconduct or child molestation cases. Here, these prior bad acts are relevant to an essential element of the crime as even if they prove propensity, they also prove a common scheme or pattern of behavior that is relevant to the crime.

   Thus, the Court should allow the YouTube video provided authentication is established and the dorm incidents, but exclude the song lyrics.

QUESTION 7

Case A: Sue owns a parcel of real property, Parcel A. Bob approached Sue and expressed an interest in buying Parcel A from her. When she orally agreed, Bob pulled out a scrap of paper and wrote down: "Sue agrees to sell Parcel A for $10,000 to Bob." Both Sue and Bob signed and dated the scrap of paper. One week later, Bob called Sue and informed her that he had the money and that he was ready to complete the sale of Parcel A the following week. Sue replied that she changed her mind and was not going to sell him Parcel A.

Case B: Bob approached Dan and expressed an interest in buying a parcel of land from him, Parcel B. When Dan orally agreed, Bob pulled out a scrap of paper and wrote down: "Dan agrees to sell Parcel B to Bob in exchange for Bob's agreement to paint Dan's house." Both Dan and Bob signed and dated the scrap of paper. One week later, Dan called Bob and informed him that he no longer wanted him to paint his house and that he was not going to sell Parcel B to Bob.

Case C: Bob approached Anne and expressed an interest in buying a rare painting that she recently inherited from her father's estate, which had been in her family for many years. When she orally agreed, Bob pulled out a scrap of paper and wrote down: "Anne agrees to sell the painting from her father's estate for $10,000 to Bob." Both Anne and Bob signed and dated the scrap of paper. One week later, Anne called Bob and informed him that she changed her mind and that she was not going to sell the painting.

In each of the above fact patterns, Bob filed a lawsuit seeking specific performance of the agreements.

How should the court rule in each of the following lawsuits?

1. **Bob v. Sue regarding Parcel A.**
2. **Bob v. Dan regarding Parcel B.**
3. **Bob v. Anne regarding the painting.**

Discuss each answer fully. Do not discuss the Statute of Frauds.

A contract requires an offer, acceptance, and consideration. An offer must create a reasonable expectation in the offeree that the offeror is willing to contract. Acceptance can be done by performance, or a signing of a writing. Consideration is a bargained for exchange generally, but Ohio recognizes the benefit/detriment analysis where there is either a benefit to the offeror or a detriment to the offeree. Once a validly formed contract has been made, one may breach a contract, either materially or by a minor breach. A material breach is a breach of an essential portion of the contract. When a breach has occurred, the nonbreaching party can cease performance on their portion of the contract and may then seek damages. Specific performance may be sought in particular circumstances. Specific performance may be sought when the contract is for the sale of a unique item or a specifically made item. Specific performance will not be awarded in service contracts.

A. Bob v Sue regarding Parcel A

The court likely should rule for Bob. Bob initially approached Sue with an interest in Parcel A, to which Sue orally agreed. The expression of interest seems to have created a reasonable expectation in Sue that Bob was willing to contract for the sale of the property. If the manifestation of interest is not enough, Bob writes on a slip of paper that states "Sue agrees to sell Parcel A for $10,000 to Bob." This creates a reasonable expectation that Bob wants to contract with Sue. Sue agrees by signing and dating the document. There was consideration: Bob was to pay Sue $10,000 in exchange for Parcel A. This produced a valid contract between Bob and Sue for the sale of land. Sue then breaches materially by stating she will not sell Bob the land. Because Parcel A is the sale of land, Bob has the remedy of specific performance because of the unique nature of land. The court should find for Bob.

B. Bob v Dan regarding Parcel B

The court likely should rule for Dan. Again, Bob approached Dan and expressed interest in Parcel B. If this is not enough to be deemed an offer, Bob writes the offer on a scrap paper, "Dan agrees to sell Parcel B to Bob in exchange for Bob's agreement to paint Dan's house." This can be construed as an offer because it creates a reasonable expectation that Bob is willing to enter into a contract for the sale of land in exchange for services. Dan accepts this offer by signing and dating the paper that contains such language. There is consideration here: Parcel B in exchange for Bob's promise to paint Dan's house. This produces a valid contract. Dan then states that he does not want his house painted and he will not sell Parcel B, producing a material breach. Because of the nature of the agreement (Bob has offered his services in exchange for the property), the court will likely not rule for specific performance because they will not award specific performance to a service contract. Bob will not be awarded specific performance and the court will likely rule for Dan.

C. Bob v Anne regarding the painting

The court will likely rule for Bob. Bob approached Anne and expressed interest in purchasing the rare painting. Anne orally agreed to this interest, which may be deemed to have created a reasonable expectation to enter into a contract, but if it has not, Bob created a valid offer upon his writing on the paper, "Anne agrees to sell the painting from her father's estate for $10,000 to Bob," which can be seen as a manifestation to enter into a contract with Bob. Anne then accepts the terms of this offer by signing the paper. There was consideration: a rare family painting for $10,000. This produced a valid contract. Anne then materially breaches by refusing to sell the painting. Because of the unique nature of the artwork, it is likely specific performance is the clear remedy. The court should rule for Bob.

QUESTION 8

Seller is the owner of a 40-unit apartment building (ECW) and an adjacent asphalt lot (Lot) located in Anytown, Ohio. On May 1, 2015, Buyer executed a valid written contract to purchase ECW from Seller in its "present condition." Buyer paid Seller the required earnest money. The contract required Seller to convey marketable title and close on November 15, 2015.

On June 1, 2015, Buyer and Seller orally agreed that Seller would sell Lot to Buyer to use for additional parking for ECW tenants and guests. Seller and Buyer agreed that Buyer would take Lot "as is" and make any necessary repairs or improvements. Buyer and Seller shook hands to seal the deal and agreed to a November 15, 2015, closing date.

At the end of June, with Seller's consent, Buyer had Lot inspected. The inspection disclosed that a new drainage system was necessary and that the asphalt surface had to be replaced, all at a cost of $25,000.

In July, Buyer and Seller discussed the needed improvements to Lot. Buyer stated that he would like to have Lot redone before closing. Seller consented.

Buyer contracted with Acme Drainage and Asphalt to install a new drainage system and to resurface Lot. Buyer sent a copy of the contract to Seller. By email to Buyer, Seller acknowledged receipt of the contract and stated "Get it done!" Immediately after receiving the email, Buyer had Acme commence work. Acme completed the work in August. Buyer paid Acme $25,000 and sent a copy of the paid receipt to Seller.

In September, a fire occurred in one unit at ECW and spread to several others, resulting in damage to 10 of the 40 units. The cost of repair for the damaged units was $75,000. Seller made a claim with his insurance company, which paid $75,000 to Seller for the loss. Seller, however, did not make any repairs.

In October, Buyer obtained a title report showing Seller had taken title to ECW by a duly recorded deed, which included a signage covenant granting Anytown, Ohio its successors and assigns the right to permit any natural or legal person to establish or maintain on said property any billboard, sign, notice, poster, advertising device, or other display. The covenant runs with the land.

At the end of October, the City Council of Anytown, Ohio erected an 18 by 18 foot permanent sign on the south side lot line of ECW. The sign states, "Welcome to Sunny Anytown, Ohio." Unfortunately, the sign blocks the sunlight and view of at least 20 ECW tenants.

Prior to closing, Buyer sent the following letter to Seller: "I am withdrawing from the agreement to purchase ECW and request that you immediately return my earnest money deposit. The existence of the signage covenant and erection of the sign by Anytown, Ohio breaches the marketable title provision of the contract. Also, 10 units have been damaged and not repaired. This is a breach as well."

Seller's response to Buyer's letter was to state by email, "I will see you at the closing on November 15, 2015."

At the date of closing, Buyer refused to close on ECW. Buyer demanded that Seller return his earnest money deposit. Seller refused. Buyer tendered the purchase money for Lot to Seller at least three times during the closing, but Seller refused to close stating, "I will not sell you Lot unless you close on ECW." The parties failed to close on either property.

Buyer sued Seller for specific performance for the sale of Lot while Seller filed a counterclaim seeking specific performance against Buyer for the purchase of ECW. Assume that specific performance is a proper form of action. Assume that the signage covenant is neither modifiable nor releasable.

1. **How is the court likely to rule on Seller's counterclaim for specific performance against Buyer for the purchase of ECW?**
2. **How is the court likely to rule on Buyer's claim for specific performance against Seller for the purchase of Lot?**

Discuss each answer fully.

A

The sale of property is subject to the Statute of Frauds (SOF). The SOF requires that sales of real property be in writing, signed by the party to be bound, and contain all essential terms, including parties, subject of the sale with specificity and usually the price or consideration for such agreement. The SOF can be exempted if a party has partly or substantially performed, improved the value of the land, or detrimentally relied under promissory estoppel. Real property disputes are remedied by specific performance by sale as damages are generally inadequate. Contracts require a valid offer, acceptance, and consideration, and are evaluated by the objective person standard.

1. The Court will rule against Seller on specific performance against Buyer for ECW

The issue is whether the court will rule for Seller to require Buyer's purchase of ECW. The rule for specific performance is a remedy for a non-breaching party. In a sale for real property, the breaching party may not request specific performance if they breached an agreement to convey marketable title and failed to disclose material issues by misrepresentation or deceit, or failed to satisfy an agreement for present condition of the property. Sellers that promise to convey marketable title are warranting that the property is free from an unreasonable risk of litigation and burdens that encumber the land which may interfere with a buyer's rights, economic value of the property, or other material matters.

Here, there was valid contract for the sale of ECW to Buyer that meets the SOF requirements of in writing, signed by party to be bound and describes purpose and transaction with essential terms. Those terms include "present condition" and "marketable title." The closing date was November 15, 2015, which requires Seller to convey good title on or before that date. Present condition is not necessarily the same as "as is." Present condition means the condition at inspection, viewing the property and at the same fair market value. Marketable title means the property is free from encumbrances, liens, burdens, covenants, servitudes, or easements that detract from the value or use for the buyer. Seller did not disclose the covenant directly to Buyer even though the Buyer likely had constructive notice, Seller should have disclosed the nature and future implications that could result in disputes or litigation. The covenant could pose significant interference and decrease the value of the property in the future. Moreover, Seller failed to repair the fire damage in ECW, which was $75,000. Seller obtained an insurance payment, but did not repair the condition or offset the sale price to Buyer. As a result of these actions, Seller breached the agreement to convey marketable title by November 15. Although Buyer may have been able to obtain insurance or may face responsibility under the transfer of property liability, Seller should have either repaired or offset the cost by insurance proceeds. Thus, Buyer prevails.

2. The Court should rule for Buyer in specific performance or restitution damages for Lot

The issue is whether there was a valid contract for Lot and whether the sale of Lot was contingent on sale of ECW. See contract rules above. Here the sale of Lot is separate from sale of ECW and does not have any contingent or conditional language stating ECW purchase is required for the sale. Although the agreement for Lot was oral and did not state a price, it can be exempted from SOF because Buyer partly performed, added significant improvements to Lot, and subsequently detrimentally relied on the sale of Lot. Buyer had Lot inspected, added drainage system for $25,000 and had the Lot resurfaced. This is substantial performance and a large improvement in value of the property. The Court may order specific performance and determine sale price or order restitution to prevent unjust enrichment of Seller.

QUESTION 9

Smith is an avid collector of Hollywood memorabilia. He has amassed his collection by quietly collecting prized items as they have come available, and without any public attention. This has allowed him to remain anonymous and to avoid having collectors call him.

Smith met with Jones to show Jones his vast collection and to discuss selling some of his items. Smith explained that he wanted to place small batches of specific items on the market over an extended period of time in order to achieve top dollar for the sales. Smith liked Jones and signed a written contract to engage Jones to sell four specific items. The items for sale consisted of Dorothy's red sparkling shoes from The Wizard of Oz, an original script from Gone with the Wind, one animation cel from Disney's Snow White movie, and one cel from the Pinocchio movie. While the agreement did not contain a minimum price, Smith told Jones that he expected to receive at least $500,000. Jones would receive an agreed-upon commission on the sales.

Jones then went to work to sell the items, and located three potential buyers. He agreed to sell the shoes to Barb for $75,000, and the script to Carl for $50,000. Diane expressed an interest in the two animated cels, and asked Jones if there were any other early Disney cels available. Jones knew that Smith had another Pinocchio animation cel that he had seen when he reviewed the entire collection before he was engaged. He described the third animation cel to Diane and told her it was in mint condition, which he warranted to Diane in the agreement they both later signed. In return, Diane agreed to purchase all three cels for a total of $700,000. Jones, proud of his work, quickly signed agreements with all three individuals for the sale of the items at the specified prices. He signed each agreement in his own name and did not indicate that he was selling on behalf of Smith.

He then went to Smith to tell him about the sales and brag about the fact that he got $825,000 for the batch. Smith did not react well. He was angry that the shoes and the script only went for $125,000, because he thought they should have received a price of at least twice that amount. He now refuses to sell the items to Barb and Carl pursuant to their agreements with Jones. Smith hit the roof when Jones told him that he had to include the third Disney cel to get the price of $700,000. Smith had not wanted to include the third cel in the sale because it was his favorite of all the art and it had some slight wear and tear.

(a) What liability, if any, does Smith have to Barb and to Carl?

(b) Assume for this question only that Smith refuses to complete the sale of the three cels to Diane.

1. What liability, if any, does Smith have to Diane?

2. What liability, if any, does Jones have to Diane?

(c) Assume for this question only that Smith decides he does want to complete the sale of the three cels, but Diane refuses to do so because the third cel is damaged. Do either Smith or Jones have the ability to enforce the sale?

Discuss each answer fully.

A

There is a principal/agent relationship between Smith and Jones. In order to have an agency relationship, there must be assent, benefit, and control. There is assent because Smith and Jones executed a written agreement authorizing Jones to sell certain items in Smith's collection and they voluntarily entered into the agreement. There is benefit for Smith because he wants to begin selling some of his collection while still remaining anonymous. This also benefits Jones because he will receive a commission for the sales. There is control because Smith told Jones which items he is tasked with selling and a minimum price Smith hopes to gain from the total sales of the items. Therefore, there is an agency relationship.

A. Smith's liability depends on what type of authority Jones had to enter into the agreements and whether the third party knew of the agency relationship. Here, Jones had actual authority from Smith to sell the items to Barb and Carl. Actual authority can be shown by words, written or spoken, giving the agent the authority to act on behalf of the principal. There is an objective and subjective test for actual authority. There must be a belief by the agent that his actions are authorized and that belief must be reasonable. Here, there was a written contract between Jones and Smith giving Jones the authority to sell the specific items set out in the agreement. Jones believed he had authority to sell the shoes to Barb for $75,000 and the script to Carl for $50,000, as there was no minimum price for each item and Jones' belief is reasonable that he had authority to sell the items for the prices he did. Additionally, Smith is an undisclosed principal and his liability is dependent on whether Jones had authority to engage in the transaction. An undisclosed principal occurs when the third party is not made aware of the agency relationship when signing the contract. Here, Smith is an undisclosed principal as Jones signed the contract with Barb and Carl in his own name, without mentioning the agency relationship. Since Jones had actual authority to enter into the contract, Smith will be liable as an undisclosed principal.

B.1. Smith's liability depends on whether Jones had authority to enter into the contract with Diane. Jones had actual authority (see above) for two of the cels and did not have any authority for the third cel. Smith is an undisclosed principal (see above) and Smith will only be liable for the sale of items he actually authorized Jones to sell. Here, Smith would be liable for the two cels authorized in the agreement between Jones and Smith, but Smith would not have any liability on the third cel that Jones included in the sale to Diane, since Jones did not have authority to sell that cel.

2. Jones could have liability on all three cels, but would definitely be liable on the third, unauthorized cel he sold to Diane without being granted permission to sell that particular cel from Smith. Since Jones did not disclose the principal to Diane, he remains liable on the contract as the party who signed it without disclosing the principal and remains liable for authorized and unauthorized transactions.

C. Smith may have the ability to enforce the sale if he ratifies Jones' actions in regard to the third cel. A principal ratifies a previously unauthorized action if he accepts the benefits of a contract after knowing its material terms. If Smith is willing to sell the third cel to Diane, he would have ratified the contract, giving both him and Jones, who remains a party to the contract based on his signing of his name to the contract not disclosing the principal, to enforce the contract, but may be liable to Diane for breach of contract due to the defective condition.

QUESTION 10

Jack and Tonya were married in Coaltown, Ohio in 1980. Jack and Tonya had two children, Drew and Nancy.

In 2005, Jack executed a valid Ohio Will (2005 Will), which provided as follows:

1. I give all of my real property to my wife, Tonya.
2. I give all the rest and residue of my estate to Tonya, Drew, and Nancy in equal shares.
3. I name Tonya as my Executor. If Tonya cannot serve, I name Nancy as my Executor.

Jack's attorney kept the original 2005 Will in a safe and Jack kept a copy that he took home.

Jack's estate was relatively meager until late 2017 when he learned that he was going to inherit $500,000 from his uncle's estate. In early 2018, Jack received a partial distribution of $50,000. Jack immediately purchased a Lexus SUV, which he titled in his name. Tonya was furious and felt that Jack should have spent the money more wisely. Jack informed her that it was none of her business.

With his new vehicle, and with the expectation of receiving the balance of his inheritance, Jack began visiting The Corner Pub, where he quickly became infatuated with Sophie, the nighttime bartender. Jack visited The Corner Pub nightly and Jack and Sophie began an affair.

When Jack received the $450,000 balance of the inheritance from his uncle in June 2018, he immediately filed for divorce from Tonya. Upon being served with the divorce papers, Tonya consulted with an attorney who told her that if the divorce was finalized, she would have no claim to the inheritance that Jack received because inherited property is not considered a marital asset.

Shortly thereafter, Jack located his copy of the 2005 Will and shredded the document. Jack drafted a letter to his attorney requesting the attorney forward the original 2005 Will to Jack so that he could destroy it.

Faced with the pending divorce and the fear that she would be disinherited, Tonya devised a plan with Drew to kill Jack. The following day, as Jack pulled into the parking lot at The Corner Pub, Tonya distracted Jack, and Drew shot Jack in the back. Drew and Tonya quickly disappeared.

Upon hearing the gunshot, two patrons who were entering The Corner Pub saw Jack lying in the parking lot. Realizing that he was mortally wounded, Jack stated the following:

> "It is my last dying wish and declaration that Sophie is to be given my Lexus SUV. Please document this as promptly as possible."

Jack took one last breath and passed away.

The next day, the two patrons who had heard Jack's Declaration about the Lexus SUV reduced it to writing. Both subscribed and signed the Declaration as competent disinterested witnesses and both indicated Jack was of sound mind.

The envelope containing Jack's original 2005 Will arrived at Jack's house on the day after his death. Nancy filed Jack's 2005 Will and Jack's Declaration regarding the Lexus SUV with the probate court 20 days after Jack's death.

Drew and Tonya were both quickly arrested and both pled guilty to murder.

At the time of Jack's death, he was survived by Tonya, Sophie, Drew, Nancy, and Gil, who was the son of Drew. Jack's assets consisted of the following:

1. The Lexus SUV;
2. A residential property owned by Jack and Tonya, jointly with right of survivorship; and
3. The $450,000 balance of the inheritance from Jack's uncle.

Who is entitled to receive Jack's assets? Discuss each answer fully.

A

1. Sophie will get the SUV. In Ohio, oral wills are valid if the testator is in his final illness, it is witnessed by two disinterested witnesses who reduce it to writing within 10 days and can prove that the testator had testamentary intent, testator intended his words to be a will, and that they were called upon to hear and remember his words. Further, it must be submitted to probate within three months. Here, Jack was in his final illness – he was shot and knew that he would die. There were two disinterested witnesses who heard his oral will and reduced it to writing within 10 days, declared that Jack was of sound mind, and submitted it to probate within three months (20 days). Oral wills can only dispose of personal property. The SUV is personal property. Therefore, this was a valid oral will and Sophie will take the SUV.

2. The 2005 will is still the operative document. In Ohio, physical destruction of a will works as a revocation; however, it must be the actual will, not a mere duplicate. Jack destroyed a copy of the will, not the real thing. He did not receive the real will in enough time to destroy it. His letter to the attorney stating his intent to destroy it has no effect.

   Tonya and Drew will take nothing. Ohio's slayer statute provides that one who feloniously or intentionally causes the death of the decendant cannot take from his estate nor be appointed representative of the estate. (Common law has a similar rule.) All interests in the will to the slayers are treated as though the slayers predeceased the decedent. This statute also applies to all will-substitutes, including rights of survivorship. Therefore, Tonya has no interest in the residential property she owned with Jack, regardless of the right of survivorship. Similarly, the devise to Tonya of all real property lapses, and the real property will go to the residue. Nancy will serve as the administrator since the will provided her as an alternative in case Tonya could not serve.

   In the will, the residue goes to Nancy, Tonya, and Drew in equal shares. As above, Tonya and Drew's interests lapse due to the slayer statute. The failure of their gifts, however, may be saved by the anti-lapse statute. In Ohio, a devise will not lapse provided that the person who predeceased (or is treated as predeceased) is a grandparent, a descendant of a grandparent, or a step-child of the testator and that person has an heir who survived the testator by at least five days. Here, Tonya is not related to Jack, so her gift is not saved by the anti-lapse statute. Drew, however, was Jack's son and he has a child who has survived the testator – Gil. Gil, therefore, will take Drew's share. Therefore, the residue will go to Gil and Nancy in equal shares. So they will each have a half-interest in the residential property as tenants in common since the will does not specifically provide for the right of survivorship.

3. The $450,000 goes to the residue, which will, as above, be split in equal shares between Gil and Nancy. Assuming administrative and funeral costs are already paid, they will receive $225,000 each.

QUESTION 11

Bob and Carl took their annual spring camping trip to the Anytown, Ohio, Municipal Park and Campground (Park). They found their campsite, and each set up his own tent. Then Bob and Carl cleared their camp space and ate lunch.

While Carl was cleaning up after lunch, Bob, who loved practical jokes, yanked the "Men's Outhouse" sign from Park's outhouse door, breaking the hook on which the sign hung in the process. He placed the sign over the flap on Carl's tent. Carl was not amused.

Later that afternoon, while Bob was fishing in the lake, Carl tried to build a large fire to cook dinner. The wood around their campsite was wet, making it difficult to light the fire. Carl decided to pour some of the kerosene he brought for their lantern on the campfire to help start the fire. Carl remembered that he handed the container of kerosene to Bob when they were setting up camp and Bob had put it in his tent. Carl unzipped the flap and entered Bob's tent to retrieve the kerosene. As Carl was leaving the tent, he noticed that Bob left his new smart watch on top of his sleeping bag. Carl always wanted a watch like that, so he took it.

Carl then poured some of the kerosene on the wet logs, hoping it would help them catch fire. When he threw a match on the logs, flames erupted, shooting high into the air and into the trees. Several burned leaves fell to the ground and the fire ended almost as quickly as it started as the kerosene burned off.

The Anytown, Ohio, County Prosecutor has charged Bob with theft and vandalism, and charged Carl with arson, trespass, theft and burglary.

Explain whether Bob and Carl should be found guilty of the crimes charged against each of them. Discuss each answer fully.

A

Bob: Theft: Bob should be found guilty. In Ohio, theft is a combination of embezzlement, larceny and false pretenses. It occurs when a person acts with purpose to deprive an owner of property/services and that person knowingly obtains/exerts control over the property or services, without the consent of the owner, beyond the scope of the owner's consent, and by means of threat or intimidation. Here, Bob knowingly removed the outhouse sign from above their park door to place it over Carl's tent. He acted with the purpose to remove the sign and knowingly obtained control of that sign, clearly without any sort of permission. As such, he meets the required elements for theft.

Vandalism: Bob is guilty of vandalism. Vandalism is the causing of harm via desecration or destruction of someone else's property without that owner's permission. Here, Bob intentionally yanked the sign down in order to play a practical joke on Carl and, by doing so, he broke the hook on which the sign hangs. This was the destruction of someone else's property without permission, making Bob guilty even if he did not mean to break the hook, but simply wished to steal the sign. Further removing a fixture from a building could also constitute vandalism.

Carl: Carl is not guilty of arson. In Ohio, arson is when by means of fire or explosion, a person creates a substantial risk of physical harm to another's property without consent, his or another's property with intent to defraud, his or another's property by means of an agreement-for-hire or consideration, property owned by the government, and a nature preserve or park owned by someone else or the government. Here Carl created a fire, not an explosion that quickly extinguished itself after searing a few leaves off a tree. There is not enough evidence to show that he created a substantial risk of physical harm to the park owned by the state. Carl created a risk of harm by negligently lighting the fire with kerosene, but the facts do not indicate that there was ever a substantial risk to the park since the wood was so wet and not likely to catch fire. Carl had no intent to harm the park by means of a fire or explosion –he was simply trying to light wet logs. This action does not seem to be reckless enough to rise to the mens rea necessary to find him guilty of arson. However, if any more harm had occurred by means of his negligent use of the kerosene, he could have ended up liable due to the recklessness of his actions and actually creating substantial harm.

Trespass: Carl is not guilty of trespass. Trespass is the act of intentionally entering another's land with knowledge that it is against the owner's permission, or staying on another's property after finding out it is against the owner's wishes. The facts do not indicate that Carl had permission to enter Bob's tent, but there might be implied permission since they were camping together and Bob placed an item that was necessary for camping in his tent. It is ambiguous if Carl had permission, but it is clear that he did not enter against Bob's permission.

Carl is not guilty of burglary. Burglary is entering the property of another with intent to commit a criminal act within by stealthily, sneakily, or forcefully trespassing into an occupied structure or a separately secured part of a structure. Here, Carl entered Bob's tent to grab the kerosene that he and Bob brought with them in order to light a fire, not to commit a criminal act. Further, the tent was not occupied at the time of his taking of the watch, so multiple elements are not satisfied.

Theft: According to the elements listed above, Carl meets the criteria for theft. Carl noticed Bob's new smart watch sitting on his sleeping bag while Bob was out fishing and he took it. This was an intentional act with the purpose to deprive Bob, the owner, of the property and Carl actually exerted control of the watch without Bob's permission.

QUESTION 12

Peter Plaintiff (Plaintiff) filed a lawsuit against Employer, Inc. (Defendant) in the Court of Common Pleas of AnyCounty, Ohio, alleging unlawful employment discrimination. The parties engaged in extensive settlement discussions prior to trial, but were unable to settle the case, and trial went forward. Defendant did not move for a directed verdict at any time during the trial. At the conclusion of trial, the jury found in favor of Plaintiff and awarded Plaintiff damages of $7,800,000. The court signed a Judgment Entry in favor of Plaintiff and against Defendant in the amount of $7,800,000 and the Clerk promptly entered the judgment upon the Journal.

Defendant was upset with the verdict, and 25 days after judgment was entered by the court, Defendant served a Motion for Judgment Notwithstanding the Verdict, which Defendant joined with a Motion for New Trial. The grounds for the Motion for New Trial were that the damages were excessive and appeared to have been given under the influence of passion or prejudice. The court of common pleas of AnyCounty does not have a local rule, and there was no Court Order in this case, pertaining to Motions for Judgment Notwithstanding the Verdict or for New Trial.

Plaintiff is in the process of preparing a response to Defendant's Motions for Judgment Notwithstanding the Verdict and for New Trial, and is intending to argue that Defendant's motions were not timely filed and the Motion for New Trial should not have been joined with the Motion for Judgment Notwithstanding the Verdict. Plaintiff also is intending to argue that Defendant waived the right to file the Motion for Judgment Notwithstanding the Verdict because Defendant did not make a Motion for Directed Verdict during trial.

1. **What is the deadline for Plaintiff to file a response to Defendant's motions?**
2. **If Plaintiff timely files a response and makes the arguments set forth above, are Plaintiff's arguments likely to prevail?**
3. **Assume for this question only that the court does not find Defendant's arguments for a new trial to be persuasive. Does the court have the power to grant the Motion for a New Trial for a reason that was not stated in Defendant's motion?**
4. **Assume for this question only that Defendant did not file a Motion for New Trial. Does the Court have the power to order a new trial on its own initiative?**

Discuss each answer fully.

1. The deadline for the Plaintiff to file a response to Defendant's motions is 14 days after service.
2. Motions for a Judgment Notwithstanding the Verdict must be filed within 28 days after the judgment is entered. The Defendant entered the motion 25 days after the verdict which is timely. Motion for a New Trial must be filed within 28 days after the judgment is entered. Defendant entered the motion 25 days after the verdict, which is timely. The Defendant's Motions were timely filed. The Plaintiff is unlikely to prevail on this claim.

   A Motion for Judgment Notwithstanding the Verdict (JNOV) is a request to vacate the judgment that was entered because examining the facts most favorable to the nonmoving party, a reasonable person could not find for the nonmoving party and relief is in favor of the moving party. The Motion for a New Trial is usually entered because new facts have surfaced that were not previously known or there was misconduct with the jury or judge. It was okay to file both motions, as long as they are not frivolous and the parties, in good faith, believe there is a claim for relief. Plaintiff will not prevail.

   Defendant did not have to make a Motion for a Directed Verdict at trial to preserve the right to later file a JNOV. A Motion for Directed Verdict may be requested, but is not required to preserve a later JNOV filing, after the Plaintiff's presentation of evidence or the close of evidence. The request states that based on the evidence provided in light most favorable to the nonmoving party, a reasonable person could not find for the nonmoving party and relief is in favor of the nonmoving party. The requirement for this request to preserve a later filing is only applicable in Federal Civil Procedure. Plaintiff will not prevail on this claim.
3. The court has the power to grant the Motion for a New Trial for a reason not stated in Defendant's motion if there has been a material error with instruction that caused extreme prejudice to the case, or there was jury misconduct or judge misconduct.
4. The court has the power to grant a new trial on its own initiative if the judge learns of jury misconduct, judge misconduct, or an instruction was clearly erroneous, misleading, or confusing. For example, when a judge overheard two jurors after a trial discuss how they were confused about the judge's instruction on how to decide a certain element and they would have decided the element a different way had the judge provided the correct instruction. The judge, after hearing this, was able to grant a new trial because the misinstruction was material to the outcome of the case.

MPT 1

State of Franklin Dep't of Children and Families v. Little Tots Child Care Center (February 2019, MPT-1)

In this performance test, examinees' law firm represents Ashley Baker, the owner and operator of the Little Tots Child Care Center. Upon its initial inspection of Little Tots, the Franklin Department of Children and Families (FDCF), the administrative agency charged with monitoring child care centers, found several violations that it deemed critical. After other violations were found on successive inspections, FDCF issued a Notice of Revocation of the license to operate Little Tots, which will take effect in seven days. Baker, who expanded the center's enrollment and obtained a government grant, which allows her to offer reduced fees, wants to challenge the revocation. The supervising attorney has filed the complaint for preliminary and permanent relief. The task for examinees is to draft the argument section of the brief in support of the motion for a preliminary injunction to prevent the license revocation until a trial can be had on the merits. The File contains the instructional memorandum, the office guidelines for drafting persuasive briefs, a statement from Baker, the Notice of Revocation, the FDCF inspection reports, and an email from a parent in support of the center. The Library contains excerpts from the Franklin Child Care Center Act and FDCF regulations implementing the act, and one Franklin case discussing the requirements for a preliminary injunction.

A

Fisher & Mason Law Office

To: Gale Fisher

From: Examinee

Date: February 26, 2019

Re: Little Tots Child Care Center

I. Statement of the Case: [omitted]

II. Statement of Facts: [omitted]

III. Body of Argument

A. Because Ms. Baker's improving compliance shows a likelihood of success on the merits and the license revocation would cause the facility to be unable to reopen, the benefits far outweigh the hardships and the injunction greatly serves public interest, so the court should grant the preliminary injunction.

A preliminary injunction is an extraordinary remedy that is typically disfavored by courts. However, such relief may be granted in appropriate circumstances to "preserve the status quo pending a decision on the merits." *Lang v. Lone Pine School Dist.*, (Franklin App. 2016). The courts in Franklin have established a four factor test to determine if the case is appropriate for a preliminary injunction. Those factors are: (1) likelihood of success on the merits; (2) irreparable harm if the injunction is not granted; (3) the benefits of granting the injunction will outweigh the possible hardships caused to the opposing party; and (4) the injunction would serve public interest.

B. Ms. Baker's continued improvement of compliance violations, plus her ability to remedy all remaining compliance violations within one week's time, are substantial indicators that she would be successful on the merits.

To establish a likelihood of success on the merits, the moving party need only establish "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." The moving party is not required to show they will meet the standard of proof at trial, only that success on at least one claim is better than negligible. *Lang*.

The Franklin Child Care Center Act was enacted to "ensure the safety and well-being of preschool-age children" by creating minimum standards for all child care centers. Sec. 1(a). The act recognizes that affordable child care for low-income parents is needed in Franklin. Sec. 1(c). To ensure safety, the act requires all child-care-facility operators to be licensed with the Department of Children and Families (DCF). The Director will inspect each facility at least once annually to ensure compliance with the Director's standards. When noncompliance is found, the Director has discretion to choose a civil fine between $500 and $10,000, or license revocation. Section 3(a), (b), and (f).

The Director requires an enrollment application to be filed for each child, containing specific information about the child and all persons to be authorized to pick up the child. Sec. 3.06. Ms. Baker took over Little Tots in June 2018. One month later, an inspection found 37 enrollment forms were incomplete. Ms. Baker worked diligently, and by the October 2018 inspection, only 16 forms were incomplete. She continued working toward meeting requirements, while making numerous upgrades to the program, and by January 2019, she was only waiting on five forms to be returned by parents. Ms. Baker made a great effort to comply with the Director's standards, and promised to make each of the five parents fill out the form when they picked up their children. Thus, this violation would be remedied by the end of the week.

The Director further requires background checks to be performed on all employees who work with the children. Sec. 3.12. At that first July 2018 inspection, Ms. Baker was told that background checks had not been performed on four of her employees. By the October inspection, background checks had been done on three of the previous four, but Ms. Baker was awaiting a background check for a newly hired teacher. By the January 2019 inspection, Ms. Baker was waiting on one of the original four employees and a newly hired employee. However, Ms. Baker contends that Anders, the teacher in question, was a holdover, meaning he was previously employed so a background check should have already been conducted. Thus, the only missing background check would be for the newly hired employee. Thus, this violation could be remedied fairly soon.

Additionally, the Director requires minimum staffing requirements. Sec. 3.13. Under the standards, one staff member must be present per eight two-year-olds, and one staff member must be present per 10 three-year-olds. At the initial inspection, Ms. Baker had nine two-year-olds in a room with one staff member, and 11 three-year-olds in a room with one staff member. In October, Ms. Baker still had nine two-year-olds in a room with one staff member. She promised to remedy the situation, and by January, the problem would have been remedied, but there was a one-week overlap between a child leaving the program and a newly admitted child. Thus, this is another violation that could be remedied within a week.

The Director also requires that children who require a special diet be provided with meals and snacks that meet the written instructions of their parent. Sec. 3.37. At the January 2019 inspection, one child with a milk allergy was in the food area where milk was provided to other children. However, that child knows of his allergy and did not take the milk. Thus, Ms. Baker, did comply with the standards of the Director because meals and snacks were provided to him that fit his dietary needs. This should not have been marked as a violation as supervision of children with allergies is not a standard.

Ms. Baker has made substantial steps to improve the condition of Little Tots, which she acquired only nine months ago. She has shown great diligence in following all standards of the Director, but understands that improvements of this size do take time. She has continuously made promises to improve, and has improved at each inspection. Based on the last violations, Ms. Baker will be in full compliance very soon. Thus, she has established at least a fair question that she is entitled to keep her license and that success on the merits is at least better than negligible.

On the other hand, opposing counsel may contend that Ms. Baker still has failed to meet all compliance standards three weeks after her last inspection. However, Ms. Baker has continued to juggle a much-needed expansion, understands the compliance standards and appreciates their importance, and has ensured all noncompliance issues will be met very soon. Again, Ms. Baker is not required to prove success on the merits by a preponderance of the evidence for a preliminary injunction, she merely needs to show success for at least one claim is better than negligible. Because of her track record of substantially improving compliance per inspection, her claim of success is better than negligible. The remaining facts of how long compliance should take, etc, is something to be determined when the matter is tried on its merits later.

C. Ms. Baker will face irreparable harm if the preliminary injunction is not granted because the license revocation will cause a complete loss of income and loss of the grant, thus, Little Tots will be unable to reopen after the license revocation is suspended and Ms. Baker will have no source of income during the trial.

"An alleged harm or injury is irreparable when the injured party cannot be adequately compensated by damages." *Lang*. Here, Ms. Baker has made it clear that Little Tots is her sole source of income, and she has taken out numerous business loans to make the necessary improvements to the center. Under Section 3 of the Act, a child care center may not be operated without a license. Thus, Ms. Baker would be forced to shut down the center during the lengthy process of adjudicating this matter. During that time, she would not be receiving income from the families she serves, but would still be paying back her loans and any expenses of maintaining

the facility. Further, Ms. Baker has taken steps to ensure the facility is affordable for low-income families. This required her to apply for subsidizing grants. If her license is revoked, she will lose this grant. There is no guarantee she would receive the grant again if she applied later. Thus, even if she could reopen the facility, she would have to find new families to serve, and may not be able to subsidize costs for low-income families. Therefore, Ms. Baker has doubts that she'd be able to reopen the center after litigation. No amount of monetary damages would be able to remedy Ms. Baker falling delinquent in her loans, or the permanent closure of a child care facility that she has poured her heart and soul into over the last nine months. The harm here is clearly irreparable.

Opposing counsel may argue that damages would be able to remedy Ms. Baker's situation at the end of litigation. However, the amount of monetary damages to pay for the late fees for falling into delinquency, and the amount to subsidize families if the grant is not received, would be substantially high. This money would come from the state as the case is against a state department. Recovery would likely be barred due to immunity and, even if it were not barred, the state would not be able to provide the amount of damages needed to reopen Little Tots for low-income families.

D. The benefits of granting the injunction outweigh the hardships caused to the Department, because many families truly need the services provided by Little Tots, but the Director faces no hardship in delaying revocation.

"The court must determine whether greater injury would result from refusing to grant the relief sought than from granting it." *Lang*. Here, the Director has discretion to either issue a civil fine or revoke Ms. Baker's license. This implies that in previous cases the Director has decided that a civil fine for noncompliance would be more beneficial than a license revocation. Because of this, the Director will not face a hardship in delaying his revocation, because he could issue fines instead. Further, delaying revocation will not harm any party because the noncompliance issues were relatively minor and will be improved very soon.

However, Ms. Baker, Little Tots, and the families served by Little Tots, will face great hardships. Ms. Baker will be forced to close her child care facility, and will have no means to provide for herself or repay her loans. Little Tots will be forced to close, losing its grant, and any hope of reopening in the future because of the significant financial burdens. The families face one of the greatest hardships though. Little Tots is the only low-income child care facility in the area. Further, it is one of the only facilities that opens earlier and closes later, providing a more flexible schedule for families who work different shifts. If Little Tots closes, even temporarily, several already-struggling families will be faced with an impossible decision: either pay more money than they can afford at a different facility, or have one of the working parents quit their job, when they already live paycheck-to-paycheck on two incomes. The decision is made even more impossible for single-family homes who face no other option but to pay more than they can afford for child care to keep a roof over their heads. One parent in particular voiced his concerns over the license revocation. He stated that he has no other options, besides having his wife leave her employment. Her employment is essential to their family though, as it is used to pay for medical bills, clothing, shoes, schooling expenses, and other such expenses for their children. Leaving her employment would also mean losing her health benefits that are much better than his. His letter stressed that dozens of parents at the facility feel the same as him, and will be forced to make the impossible decision mentioned above.

Opposing counsel may argue that these families will only be without child care temporarily during the length of the litigation or until a new facility opens. However, no facts suggest that a facility is even in the works to accommodate low-income families in the area. Further, this court is well-aware of how lengthy litigations can be. The families served by Little Tots already are scraping by to make ends meet and will not be able to sustain their finances for the length of a trial. Further, once a parent leaves their income to provide child care, there is never a guarantee that they will receive a position that pays similar or has comparable benefits. Therefore, these parents may be permanently burdened by the closing of Little Tots.

It is quite clear that the benefits of granting this injunction outweigh the hardships to the Department.

E. The preliminary injunction would serve the public interest of providing safe child care to low-income families, and promoting overall participation in the local economy.

One of the listed purposes of the Act is to provide low-income families with affordable child care. Little Tots is the only option for low-income families. Because of this, it is clear that child care options for low-income families is a public interest. Closure of Little Tots would go against the very purpose of the Act, and would thus go against the public interest. Little Tots is a safe option for families, as none of the compliance violations pertained to major safety issues and will all be remedied soon.

Further, the public has an interest in the financial assets of other members of the community in that any spending money will likely be spent in the community and will continue to further economic growth in communities, many of which are still struggling to recover from the recession a decade ago.

F. The factors all weigh heavily in favor of granting the preliminary injunction.

Ms. Baker's likelihood of success is better than negligible and she faces irreparable harm if the injunction is not granted. We ask this court to consider the following four factors and grant the preliminary injunction in favor of Little Tots and Ms. Baker.

MPT 2

In re Remick (February 2019, MPT-2)

This performance test requires examinees to draft an objective memorandum analyzing whether the client, Andrew Remick, has a viable negligence claim against motorist Larry Dunbar under the alternatives set forth in sections 42 and 44 of the Restatement (Third) of Torts, often referred to as the "Good Samaritan" doctrine. Remick's car had stalled at dusk on a winding road when Dunbar, a former auto mechanic, offered assistance. While Dunbar was attempting to jump-start the car, another motorist drove around the bend and rear-ended the vehicle. Remick was in the back seat with a twisted ankle when the force of the collision threw him against the driver's seat, which resulted in multiple injuries, including a concussion and a broken arm. The primary inquiry is whether "Good Samaritan" Dunbar owed Remick an affirmative duty of care under the circumstances to protect Remick and his car from being hit by another motorist. The File contains the instructional memorandum, a transcript of the client interview, and a memorandum from the firm's private investigator. The Library contains excerpts from the Restatement (Third) of Torts and three Franklin cases.

Issue: At issue is whether Andrew Remick ("Mr. Remick") has a viable negligence claim against Larry Dunbar ("Mr. Dunbar") when Mr. Dunbar took affirmative steps to assist Mr. Remick when his car stalled on a road and was in the back seat after suffering an ankle injury.

Facts: [Omitted.]

Analysis:

To find a person at fault in a negligence action, the following four elements must be shown: (1) duty, (2) breach of duty, (3) causation, and (4) injury. *Thomas v. Bayton Golf Course* (Fr. Ct. App. 2016).

(1) Duty.

A duty must be recognized by law and must require a defendant to conform to a particular set of standards in order to protect others against unreasonable risks of harm. *Thomas v. Bayton Golf Course* (Fr. Ct. App. 2016). An affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. *Boxer v. Shaw* (Fr. Ct. App. 2017). Here, Mr. Dunbar was under no duty to stop and assist Mr. Remick whose car was stalled. Common law ordinarily imposes no duty on a person to act; however, when a person chooses to voluntarily act, that person assumes a duty to use reasonable care. Id. Franklin has adopted the "Good Samaritan" Doctrine set out in Sections 42 and 44 of the Restatement (Third) of Tort (the "Restatement"). *Weiss v. McCann* (Fr. Ct. App. 2015). By Mr. Dunbar pulling over to the shoulder of the road and asking if Mr. Remick needed help, it is possible that a duty was created under the Good Samaritan Doctrine.

According to Section 44 of the Restatement, when an actor who, despite no duty to do so, undertakes charge of another who reasonably appears to be imperiled and helpless or unable to protect himself or herself, the actor then has a duty to exercise reasonable care while the other is within the actor's charge. The fact that a person may be distraught about a situation will not render that person "helpless." *Boxer v. Shaw* (Fr. Ct. App. 2017). The determination of whether an individual is "imperiled" and "helpless" is made on a fact-by-fact basis within the context of each case. In Thomas v. Bayton, the court held that an intoxicated person who the defendant put behind the wheel of a car was considered "imperiled" and "helpless," even if such person's conduct of drinking rendered him helpless. Here, Mr. Remick was rendered imperiled and helpless due to his own conduct. Mr. Remick hurt his ankle when he attempted to push his car to the side of the road and instead slipped and fell. Since the road was well lit and somewhat remote, Mr. Remick decided to rest his leg in the back seat of his car. By the time Mr. Dunbar had stopped to help, Mr. Remick's ankle had become more swollen and he was not able to put any weight on it. As such, a court could, in fact, find Mr. Remick was imperiled and helpless, even though his own conduct led him to slip and fall and end up in the back of his car unable to move.

Even if a court finds one to be "helpless," Mr. Remick will still need to show that Mr. Dunbar "took charge" of Mr. Remick. Id. To show that Mr. Dunbar "took charge," Mr. Remick will need to show that Mr. Dunbar, through affirmative action, assumed an obligation or intended to render services for Mr. Remick's benefit. See e.g., *Thomas v. Baytown Golf Course* (Franklin Ct. App. 2016) (golfer assumed duty when he told a golf course employee that he would take the intoxicated golfer home); *Sargent v. Howard* (Franklin Ct. App. 2013) (driver could be held liable for injuries sustained when the driver left an ill passenger in an unlocked, running vehicle at night while the driver used a convenience store restroom). Here, Mr. Dunbar took charge when he mentioned he was a mechanic and offered to help. The affirmative steps that indicated he assumed such obligation or intended to render services for Mr. Remick's benefit are that

A

he grabbed a toolbox and began poking around the car. He mentioned the car might have a bad alternator so he was going to try and jump-start the car to see if the alternator was working. The facts clearly indicate that Mr. Remick was imperiled and helpless and that Mr. Dunbar took affirmative steps to render services for Mr. Remick's benefit.

However, even if the court ruled he was not imperiled and helpless, Mr. Dunbar could still have assumed a duty under Section 42 of the Restatement. Unlike Section 44, Section 42 of the Restatement does not require the person be in an imperiled, helpless position, just that the actor's actions increased the risk of harm or that the victim relied on the actor. According to Section 42 of the Restatement,"[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 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 reasonable care in the undertaking." According to Comment C of Section 42 of the Restatement, the duty imposed is that of reasonable care, which may be breached either by an act of commission (misfeasance) or by an act of omission (nonfeasance). Section 42 of the Restatement applies when a private person assists a person in need of aid. *Weiss v. McCann* (Fr. Ct. App. 2015). Here, Mr. Dunbar, a private actor, clearly assisted Mr. Remick when he stopped and asked if he wanted his mechanical help. The threshold test of whether an undertaking occurred is whether the person knew the undertaking serves to reduce the risk of harm to another, or the circumstances would lead a reasonable person to know the undertaking serves to reduce the risk of harm to another. Section 42 of the Restatement. By helping to fix the car, Mr. Remick would be able to move it to the side of the road or drive to a nearby hospital, depending on the status of his ankle. However, Mr. Dunbar may be able to argue that the same harm would have existed had he not offered his services. It is a remote stretch of land and the next car to pass would have been the one who hit him. Mr. Remick could argue that even despite the possibility of the harm still existing, he still relied on Mr. Dunbar to use reasonable care.

While there is some argument under Section 42 of the Restatement that Mr. Dunbar did not owe a duty of care, it is clear that Mr. Remick was an imperiled and helpless individual and that Mr. Dunbar took charge of Mr. Remick. As such, the next question is whether Mr. Dunbar breached his duty of care.

(2) Breach.

An actor breaches a duty of care when such actor's conduct is unreasonable in light of foreseeable risks. *Weiss v. McCann* (Fr. Ct. App. 2015) (citing *Fisher v. Brawn* (Franklin Sup. Ct. 1998)). The car was in the northbound lane on a relatively remote, two-lane stretch of highway. The location was roughly 75 feet from the bend in the road. Had Mr. Dunbar been working on the car during the day when the accident occurred, there is a good argument that Mr. Dunbar was acting reasonably when he failed to move the car to the side of the road, set-up flares or put his blinker lights on. However, as it got darker, a reasonable person under the circumstances given the location of the vehicle in comparison to the bend would have taken some precautionary steps. Even if Mr. Dunbar argues it was a remote road, there was still a foreseeable risk that a car could pass by. The speed limit was 55 miles per hour and anyone travelling northbound would be rounding a corner. Clearly, given the timing and the darkness, the driver may not be able to stop in time if it was not able to see the car until it got closer. Further, Mr. Remick even made suggestions of precautions that could be made and Mr. Dunbar said they were unnecessary. While one could argue it was unreasonable to attempt to move the car, even though it was plausible since it was a stick shift, due to the fact Mr. Remick injured himself undertaking such endeavor, there were other reasonable, less burdensome steps that Mr. Dunbar could have taken to ensure the safety of Mr. Remick and those on the road who may not be able to see the car. As such, a reasonable person under the circumstances would have taken steps to ensure that others on the road would be aware of the care.

(3) Causation.

An actor's breach of its duty is said to cause the injury when there is a reasonably close causal connection between the actor's conduct and the resulting harm. *Weiss v. McCann* (Fr. Ct. App. 2015) (citing *Fisher v. Brawn* (Franklin Sup. Ct. 1998)). Here, the driver immediately applied the brakes when she was able to see the car. Her estimated speed at impact was 25 miles per hour. In order to show there was a reasonably close causal connection, Mr. Remick will need to show that had the flares been set up or the blinkers on, then the accident would not have occurred.

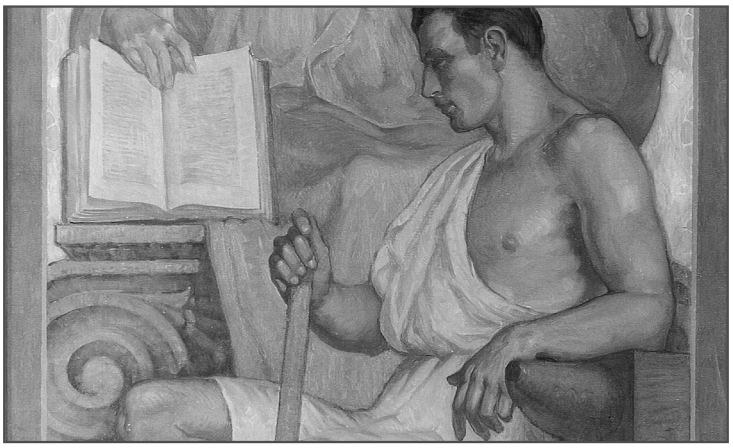
(4) Injury.

The plaintiff must allege damages, including at least one of the following: lost wages, pain and suffering, medical expenses, or property loss or damage. *Weiss v. McCann* (Fr. Ct. App. 2015) (citing *Fisher v. Brawn* (Franklin Sup. Ct. 1998)). In Mr. Remick's case, as a result of the collision, he dislocated his shoulder, broke his arm, and had a minor concussion. While the doctor does not believe there are any long-term complications as a result of the concussion, the orthopedist thinks he will likely need surgery to repair the damage to his shoulder, and the broken arm will need to heal for another three to four weeks before the cast can be removed. He will likely be required to undergo physical therapy for several months to regain full function in his left arm and shoulder. The injuries clearly resulted in medical expenses, as he will need to pay the doctor, orthopedist, and surgeon for their medical services and treatment. In addition, Mr. Remick owns a landscaping business, which requires physical activity. Without full use of his shoulder and arm, he will not be able to work and will likely suffer lost profits during the several months of physical therapy before he regains full function of his left arm and shoulder.

Conclusion:

The facts and circumstances indicated Mr. Remick has a strong claim for negligence when Mr. Dunbar took affirmative steps to assist Mr. Remick when his car stalled on a road.

Published by
The Supreme Court *of* Ohio
Office of Bar Admissions
614.387.9340
sc.ohio.gov
May 2019



On the cover:

Detail from the Thomas J. Moyer Ohio Judicial Center Law Library Reading Room Mural 7, which depicts the availability of knowledge in printed books.

THE SUPREME COURT *of* OHIO

65 SOUTH FRONT STREET COLUMBUS OHIO 43215-3431