

February 2019

New York State
Bar Examination

MEE & MPT Questions

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MEE QUESTION 1

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

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

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

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

The man has sued the woman and the hospital, alleging negligence. Neither defendant is judgment-proof, and this jurisdiction has no automobile-guest statute. The parties have

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stipulated that the man's damages for the injuries he suffered in the accident are \$100,000 and his damages from the infection he contracted are \$250,000.

1. Could a court properly find that the woman was negligent even though she was driving below the posted speed limit? Explain.
2. Could a court properly find that the woman is liable for the man's damages resulting from the infection? Explain.
3. Could a court properly find that the hospital is liable for the man's damages resulting from the infection? Explain.
4. If a court found that both the woman's negligence and the hospital's negligence caused the man's infection, could the woman's liability be limited to \$100,000 for injuries the man suffered in the accident? Explain.

MEE QUESTION 2

A company is in the business of manufacturing and selling stereo equipment. Several months ago, the company borrowed money from a bank, to be repaid by the company in monthly installments. The loan agreement, which was signed by the company's owner, provided that, to secure the company's obligation to repay the loan, the company granted the bank a security interest in "all personal property" owned by the company. Also that day, under an oral agreement with the company's owner (who had full authority to speak on behalf of the company), the bank took possession of one of the most valuable items of the company's property—an original Edison gramophone that the company had acquired because it was the earliest precursor of the company's digital music players—as part of the collateral for the loan. The bank properly filed a financing statement in the appropriate filing office, listing the company as debtor and, in the space for the indication of collateral, listing only "all personal property."

Since borrowing the money, the company has run into various financial troubles. It has missed some loan payments to the bank and recently lost a lawsuit, resulting in a large judgment

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against the company. Last month, the judgment creditor obtained a judicial lien on the gramophone.

Last week, the bank notified the company that it was in default under the loan agreement. Without giving advance notice to the company, the bank sold the gramophone to an antiques collector in a commercially reasonable manner. The judgment creditor has learned about the sale of the gramophone and asserts that he had a superior claim to it.

The sale of the gramophone did not generate enough money to satisfy the company's obligation to the bank. The bank would like to seize some of the company's other property in which the bank has an enforceable security interest.

1. Does the company have any claim against the bank with respect to the sale of the gramophone? Explain.
2. As between the bank and the judgment creditor, who had a superior claim to the gramophone? Explain.
3. Does the bank have an enforceable security interest in any personal property of the company other than the gramophone? Explain.

MEE QUESTION 3

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

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

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

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

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

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

1. What type of business entity is Radiology Services? Explain.
2. Did Carol have the authority to purchase the imaging machine without the consent of Jean and Pat? Explain.
3. Did Jean’s statements to Carol constitute a withdrawal from Radiology Services? Explain.
4. Were Jean’s statements sufficient to entitle her to receive a buyout payment from Radiology Services for her interest in the practice? Explain.

MEE QUESTION 4

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

In August, a woman who lived in State C called the reservation center in State B to obtain a round-trip ticket for the woman to fly between State C and State A in early September. In early September, the woman used the ticket to fly to State A. The purpose of her trip was to hunt for an apartment in State A, where she was planning to start working at a new job that was set to begin in December. The woman found an apartment and signed an agreement to rent the apartment for one year, starting on December 1.

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

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

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

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

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

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MEE QUESTION 5

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

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

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

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

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

- (a) \$10,000 to a hospital for the son's emergency-room care
- (b) \$35,000 to his former wife in unpaid, judicially ordered child support
- (c) \$5,000 to a friend for repayment of a loan, five years ago, to purchase a high-end computer-gaming system for recreational use

Repayment of the debt to the friend was due last year, but the son defaulted on the loan.

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

Over the last seven years, although the son's and daughter's financial needs were similar, the trustee has distributed \$80,000 from trust income and principal to the settlor's daughter and

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nothing to the settlor's son, despite the son's repeated requests for trust distributions to help him pay his hospital bill, child support, and loan.

1. Given the terms of the trust the settlor created, could the trustee have properly distributed trust assets to the son to enable him to pay (a) his hospital bill, (b) child support, and (c) the loan to purchase the computer-gaming system? Explain.
2. Did the trustee abuse his discretion in refusing to make any distributions to the son during the past seven years? Explain.
3. In light of both the discretion granted the trustee and the spendthrift clause in the trust, may the son's three creditors obtain orders requiring the trustee to pay their claims against the son from trust assets? Explain.

MEE QUESTION 6

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

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

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

Ben went to his neighbor's house and knocked on the door, but there was no answer. Just as he was about to leave, he noticed that a ground-floor window was ajar. Ben pushed the window

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fully open and began to climb into the house to retrieve the painting. The neighbor, who had been asleep upstairs, was awakened by the noise and ran downstairs to find Ben halfway through the window. The neighbor became enraged. Ben tried to explain, but the neighbor would not stop yelling. Ben decided that it would be better to return to his home and retrieve the painting later, after the neighbor had a chance to cool off. But the neighbor followed him outside and across the lawn, yelling, “How dare you sneak into my house!” The yelling attracted the attention of a police officer who was passing in her patrol car. The officer stopped to investigate, and Ben was arrested, questioned, and released.

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

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

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

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

MPT 1 – State of Franklin Department of Children and Families v. Little Tots Child Care Center

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.

MPT 2 – In re Remick

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 backseat 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.

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Sample Essay Answers

FEBRUARY 2019 NEW YORK STATE BAR EXAMINATION

SAMPLE ESSAY ANSWERS

The following are sample candidate answers that received scores superior to the average scale score awarded for the relevant essay. They have been reprinted without change, except for minor editing. These essays should not be viewed as "model" answers, and they do not, in all respects, accurately reflect New York State law and/or its application to the facts. These answers are intended to demonstrate the general length and quality of responses that earned above average scores on the indicated administration of the bar examination. These answers are not intended to be used as a means of learning the law tested on the examination, and their use for such a purpose is strongly discouraged.

ANSWER TO MEE 1

1. The woman may still be liable to the man in a negligence action even if she had been driving under the speed limit. The issue here is whether the woman owed a duty to the man and breached such duty when she drove the car at the speed of 40 mph on an icy highway during a winter storm. In order to prevail on a negligence claim, the plaintiff must show that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach caused the injury, and (4) plaintiff suffered damages as a result. In the present case, the element of damage is easily satisfied as the man suffered injuries that required emergency surgery at the hospital. As for the element of duty, a driver of a car has a duty toward her passengers and/or other drivers on the road to use the standard of care that a reasonable driver would employ in her position. While some states may impose additional duties that a driver might owe to a passenger through relevant statutes, there are no such automobile-guest statutes here, and as such, the relevant determination is whether the woman had used reasonable care when she was driving with the man in the passenger seat. Here, although the woman drove under the speed limit, the facts suggest that the woman may still have breached her duty of reasonable care that she owed to the man. That the woman drove under the speed limit by itself is not dispositive of any issue in the present negligence claim, while the fact may be relevant if this had been a strict liability case. Here, the facts state that the woman and the man were traveling on "an icy highway during a winter storm." In such a situation, it is likely that the court would find that a reasonable driver would have exercised an even higher level of care than if she had been driving under normal conditions, as driving under such harsh conditions would predictably prove to be much riskier. Not only would the roads be slippery, but the winter storm would have also hindered visibility greatly. As such, it is possible that a court could properly find that the woman had breached her duty of care that she owed to the man when she drove 40 mph in such conditions when a reasonably prudent driver would have driven much slower than 40 mph. If the above duty and breach elements are proved, then causation would be easily shown. Causation may be actual or proximate. Causation is actual when the accident would not have occurred but for the defendant's negligence. Here, the man would not have been injured but for the woman's negligent driving as the woman was driving the car, the man was wearing a seat belt, and no other cars were involved in the accident. As such, all four elements of negligence could be shown, and therefore a court could properly find that the woman was negligent.

2. The court could properly find that the woman is liable for the man's damages resulting from the infection. Causation may be actual or proximate. When determining if a defendant is a proximate cause of the plaintiff's injuries, the court may examine whether the defendant's actions have increased the risk of injuries resulting from the chain of events that involved the plaintiff and the defendant. The main issue here is foreseeability. As discussed by the Supreme Court in Palsgraf, a defendant may be liable for injuries that she did not actually cause if her actions had proximately caused the injury - that is, if the

defendant's actions had increased the likelihood of the plaintiff's injury, and that risk of receiving such injury was foreseeable. A court could properly find that it would have been foreseeable for the driver that injuring a passenger in car accident would increase the likelihood that the passenger would suffer further complications from medical malpractice in hospitals. Therefore, a court could properly find that the woman is liable for the man's infection damages.

3. A court could properly find that the hospital is liable for the man's damages resulting from the infection. The doctrine of *res ipsa loquitur* may apply here. This doctrine states that a defendant may be liable for plaintiff's injuries absent direct evidence of causation if the harm is of a type that would normally not exist without defendant's negligence. Here, while there is no evidence that suggest that the man's infection injuries were directly caused by the hospital's negligence, there are circumstances that suggest that the man's infection is an injury that generally would not be in existence but for some negligence of the hospital. The man was treated by only the hospital in question and no others. It is highly unlikely that the infection in question would occur for reasons other than contaminated blood products or improperly sterilized medical instruments. The hospital did not use any blood products when treating the man. The infection in question normally required 10 to 13 days for the symptoms to develop, and the man had been being treated at the hospital during that exact period. The man has no other history of drug use. All sterilization procedures at the hospital are performed by hospital employees. While any one of these facts alone would be insufficient to prove *res ipsa loquitur*, taken together, the court could properly find that the man's infection would not have occurred absent some negligence of the hospital. Therefore, the court could properly find that the hospital is liable for the man's damages resulting from the infection.

4. The woman's liability may not be limited to \$100,000 for injuries the man suffered in the accident if a court found that both the woman's negligence and the hospital's negligence caused the man's infection. When multiple defendants are found to be liable to a plaintiff in a negligence claim, they are found to be jointly and severally liable unless there are other statutes that apply to the case. Any one of the defendants who is found to be jointly and severally liable to a plaintiff with other defendants are liable for the full amount of damages; in other words, the plaintiff may recover the full amount of damages from any one of the defendants. In the present case, if the court finds that the woman and the hospital are both liable for the man's infection, the woman and the hospital are both jointly and severally liable for the amount of \$250,000. Therefore, the man could recover \$250,000 from either the hospital or the woman. Should the man decide to recover from the woman for his infection damage, the woman would be liable for all or part of \$250,000 in addition to the \$100,000 that she owes to the man. If the man recovers the entire \$250,000 from the woman, the woman may also seek contribution from the hospital for their contributory negligence.

ANSWER TO MEE 1

1. The issue is whether the woman's compliance with a statute precludes a court from finding that she breached her duty of care and was thus negligent. Ultimately, a court could properly find that the woman was negligent even though she was driving below the posted speed limit.

For a court to properly find that the woman was negligent, it must find that: (1) the defendant owed the plaintiff a duty to conform her conduct to a specified standard of care for the protection of the plaintiff against an unreasonable risk of injury; (2) the defendant breached that duty; (3) that breach was the actual and proximate cause of the plaintiff's injuries; and (4) the defendant suffered damages. When an individual engages in an activity that creates an unreasonable risk of harm to persons in the position of the plaintiff, the duty of care extends from the individual to the plaintiff. Generally, the individual must exercise the reasonable care that an ordinarily prudent person would exercise under the circumstances. Failure to exercise such care amounts to a breach of duty. Nonetheless, where a statute provides a specific standard of care and that statute is designed to (i) protect persons in the position of plaintiff (ii) from the type of harm that materialized, that standard will replace the ordinary prudent person standard of reasonable care, and an individual's failure to comply with the statute amounts to negligence per se--which is conclusive proof of the first two elements of the prima facie negligence case: duty and breach. However, by contrast, compliance with a statute is not conclusive proof of duty and breach; but, it is evidence that a jury might consider. In addition, violations of a statute may be excused where compliance with a statute would be impossible or be more dangerous than violating the statute.

Here, the woman owed the man a duty because by driving a car, on a icy highway during a winter storm, in which he was a passenger, she engaged in conduct that created a foreseeable risk of unreasonable harm to the man. As such, the general duty of care extended from the woman to the man. While the speed limit was 50 MPH and was very likely created to protect those on the road (including passengers) from drivers driving at dangerously high speeds from harms such as cars overturning, colliding, etc., the fact that the woman was driving 40 MPH, and therefore complied with the speed limit statute, does not mean that she was not negligent. A finder of fact could determine that an ordinary prudent person exercising reasonable care under the circumstances would have driven at a speed less than 40 MPH because of the icy roadway and the winter storm conditions. If the finder of fact were to find that this is the care that an ordinarily prudent person would have exercised under the circumstances, then breach would be established. Thus, even though the woman complied with the relevant statute, a court could still find that the woman breached her duty to the man.

The facts establish that the man suffered damages. Therefore, if a court also finds that the woman's breach was the actual and proximate cause, then a court could properly find that the woman was negligent, despite her compliance with the speed limit statute.

2. The issue is whether the man's damages resulting from the infection were foreseeable such that a court could properly find that the woman is liable for such damages. Because the damages resulting from the infection were foreseeable, a court find that the woman was the proximate cause of the injuries and could find her liable for the man's damages resulting from the infection.

As mentioned above, for a court to properly find that the woman was negligent, it must find that: (1) the defendant owed the plaintiff a duty to conform her conduct to a specified standard of care for the protection of the plaintiff against an unreasonable risk of injury; (2) the defendant breached that duty; (3) that breach was the actual and proximate cause of the plaintiff's injuries; and (4) the defendant suffered damages. At issue here is whether the woman was the proximate cause of the man's damages resulting from the infection. When an individual is negligent, she is liable for all results that are the natural and probable consequences of her acts--i.e., she is liable for foreseeable harms. Where an independent force combines with the individual's acts to accelerate or aggravate a plaintiff's injuries, the individual will be liable if the independent force and resulting harms were foreseeable. Generally, negligence in medical treatment and harms occurring during the course of medical treatment for the injuries caused by the individual are foreseeable because they are within the normal incidents of the individual's conduct. By contrast, where an unforeseeable superseding force after the individual's actions causes harm to the plaintiff and the result of the superseding force was not foreseeable, the individual's liability is cut off by the superseding force, and the individual's breach will not be deemed the proximate cause of the plaintiff's injuries.

Here, as a result of the accident that occurred while the woman was driving, the man (and the woman) were rushed to a local hospital in its ambulance. The man received emergency surgery and remained in the hospital for 10 days, and 3 days after he was released, he was diagnosed with a serious infection that was more than likely caused by his stay in the hospital given that the disease is "transmitted in nearly all cases" through exposure to contaminated blood products, improperly sterilized medical instruments that come into contact with a patient's blood, and other sources in a hospital environment. Although infections in persons who have not received a blood product and have not been hospitalized during the period of likely exposure are possible, they are rare. Moreover, the man's physician stated that "he must have contracted this infection at the hospital" because the man was a patient at the hospital during the infection and symptom development period, which is 10-13 days: the precise period in which the man was in the hospital, released, and then diagnosed with the infection. It is of no import that the physician was not affiliated with the hospital or was the man's personal physician. Likewise, it is of no import that most hospitals have completely eliminated cases of this

infection by adopting expert-recommended sterilization procedures. If the hospital was negligent, its negligence would be foreseeable because negligence during medical treatment is within the foreseeable incidents of a tortfeasor's risk-creating conduct.

The abovementioned facts establish that it was foreseeable that the man would develop an infection during his stay at the hospital. As such, the woman proximately caused these injuries and a court could properly find that the woman is liable for the damages resulting from the infection.

3. The issue is whether the hospital breached any duty of care it owed to the man. Because the hospital breached a duty to the man, and because the hospital is vicariously liable for the acts of its employees, it can be held liable for the man's damages resulting from the infection.

Doctors and those with superior skills are charged with a higher duty of care than the ordinarily prudent person reasonable care standard. They must exercise the care, skill, and knowledge of an average member of the profession who is in good standing. For doctors, courts generally use a national standard of care to define the standard doctors must adhere to. Under the doctrine of *res ipsa loquitur*, if a plaintiff can establish the requisite elements, the finder of fact is permitted, but not required, to infer the first two elements of the *prima facie* negligence case: duty & breach. For *res ipsa loquitur* to apply, the plaintiff must establish that: (1) the accident was of a kind that normally does not occur in the absence of negligence and (2) the accident was attributable to the defendant, i.e., it was of a type that would normally occur due to the negligence of someone in the position of the defendant. To prove this second element, the plaintiff can show that the defendant had exclusive control over the instrumentality that caused the accident. Additionally, the plaintiff must establish that the accident was not attributable to the plaintiff.

Here, the first element can very likely be established: The serious infection is transmitted in nearly all cases through exposure to either contaminated blood products or improperly sterilized medical instruments that come into contact with a patient's blood. There are other possible sources of the infection in a hospital environment, including the failure of staff to properly follow handwashing techniques to avoid transmitting the infection between patients and the failure of staff to properly identify and discard certain used medical instruments that cannot safely be sterilized. Although infections can possibly occur in individual who have not received a blood product and have not been hospitalized during the period of likely exposure, this is rare and therefore ordinarily does not happen absent negligence.

Likewise, the second element can very likely be established for the reasons listed above, and because the hospital is vicariously liable for the acts of its employees (discussed below); unlike *Summers v. Tice*, here, the plaintiff need not identify precisely which

medical attendant or doctor was negligent to hold the hospital vicariously liable. In other words, the accident was certainly attributable to the hospital because during the period of likely exposure, the man was in the hospital, giving the hospital exclusive control over the instrumentality that caused his injuries. Moreover, even though there is no record of when the hospital starting using the sterilization procedure recommended by experts, given that cases of the infection have been almost completely eliminated in hospitals that have adopted such measures, it is highly likely that the hospital had not adopted such procedures at the time that the man was infected. (Indeed, this can be used as evidence of custom to further demonstrate that the hospital breached its duty of care. Given that doctors are held to the higher standard of care mentioned above, the failure to adhere to the expert-recommended sterilization procedure may in and of itself be considered a breach.) Further, the man can establish that the accident was not attributable to him because he had no history of intravenous drug use and did not receive any medical treatment for several months before his hospital stay. These facts further attribute the accident to the hospital.

A principal or employer is vicariously liable for the negligence of its agents or employees when the negligence occurs while the agent/employee is acting within the scope of his or her employment. Here, the facts state that all sterilization procedures at the hospital are performed by hospital employees. Moreover, as explained above, the infection was certainly the result of the negligence of an employee in some shape or form. The employee(s) were acting in the scope of their employment because it happened while the man was being treated. As such, the hospital can be held vicariously liable for its employees' negligence.

Given that the man can establish breach using the doctrine of *res ipsa loquitur*, and that the hospital is vicariously liable for the negligence of its employees, a court could properly find that the hospital is liable for the man's damages resulting from the infection.

4. The issue is whether the rules of joint and several liabilities allow for the woman's liability to be limited to the \$100,000 for the injuries the man suffered in the accident. Ultimately, the woman's liability cannot be limited to \$100,000 for the injuries the man suffered in the accident.

Under the rules of joint and several liability, where the actions of two tortfeasors combine to cause the plaintiff one indivisible injury, the individuals are jointly and severally liable. That is, the plaintiff may recover the full amount of damages from either or both of the tortfeasors. Notwithstanding this, in a pure comparative negligence jurisdiction, if a jury found each tortfeasor to be a certain proportion at fault for the injuries, the tortfeasors may seek contribution or indemnity from one another.

Here, if a court found that the woman's negligence and man's negligence combined to cause the man's infection, they would be held jointly and severally liable. Thus, the

woman's liability could not be limited to \$100,000 for injuries the man suffered in the accident. The woman is jointly and severally liable for the full \$350,000. If the man collects all of the judgment from her, the woman could then seek contribution for \$250,000 from the hospital. However, the woman's liability could not be limited to \$100,000 for the injuries the man suffered in the accident. Indeed, this would frustrate the court's finding that her negligence caused the man's infection because it would eliminate her liability for the infection.

Thus, the woman's liability cannot be limited to \$100,000 for the injuries the man suffered in the accident.

ANSWER TO MEE 2

1. The company has a good claim against the bank with respect to the sale of the gramophone. The key issue here is whether the bank observed the proper sale procedures in enforcing that security interest. (The preliminary question of whether the bank had an enforceable security interest over the gramophone is dealt with in part 2 of the answer below.)

As a general rule under Article 9 of the UCC, a secured party is entitled to enforce its security interest over personal property if the debtor is in default under the relevant security agreement. Enforcement may take place by a variety of means, including repossession (self-help), strict foreclosure and by exercising a power of sale. In order to correctly exercise a power of sale, the secured party must: (i) conduct the sale process in a commercially reasonable manner; and (ii) give reasonable prior notice of the sale to the debtor, any guarantors of the debtor and (in the case of non-consumer transactions) any other secured parties or claimants against the property of whom the prospective enforcing secured party has notice. If the sale procedures are not correctly followed, the debtor may claim its actual damages against the secured party and the secured party may also be precluded from recovering any deficiency judgment that may apply.

Here, the bank elected to sell the secured property (being the gramophone) to an antiques collector in a commercially reasonable manner, after notifying the company that it was in default under the loan agreement. This on its face appears to satisfy the preliminary factual requirement that the debtor (the company) must be in default, and also satisfies the first requirement of a reasonable sale process. However, the notice requirement is not satisfied here. While the bank notified the company of the default itself, the bank did not notify either the company or the other secured party (the holder of the judgment lien) of the plan to sell the gramophone. Therefore the company and the judgment creditor were not afforded the rights they were entitled to under Article 9, and the bank is in breach of its Article 9 obligations.

On the basis of this breach, the company may be able to seek monetary damages from the bank. Given that the sale was at a good price, probably the main source of damages it can claim would be its loss of profits or some other indirect measure of damages. In any event, however, the company may also be able to seek relief from any deficiency claims by the bank, on the basis that it has forfeited these claims by its breach of the Article 9 power of sale process.

2. The bank has a superior claim to the gramophone. The key issues here are: (i) whether the bank had a valid and enforceable security interest over the gramophone; and (ii) whether the bank's security interest takes priority over the judgment creditor's security interest.

On the first issue - a secured party can enforce a security interest that has attached and has been properly perfected. In order for attachment to occur, three things are required: (a) valid security agreement which describes the collateral and evidences the intent to grant security over it (which may be oral in relation to personal property); (b) the debtor must have the present right to convey the interest in the relevant collateral; and (c) the secured party must give value in exchange for the security interest. Perfection can then occur by filing, possession or control (depending on the type of collateral in question). Physical possession of the collateral is an acceptable form of perfection for tangible goods, including equipment and inventory.

Here, all three elements of attachment are most likely present in respect of the gramophone. Firstly, although the facts may be open to dispute, there is likely a valid security agreement which describes the collateral and evidences the intent to grant security over it. While the written loan agreement is probably not sufficient on its own (because its description of the collateral is "supergeneric" rather than having sufficient specificity), the subsequent oral agreement between the company and the bank to take possession of the gramophone by way of collateral to the loan is probably sufficient to evidence agreement and intent to create a security interest. On the second element, the gramophone is described as being "one of the most valuable items of the company's property" and therefore it is safe to assume that the company owned and therefore had a right to convey an interest in the gramophone. Third, the bank gave value in exchange for the security interest, in the form of the provision of the loan. Here, there is most likely sufficient contemporaneity between the giving of value and the giving of security because they occurred on the same day and as part of a single transaction contemplated by the parties. Accordingly, the security interest of the bank validly attached.

Here, the requirements for perfection are also met. Whether the gramophone is considered equipment (as a long term durable item used to promote the company's business) or inventory (on the basis that it is actually for sale), the gramophone clearly falls into the category of tangible personal property. A security interest over it can therefore be perfected by possession. This is in fact what occurred when the bank took

physical possession of the gramophone on the date of the loan agreement and then maintained such possession until the point of exercising its power of sale. Accordingly, the bank had a valid and enforceability security interest over the gramophone.

On the second issue, as a general rule under Article 9, a prior perfected security interest will take priority over a later perfected security interest or a later filed judgment lien. Here, the bank's security interest was perfected at the point where the gramophone was handed over, whereas the judgment lien was only filed at a later date (last month after the creditor received the judgment against the company). Therefore the bank's security interest takes priority over the gramophone and the bank has a superior claim to that particular item.

3. Although it is a close call dependent on the construction of the security agreement, the better answer is that the bank does not have an enforceable security interest in any other personal property of the company. The key issue here is whether the description of the bank's security (set out in the written security agreement) was stated with sufficient particularity to cause the security interest to validly attach to the other property.

As a general rule, under Article 9 of the UCC, attachment occurs when the following three requirements are met (as stated above): (a) valid security agreement which describes the collateral and evidences the intent to grant security over it (which may be oral in relation to personal property); (b) the debtor must have the present right to convey the interest in the relevant collateral; and (c) the secured party must give value in exchange for the security interest. In relation to the first element of a security agreement, it is essential that the collateral to be secured is described with sufficient particularity to adequately identify the collateral. While a "supergeneric" description (such as "all assets" of the debtor) may suffice for purposes of the financing statement to be filed for perfection purposes, something more detailed is required to be inserted into the security agreement itself.

Here, the security agreement does not appear to be sufficient to establish the first element required for attachment, because the description of the collateral is merely "supergeneric" in referring to "all personal property" owned by the company. On the other hand, the second and third elements are likely met on the facts, because the relevant collateral is all personal property "owned by" the company and value was given by the bank in the form of a loan to the company (and it appears that the bank also perfected by filing). However, given that all three elements are required in order for a security interest to attach (and in order to make the secondary question of perfection and enforceability operative), the lack of the first element of a sufficient security agreement is fatal in this case. Accordingly, the bank does not have an enforceable security interest in any personal property of the company other than the gramophone.

ANSWER TO MEE 2

1. Sale of Gramophone

The issue is whether or not the company has any claim against the bank with respect to the sale of the gramophone.

When a debtor defaults on their obligations to a secured party, the secured party may take actions in order to recover the value of the debt. However, the debtor still retains certain rights in regards to how a secured party may dispose of such property. A secured party must give reasonable notice to the debtor that the secured party intends to sell the collateral (usually 10 days has been found to be sufficient). Additionally the secured party must dispose of the collateral in a public venue in a commercially reasonable manner. A debtor also retains the right of redemption if they fully pay off the debt to the secured party before such a sale has taken place.

Here, while the bank did sell the gramophone in a commercially reasonable manner, the bank failed to provide any notice to the company.

Therefore, the Company does have a claim against the bank with respect to the sale of the gramophone.

2. Superior Title to Gramophone

A. Bank's Interest

The issue is whether the bank or the judgment creditor has superior claim to the gramophone.

In order for a Secured Party to have claim to the property of a debtor the Secured party must have a perfected security interest in the property. In order to have a perfected security interest the secured party's interest must first attach. In order to attach (1) the Secured Party must give value to the debtor, (2) the Debtor must have rights in the collateral, and (3) there must be a valid security agreement, which must be (A) authenticated, (B) Intent to create a security agreement, and (C) a description of the collateral. Once a Secured Party has attached their interest in the property they must perfect. Perfection can happen through filing a Financing Statement; it may be automatic, through Possession, Control or delivery. When perfection happens through a financing statement, the statement must include the name and address of both the debtor and the secured party, as well as a description of the collateral. For the financing statement, generalizations of the type of collateral are acceptable. Once a party's security interest has been deemed to have been perfected, a court will apply the first-in-time first-in-right rule.

Whereby the party to first perfect, will be the party who succeeds in a dispute over superior claim.

Here, the Bank's interest in the Gramophone was only perfected when they took possession of the gramophone. While the Bank gave the company value, and the company had the right at the time to give the bank an interest in the gramophone, stating "all personal property" is not a sufficient description for a valid security agreement. However, even though there was not a valid security agreement in place, the financing statement and possession of the gramophone was enough to put the judgement creditor on notice of the bank's interest in personal property, which would include the gramophone. Although the judgement creditor will have priority in regards to all of the other personal property owned by the company, it will not have superior claim in regards to the gramophone.

Therefore, the bank has superior claim to the gramophone.

3. Enforceable Security Interest in Personal Property

The issue is whether the bank has an enforceable security interest in any personal property of the company other than the gramophone.

As discussed above in order for a Secured Party to have an enforceable Security interest, it must not only attach but also perfect. In order for a Security Agreement to be valid the description of the collateral must be sufficient to put all subsequent creditors on notice of the interest.

Here, the Bank gave the company value, and the company had rights in their personal property to give to the bank, and the bank executed what seemed to be a valid security agreement. The problem however is that the security agreement did not have enough specificity as is required to validly put later creditor on notice of the bank's interest. By lacking additional specificity or including "hereinafter acquired" later creditors have the difficult task of figuring out whether property was acquired before, during, or after the execution of the original security agreement.

Therefore, the bank does not have an enforceable security interest in any personal property of the company other than the gramophone.

ANSWER TO MEE 3

Radiology Services is a General Partnership

The issue is what kind of company was formed when the signed documents for forming an LLC were never filed.

When a company fails to file or be incorporated, the company can be found to be a general partnership if the facts indicate so. A general partnership is an association between 2 or more persons to run an on-going business for profit. A general partnership does not need to have any formalities or filings in order to be formed. The party's intentions are not necessarily relevant.

Here, the parties failed to validly create an LLC because an LLC requires that the documents are signed and filed with the Secretary of State in accordance with the statute. Because an LLC was never validly formed, the question becomes whether the parties formed a general partnership. Here there are 3 people (more than 2) that have agreed to create an on-going business for profit. They have created a radiology practice together and they earn profits. The facts do not indicate that the company is to be short term. The purchase of expensive radiology equipment also indicates that they intend to create an on-going business. Therefore, the parties have formed a general partnership.

Carol had Authority to Purchase the Imaging Machine without Jean and Pat's Consent

The issue is whether Carol had the authority to purchase the machine without obtaining consent from the other general partners.

In a general partnership, the default rule is that the general partners are entitled to co-manage the business and to conduct matters that are within the ordinary course of business. Unless otherwise stated, all of the general partners have the authority to act in the ordinary course of business. When a general partner has actual or apparent authority, they can bind the partnership to any acts or contracts entered into that are in the ordinary course of business. The ordinary course of business considers the purpose of the business and acts that are incidental to achieving business purposes. When a partner objects to an act that is within the ordinary course of business, there must be a majority vote of the partners in order to act. However, when a partner does not object to an act within the ordinary course of business, a general partner has the authority to act unless otherwise specified by the partners.

Here, the facts do not indicate that Carol's authority as a general partner is limited in any aspect. Therefore, Carol is entitled to act within the ordinary course of business on behalf of the partnership. Carol's act of purchasing the imaging machine appears to be within the ordinary course of business because the business is a radiology practice and imaging

equipment is basic equipment needed for a radiology practice. Had Jean or Pat stated they opposed the act of buying the equipment when Carol first suggested it, they would have had to conduct a vote and Carol may not have had the authority to purchase the equipment if the majority would have voted against the act. Because neither Jean or Pat mentioned their opposition, Carol was justified in acting within the ordinary course of business by purchasing the equipment for the company.

Jean's Statement to Carol Constituted a Withdrawal

A general partner always has the power to withdraw from the partnership. The general partner can withdraw simply by making an unequivocal statement indicating her intent to withdraw.

Here, Jean clearly indicated her intent to withdraw from the partnership when she stated "I'm out of here and never coming back." This statement coupled with her demand for a buyout clearly indicates her intent to withdraw from the partnership. Therefore, Jean's statements constituted a withdrawal from the partnership.

Jean is Entitled to a Buyout Payment

The issue is whether Jean is entitled to a buyout after she withdrew.

A general partner always has the power to withdraw from a partnership. In an at-will partnership, a partner can withdraw at any time so long as it is not contrary to the partnership agreement. This withdrawal will not be considered wrongful if it was in accordance with any requirements in the partnership agreement. In a partnership at will, the parties have an agreement to for a partnership for an indefinite amount of time and not for the purpose of a particular undertaking or term. Previously, when partner in a partnership at will withdrew, the partnership was required to dissolve. However under the Revised Uniform Partnership Act, a partnership may continue without the withdrawn partner if the parties agree to continue and to buy out the withdrawing partner and pay them their interest in the practice.

Here, Jean withdrew from an at-will partnership. The parties formed an at-will partnership because their radiology practice was not for a specific term or particular undertaking. The facts do not indicate that there was partnership agreement that specified the way to withdraw. Therefore, Jean could properly withdraw simply by stating her intention to do so. Because the partnership continued after Jean's withdrawal, she is entitled to a buyout payment from the partnership for her interest in the practice.

ANSWER TO MEE 3

1) Radiology Services is a general partnership.

The issue here is whether Carol, Jean, and Pat successfully created a limited liability company.

A limited liability company is created when: 1) in a writing the parties agree and consent to forming a limited liability company; 2) there is at least one general partner, and one or more limited partners; 3) the writing contains the name of the business along with language of "Ltd." or "LLC" to evidence intent in formation of a limited liability company; and 4) the agreement is filed with the proper state agency (usually secretary of state). If any of these requirements is lacking, the parties are presumed to have formed a general partnership. A general partnership is the default business organization and is formed when two or more people carry on as co-owners a business for profit. There are no formalities required other than two or more people creating a business relationship. Sharing in profits equally is evidence of a general partnership.

Here, Carol, Jean, and Pat have not successfully created a limited liability company. Although intending to do so and retaining an attorney to organize the practice as a limited liability company, along with having the necessary documents needed to do so, because Carol, Jean, and Pat did not sign the documents and never filed them with the proper state agency, Radiology Services was never created as a limited liability company. However, Radiology Services will be found to be a general partnership because as stated above, Carol, Jean and Pat are carrying on as co-owners a business for profit and share in the profits of Radiology Services equally. Since the documents creating the limited liability company were never signed or filed, the default business organization Carol, Jean, and Pat created was a general partnership.

Therefore, Radiology Services is a general partnership.

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

Each partner in a partnership is considered an agent of the partnership business. Each agent has authority to act on the partnerships behalf when they have actual or apparent authority. Actual authority is authority a partner has based on express or implied communications with the partners. Evidence of actual authority can be shown in a partnership agreement. Express authority is authority a partner has to carry out all duties associated with the partnership business. Implied authority is authority the partner reasonably believes they have to carry out the partnership business by past dealings or duties associated with carrying out actual authority. Apparent authority is authority a partner reasonably believes they have because the other partners "hold out" the partner as

having this authority so as to imply to a third party the partner has actual authority. Partners may act as agents on behalf of the partnership business without consent of the other partners when the act is in the ordinary course of the partnership business. Any acts outside the ordinary course of the partnership business must be approved by all partners in a unanimous vote.

Here, Carol had authority to purchase the imaging machine without the consent of Jean and Pat. As a partner, Carol has agency to act on behalf of the partnership business. Carol has actual authority to act due to implied communications with Jean and Pat. Carol had previously suggested to Jean and Pat that the practice replace some imaging equipment. Neither Jean nor Pat expressed concerns over Carol doing this on behalf of the partnership. Also, because purchasing imaging equipment is in the ordinary course of business of the partnership, Radiology Services, she has actual authority to enter into transactions within the scope of the partnership business, including purchasing radiology equipment.

Therefore, Carol had the authority to purchase the imaging machine without the consent of Jean and Pat.

3) Jean's statement constituted a withdrawal from Radiology Services.

The issue is whether a partner in a partnership business can withdraw from the partnership at any time.

A partner in a partnership "at will" may withdraw from the partnership business at any time. A partnership is "at will" when the partnership business is not created for a limited duration or for a specific undertaking. Here, the Radiology Services is "at will" because there is no indication it was created for a limited duration or for a specific undertaking.

When a partner in a partnership "at will" expresses to the other partners their intent to dissociate from the partnership business, it triggers dissolution of the partnership. Here, Jean was furious at Carol's purchase of the radiology equipment and expressed to Carol and Pat "I'm out of here and never coming back. Just give me my share of the value of the practice." This constitutes Jean's intent to dissociate, triggering dissolution of the partnership.

Therefore, Jean's statement to Carol constituted a withdrawal from Radiology Services.

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

When a partner in a partnership business dissociates from the partnership, it triggers dissolution of the partnership. Upon dissolution, the partnership business must begin

"winding up" the partnership business which includes ending the business, settling up the current business of the partnership, and paying off debts and obligations before any partner is entitled to receive profits from the partnership business. Absent language in an agreement to the contrary, partners share in profits equally and share in losses the same as they do profits. However, if the remaining partners agree to carry on the partnership business (absent the dissociating partner) this will stop the partnership from dissolving. The remaining partners must pay the dissociating partner his/her interest in the partnership business.

Here, because Jean's statements constituted a withdrawal and has expressed her intent on dissociating from the partnership, it normally would trigger dissolution of the partnership business. However, Carol and Pat subsequently agreed to continue the partnership business without Jean and therefore must "buy her out" of the partnership business in order to continue Radiology Services. Since Carol, Jean, and Pat decided to split the profits of Radiology Services Equally, they each own a 1/3 interest in Radiology Services.

Therefore, in order to continue the partnership business, Jean is entitled to a buyout payment from Radiology Services for her interest in the practice, and Carol and Pat must pay Jean 1/3 of the value of Radiology Services.

ANSWER TO MEE 4

The federal district court should grant the motion to dismiss for lack of personal jurisdiction.

Personal Jurisdiction

Personal jurisdiction ("PJ") is about the court's power over the defendant. In order for a court to exercise PJ over a defendant, there must be both a state-long arm statute authorizing it, and it must comply with the due process clause of the constitution. Because the State's long-arm statute permits PJ to the maximum extent of the constitution, only a constitutional analysis is necessary here.

A defendant may be sued over any claim when the court has "general jurisdiction" over him. General jurisdiction is where a defendant is essentially at home. There is no general jurisdiction in this case, because a corporation is at home for purposes of PJ in the state of its incorporation, and where it has its principal place of business ("PPB"). The airline is incorporated in state A, and its PPB is likely in State A also, because its corporate headquarters is there, and this is generally the "nerve center" of a corporation.

If general jurisdiction does not exist, in order for a court to exercise PJ over a defendant, it must have specific jurisdiction. Specific jurisdiction is about contacts, relatedness, and fairness. That is, the defendant's contacts with the forum with respect to the claim must be related to it in such a manner that it is foreseeable that it could be sued there and it is fair to do so. Here, the airline has purposely availed itself to the laws and benefits of State B by placing a reservation center there. It is also foreseeable that it could be subject to litigation there for some claim related to the call center. However, the woman's claim is unrelated to the call center. Here, even though the woman booked her reservation by calling the center in State B, the claim is quite unrelated to the call itself. The claim is about the crash that occurred in State A while flying from State C to State A. Therefore, the airline's contacts with State B are very unrelated to the claim at issue, and thus it is unlikely that the court could exercise specific jurisdiction over it.

Because there is no general or specific jurisdiction over airline in State B, the court should grant the motion to dismiss for lack of personal jurisdiction.

Subject-Matter Jurisdiction

Although there appears to be no personal jurisdiction in State B over airline in this case, there is subject matter- jurisdiction ("SMJ") over the case. SMJ is about power over the case, and can occur when there is a federal question, or when there is diversity jurisdiction (or supplemental jurisdiction when appropriate). Here, there is no federal question, because this involves a personal injury claim, and tort claims are state law claims. Because the complaint itself does not attempt to enforce any right arising from federal law, there is no federal question here.

On the other hand, diversity jurisdiction is present when there is complete diversity of citizenship and the amount in controversy exceeds \$75,000. Complete diversity of citizenship is present when no single plaintiff is a citizen of the same state as any single defendant. An individual is a citizen of her domicile, while a corporation is citizen of any state in which it is incorporated, and the one state where it has its PPB. As discussed, the airline is a citizen of State A because it is incorporated there and has its PPB there. The woman is a citizen of State C because she is domiciled there. Although the woman was planning to move to State A, got a new job there, and found an apartment there, a person's domicile does not change until it is perfected, which requires both physical presence and intent to remain permanently. The woman has returned to State C following her injury, and although she hopes to move to State A soon, she has not. Consequently, her domicile has not changed and she is still a citizen of State C. Therefore, complete diversity of citizenship exists. Also, because the complaint seeks damages of \$1 million, this far exceeds \$75k, and the amount in controversy requirement is met.

ANSWER TO MEE 4

The woman's lawsuit, commenced against the airline in a federal court in State B, raises a number of issues relating to personal and subject matter jurisdiction. The federal court in State B must have both personal and subject matter jurisdiction over the airline in order to proceed.

Firstly, State B does not appear to have personal jurisdiction over the airline as follows.

Personal jurisdiction may be either general (where a person or entity is domiciled in a state) or specific (where a person or entity has such substantial purposeful contacts with a state such that it is fair to exercise jurisdiction over them there). Federal courts follow federal procedural rules but must follow the substantive law of the state that they sit in (in this case jurisdiction is a matter of substantive law, and the State B federal court will follow the state B state law as to the matter of personal jurisdiction, pursuant to the Erie doctrine). State B's long-arm statute allows its courts to exercise personal jurisdiction to "the maximum extent allowed by the 14th amendment of the US Constitution".

As to general personal jurisdiction, companies have two domiciles - where they are incorporated and where their principal place of business is (typically the Company headquarters). In this case both corporate HQ and incorporation for the airline is in State A rather than State B.

As to specific (long-arm) personal jurisdiction, the court will need to consider the constitutional test according to State B's long-arm statute; that is, whether the airline has such substantial purposeful contacts with a state such that it is fair to exercise jurisdiction over them there. The airline does have operations in State B - namely, the facility where it receives and processes online and telephone reservation requests is located in State B that employs around 150 of its staff. It was via this reservation facility that the woman arranged her travel booking. Although this is not an insignificant presence, taking the circumstances as a whole it appears unlikely that a court would exercise specific jurisdiction over the airline in State B. The airline is incorporated in State A where it also has its headquarters, and has the vast majority of its operations and workforce in state C (12,000 of its 15,000 employees are in State C). In addition, the airline does not serve State B. On balance the airline's contacts with State B are purposeful but not significant enough considering the location and spread of the rest of the airline's business to ground a case against it in State B (as opposed to State A or C).

The woman has not selected state B to lay claim because the airline has clear and purposeful connections there (and in fact she has very minimal connections there herself), but because of the larger awards that State B juries tend to give in such cases. In addition to the factors above, for a State B court to take such a claim would likely violate the important public policy against encouraging forum shopping by plaintiffs.

However, State B does appear to have diversity subject matter jurisdiction over the proceeding as follows. The case will need either Diversity Subject Matter Jurisdiction or Federal Question jurisdiction to proceed in the State B Federal Court. As the claim arises under state tort law the federal question basis does not arise. Diversity jurisdiction requires that there be (1) complete diversity between plaintiffs; and (2) the amount in dispute exceeds \$75,000. The monetary threshold should be clearly satisfied in this case with the plaintiff's claim in excess of \$1 million. There is a suggestion, as above, that the woman may be forum shopping, however even if the amount of her claim of \$1 million is inflated it is most likely that she will have a good faith claim over the threshold.

As to the diversity requirement, as above, the airline corporation is domiciled in State A with both its HQ and place of incorporation in that state. There is an issue as to whether the plaintiff resides properly in State A (defeating the diversity requirement) or State C (meeting the requirement). A person is domiciled where they are present and evince an intention to permanently reside, determined at the time of filing their claim. While the woman at one time (prior to the accident) evinced an intention to move permanently to State A (by signing the rent agreement and securing a job there), this intention had lapsed by the time the case was filed. Following her hospitalization, she has been unable to work and has continued to live in State C although she one day hopes to move to State A and begin working in the new job. This hope for the future at the time she filed the action is insufficient to make State A the plaintiff's domicile for the purposes of diversity jurisdiction - she will be considered a resident of State C.

Accordingly, both diversity and monetary threshold requirements are met for Subject Matter Diversity Jurisdiction in State B, however it does not have either general or specific personal jurisdiction over the airline.

Finally, it is noted that the woman would always be entitled to lay claim in the state where the accident and her injuries actually occurred - but in this case that is in State A, and not State B, so that does not assist her.

ANSWER TO MEE 5

1. Authority to Make Distributions

The issue is whether the trustee had authority to make distributions from trust principal and interest to allow him to pay his various expenses. The trustee could have, in his discretion, paid the son's hospital bill and for the son's child support, but likely lacked discretion to pay the loan for the computer.

A trustee owes fiduciary duties to the beneficiaries of the trust, and those duties are shaped by the instrument setting out the trust and its terms. Specifically, a trustee may not contravene the (permissible) explicit terms of a trust that limit his discretion to make distributions. Here, the settlor's trust instrument endowed in the trustee the sole discretion to make distributions to the settlor's son and daughter so long as those distributions were "for each child's support." Courts construe the term "support" to refer to support in meeting the necessities of daily life - that is, food, housing, medical care, and the like. Trusts established for the "support" of a settlor's heirs (or any other beneficiaries the settlor may elect) are designed to ensure that the settlor's beneficiaries are able to meet the basic requirements of daily life.

Here, the son's medical bills clearly fall into the category of "support" - the bills are for services rendered to the son for care that may well have required him to live, or at least required him. The son's outstanding child support bill also likely falls into the category of "support" - child support is designed to pay for the expenses of the children of a couple (unlike alimony/spousal support, which covers the spouse's costs of daily living). The son would be required to support his children if he lived with them or if he and his ex-wife were still married and money from the support trust would be available for that purpose because the son would be meeting the needs of his daily life. That the amounts are now unpaid child support therefore does not alter this conclusion - the child support amounts count as "support" for the son within the meaning of the trust grant. Moreover, the children that will be the beneficiaries of the child support payments have an interest in the residuary of the trust - they are its only living residual beneficiaries. The trust's purpose therefore will not be undermined by distributions for child support, and the trustee may make such payments. The computer, on the other hand, is not support - its expense, weighed against the son's salary, shows that it is not a necessity of everyday life, and indeed it was for recreational use. The trustee likely therefore lacked discretion to use trust proceeds to pay for it.

2. Discretion to Make Distributions

The issue is whether the trustee, empowered with the discretion to make distributions, abused his discretion in making distributions to the daughter but not to the son. He

likely did in refusing to make distributions for the hospital bill and child support, but did not abuse his discretion in refusing to pay for the computer.

The trustee's power to use his discretion to make those distributions that he deems "advisable" does not require him to make equivalent distributions to the son and the daughter. Therefore, the trustee did not per se abuse his discretion by making \$80,000 in distributions to the daughter but none to the son.

However, the trustee nevertheless likely abused his discretion in refusing to make distributions for the son's medical bills and child support. Although the trust instrument allows him to make distributions that he deems "advisable," he must exercise the care that a reasonably prudent fiduciary would use in using that discretion, and may not be motivated by animus. Here, the refusal to make distributions to the son is apparently motivated by personal distaste, rather than a reasonable cost-benefit analysis of the propriety of distribution in light of the son's needs. And, in light of those needs and the son's \$35,000 salary, a prudent beneficiary would have paid for the medical expense and child support, both because doing so is economically justified and because, in the case of the child support, doing so is in the interest of the son and his family.

3. Piercing the Trust

First, as a baseline matter, all three creditors may obtain judgments against the son, requiring him to pay them any of the trust money that is actually distributed to him.

However, the central issue in this question is whether the son's creditors may collect directly from the trust, even though the trust contains a spendthrift clause prohibiting the voluntary assignment of the son's interest and barring the son's creditors from reaching that interest, and then, if so, whether the creditors may require the trustee to exercise his discretion to pay them. The hospital and child support (the wife) creditors may pierce the spendthrift clause of the trust. Spendthrift trusts are disfavored, and in some jurisdictions, a settlor simply may not limit the power of creditors to reach trust assets. However, even assuming that the restriction is valid in general, the hospital and the child support creditors may collect from the trust. Public policy disfavors the use of a trust to hide assets from the creditors that provide an individual with necessities (such as hospital services) or as a means of restricting a person's assets from child support creditors. Accordingly, a court will likely hold that the spendthrift restriction is not enforceable as to the hospital bill and the child support obligation. Moreover, in light of the fact that the spendthrift clause is likely not valid to prevent the hospital and the child support creditor from reaching the trust assets, the creditors (the hospital and the wife) will be able to obtain judgments requiring the trustee to satisfy their obligations - trust law will not permit a trustee to exercise his unilateral discretion to refuse to pay a valid judgment that reaches trust assets.

The computer, however, is another story. Unlike child support or a medical bill, that expense is not a necessity of everyday life, and public policy does not disfavor restrictions on trust assets being used to fund such expenses. Accordingly, the spendthrift clause may not be avoided by the computer creditor, and that creditor cannot obtain an order requiring the trustee to pay him for the computer from trust assets.

ANSWER TO MEE 5

1. Propriety of Distributions

The trustee could have properly distributed assets to pay the hospital bill and child support, but not the computer- gaming system. The settlor has established a support trust, which places full discretion in the trustee to distribute according to his legal duties and the terms of the trust, but also contains a spendthrift provision protecting the trust corpus and undermining the alienability of the trust interest by the beneficiaries. This is entirely legal.

The trustee has fiduciary duties to the beneficiaries, including a duty of loyalty to the beneficiaries and a duty of due care with respect to the trust corpus. Since there are two beneficiaries, he must manage the corpus with both their interests in mind. The trustee also has a duty to follow the express terms of the trust, which requires that he distribute trust income and principle for each child's support, although he has discretion in determining whether those conditions are met. In determining the proper distributions for a support trust, a court will look to many factors, including the living standards of the beneficiaries that they are previously accustomed to, and the severity of the need or debt that draws upon the trust. Generally, necessities almost always fit the bill, and purely recreational items almost never do; furthermore, since the trustee has broad discretion in this matter, his decisions will not be overturned absent an abuse of discretion.

In this case, the child's hospital bill is almost certainly properly paid by the trust. Emergency room bills, by definition, are necessary for the support of the beneficiary. While an elective surgery would be much harder to justify, an emergency room bill is probably exactly what the settlor had in mind when creating the trust, and the distribution therefore is proper. The child support is a closer call, since the operative question is whether it is necessary for the beneficiary's support. Paying off child support judgments is not generally required in order to support an individual. However, as discussed below in question 3, child support judgments can pierce the spendthrift protections and require distribution of trust assets *anyway*, so paying them is certainly not an improper distribution. More generally, child support payments can result in wage garnishment, repeated court attendance which can render a service industry job like the son's quite

fragile, and other serious impacts on the son's life that themselves may be sufficient to trigger the support language in the trust.

By contrast the gaming system would not be a proper distribution. The gaming system is purely recreational, and needlessly high-end. It provides no necessities of nourishment, care, or even self-actualization (a low-end gaming system would suffice under that theory, if even possible). Because of that, a distribution to the son for the gaming system would be an improper distribution under the terms of the trust.

2. Did the trustee abuse his discretion in refusing to make distributions to the son

The trustee, as outlined above in question 1, has a fiduciary duty to his beneficiaries. Those duties include loyalty to the beneficiaries. In this case, the trustee's behavior indicates that he has breached that fiduciary duty. The trustee has failed to make *any* distributions to the son, while making significant distributions to the daughter, even though their incomes appear to be similar (and not substantial), and even though the son has significantly expenses to cover in his life. The son has 3 children, two of which are not yet teenagers, who, although they live with their mother, are a burden on the son's financial resources. The daughter, by contrast, is unmarried and single, and so has nobody to take care of at all. Under these circumstances, to distribute \$80,000 to one beneficiary and none to the other over 7 years is a clear breach of the duty of loyalty. This is of course confirmed by the trustee's comments to the sister, where he describes the son ("without any direct basis") as "an adulterer" a "terrible father" and a "bum."

3. Can creditors obtain trust assets by judicial order?

Spendthrift trusts, as described in question 1 above, are generally immune from creditors. The trust in question is a spendthrift trust and was properly formed. Therefore, it is generally immune from creditors. However, there are certain exceptions to this rule. Federal income taxes are accepted from this immunity, although none are at issue here. Child support orders are also accepted from this immunity, which means that the child support judgment creditor could obtain an order requiring the trustee to pay out from trust assets the balance of child support payments (\$35,000). The final exception is necessities. As in contracts with persons under the age of majority, contracts for necessities can frequently puncture the spendthrift provision and take from the trust assets. The policy reasons behind this are to ensure that parties stay willing to provide necessities to those in need without worrying about whether they'll be paid for it. For this reason, the hospital can probably obtain a judicial order to take from trust assets or compel a distribution straight to them. The friend, however, probably cannot compel distribution. Even if he obtains a judicial lien, he will not be able to reach the trust assets or compel distribution in order to clear the son's \$5,000 debt. This is because spendthrift trusts are specifically designed to ensure that they can continue to support their beneficiaries and not be emptied out upon trust formation by various hungry creditors.

ANSWER TO MEE 6

1. Ben should not be charged with burglary because he did not have the intent to commit a felony. Burglary is the breaking and entering into the dwelling of another at night with the intent to commit a felony within. "Breaking" refers to a physical act allowing entry into the dwelling. It does not require excessive force or damage. "Entering" means that the defendant crossed the threshold into the dwelling - even part of the defendant is sufficient to satisfy this element Ben pushing the window fully open constitutes the necessary action required for "breaking", and his entrance halfway into the house is "entering." A dwelling is the place where a person resides - here, the house belonged to Ben's neighbor, and so this element is met. Ben entered at 10 p.m., and so the nighttime element is met as well. Where the charge fails is the final element - intent to commit a felony. This charge requires specific intent - it does not matter whether the alleged burglar actually committed a felony, so long as he had the intent. Conversely, taking an action that would constitute a felony, without the intent to take that action, does not satisfy the element. Here, Ben will argue that he was under the impression that the painting was his. The neighbor suggested he give the neighbor the painting "for safekeeping" and would trade for a print to satisfy Ben's girlfriend's jealousy. There is no indication that this arrangement was permanent, and so Ben can successfully argue that when he entered the neighbor's house to retrieve the painting, he thought he was taking back his own property. This defeats the burglary charge, as Ben does not have the necessary intent. Therefore, he should not be charged with burglary.

2. Ben should not be charged with larceny because he did not have the necessary intent to permanently deprive his neighbor of property. Larceny is the taking of the property of another with the intent to permanently deprive the victim of that property. "Taking" requires that the victim did not give consent, and so when Ben took the unsigned print from his neighbor's house, he did not take the property without his neighbor's consent. He also did not intend to permanently deprive his neighbor of the property, as the facts indicate that both Ben and his neighbor considered the arrangement to be temporary. While Ben formed the necessary intent later, he still did not "take" the property under the definition of the crime. Therefore, he should not be charged with larceny.

3. Ben should be charged with embezzlement because he misappropriated property of which he had been given possession, but not title. Embezzlement is the misappropriation of property to which the defendant has been given possession, with the intent to deprive the rightful possessor of that property. Here, Ben took possession of the print. At the time he took possession, the neighbor voluntarily gave him the print under their agreement. It was only after he was questioned by the police that Ben decided to sell the print, without consent or right to the property being sold. He had the intent to deprive his neighbor of the neighbor's rightful property, because he knew that the neighbor wanted the print back - when he sold it, he said "I shouldn't have it at all," which shows that knowledge. Crucially, Ben was given possession of the property, not title. The neighbor did not give

him the print as a gift, nor did title pass between the two. Ben was merely given possession of the print with the understanding that the possession would one day revert back. He misappropriated that property after he had been given possession, against the rights of the owner. Therefore, he can be charged with embezzlement.

4. The art dealer can be charged with receiving stolen property because it can be shown that she had knowledge that the print had been stolen. A person can be charged with receiving stolen property if they take ownership of property with the knowledge that it had been unlawfully acquired. Here, the art dealer bought the stolen print from Ben and resold it. While the art dealer will argue that she did not have such knowledge, it can be shown from her actions that she had the necessary knowledge. A person knows something if they are aware of the high probability that it exists. Here, the art dealer broke from her usual convention of investigating ownership history after Ben said that he "shouldn't have it at all." Instead, she bought it without further discussion, and sold it for 10 times the price to a collector who was famous for not being interested in exploring the ownership history of his acquisitions. This shows that the art dealer knew the property was unlawfully acquired, and willfully refusing to learn that property is stolen if no defense when the circumstances are clear. The dealer can therefore be charged with receiving stolen property.

ANSWER TO MEE 6

Burglary

Ben should not be charged with burglary for the incident at the neighbor's house. The issue is whether the intent to recover one's own property from another's home is sufficient to support a burglary conviction.

Burglary is the breaking and entering of another's dwelling at night with the intent to commit a felony therein. Breaking requires that the defendant exert some force to enter the dwelling. Entry requires that all or part of the defendant (or some object used by the defendant) enter the dwelling. Here, Ben forcibly broke into the neighbor's home by pushing open the partially-opened window, and entered the home by climbing halfway through the window. Ben attempted to enter his neighbor's home at 10 PM, satisfying the "dwelling" and "at night" elements as well. Ben intended to retrieve his painting from his neighbor. The only possible felony that Ben could have had intent to commit was larceny. Larceny is the taking and carrying away of the personal property of another by trespass with the intent to permanently deprive the owner of his property. Ben did intend to take and carry away his painting, but the painting was not the "personal property of another." The painting belonged to Ben. The neighbor only offered to hold Ben's painting "for safe-keeping." Because Ben intended to enter the neighbor's house to

retrieve his *own* painting, he lacked the requisite intent to be convicted of burglary. Ben should not be charged with burglary for the incident at the neighbor's house.

Larceny

Ben should not be charged with larceny for his actions involving the unsigned print. The issue is whether the defendant must have the intent to permanently deprive the owner of his property at the time of the taking.

Larceny is the taking and carrying away of the personal property of another by trespass with the intent to permanently deprive the owner of his property. The defendant generally must have the requisite intent at the time of the taking. Under the doctrine of continuous trespass, there is an exception if the initial taking was wrongful, and the defendant later develops the intent to permanently deprive the owner of his property. Ben "took and carried away" the neighbor's painting when the neighbor hung it in Ben's house. At that time, Ben's taking was not wrongful, because it was with the owner's permission. Therefore, the taking was without "trespass." Also, at that time, Ben intended to return the painting to the neighbor. Ben only developed the intent to permanently deprive the neighbor of the painting later, after he became mad at the neighbor when he attempted to retrieve his own painting. This does not amount to "continuing trespass" because the initial taking was not wrongful. Therefore, Ben lacked the requisite intent at the time of the taking, and should not be charged with larceny.

Embezzlement

Ben should be charged with embezzlement with respect to the print. The issue is whether he was in lawful possession of the property, and wrongfully took it.

Embezzlement is the unlawful taking personal property of another by one who is in lawful possession with the intent to permanently deprive the owner of his property. Here, Ben was in the lawful possession of the unsigned art print because the neighbor agreed to hang the print in Ben's home for the time being. Ben only had permission to display the painting in his home. Ben wrongfully took the neighbor's print when he removed it from his home and sold it to the art dealer. Ben had no permission or right to dispose of the property in this manner. Moreover, Ben sold the print because he was mad at his neighbor and with the intent that the neighbor not recover his painting. Therefore, Ben should be charged with embezzlement with respect to the print.

Receiving Stolen Property

The art dealer should be charged with stolen property. The issue is whether the art dealer had the requisite mental state. Receiving stolen property is the possession and control of personal property of another knowing that it was obtained unlawfully and with the intent

to permanently deprive the owner of his property. Whether one "knows" that the goods were stolen will include a scenario where the defendant was willfully ignorant. The art dealer had possession over the art print when she physically took the print from Ben. The painting in fact belonged to the neighbor. The art dealer arguably should have known that the painting was obtained wrongfully because of Ben's statement that "I shouldn't have it at all," and the fact that he was selling it for far less than it was worth. The art dealer normally investigates her purchases to ensure that they are legitimate, but neglected to do so here, despite indications from Ben that the painting was obtained wrongfully. Further, the art dealer sold the painting to a collector who was known for being disinterested in investigating the rightful ownership of his purchases. Under these circumstances, a court will likely find that the art dealer "knew" that the print was wrongfully obtained because she ignored circumstances indicating that it was. Additionally, the art dealer's sale to a buyer who "famously" did not investigate his purchases for a high price evidences her intent to deprive the rightful owner of his property permanently. Therefore, the art dealer should be charged with receipt of stolen property.

ANSWER TO MPT 1

MOTION FOR PRELIMINARY INJUNCTION

Statement of the Case: [omitted]

Statement of the Facts: [omitted]

Body of the Argument:

While preliminary injunctive relief is an extraordinary remedy disfavored by the courts, this relief may be granted in appropriate cases to preserve the status quo pending a decision on the merits. Four factors must be met for preliminary injunction to be granted: (1) the moving party is likely to succeed on the merits, (2) that the moving party will suffer irreparable harm if the injunction is not granted, (3) that the benefits of granting the injunction outweigh the possible hardships to the party opposing the injunction, and (4) that the issuance of a preliminary injunction serves the public interest. [*Lang v. Lone Pine School District* (Franklin Court of Appeal 2016)]

As will be discussed below, these four factors are clearly met in this case, which merits the grant of preliminary injunction to prevent the Franklin Department of Children and Families (FDCF) from revoking Baker's license to operate Little Tots.

I. Ashley Baker (Baker) will likely succeed on the merits given that she has substantially complied with the requirements of the Franklin Administrative Code (FAC), and has a right to continue operate Little Tots Care Center (Little Tots) pursuant to the policies of the Franklin Child Care Center Act (FCCCA).

To establish likelihood of success, a party seeking preliminary relief only needs to demonstrate that her chances to succeed on at least one of her claims are better than negligible -- that is, her claims for relief are better than a mere possibility. [*Lang v. Lone Pine School District* (Franklin Court of Appeal 2016)] The moving party must raise a fair question regarding the existence of the claimed right and the relief he is entitled to if successful at trial on the complaint for permanent relief. [*Id.*] Thus, in *Lang v. Lone Pine School District*, where the parents of a disabled child, Michael Lang, sued the school district for violating his rights as a child with disabilities and sought preliminary injunctive relief to allow Michael to bring a service dog to school, the Franklin Court of Appeal found that there was a likelihood of success on the merits based on the fact that there was no dispute that Michael was a child with disability, he needed accommodation, and the service animal may well be the sort of accommodation needed. Hence, the Langs showed a fair question regarding the rights of their son and the likelihood of receiving a remedy at trial.

Here, there is no dispute that Ashley Baker is the owner and operator of Little Tots, who took over only eight months ago and received a government grant to subsidize the center. The grant allows her to charge reduced fees to parents whose income falls below a certain level and to hire more staff and expand the number of children that Little Tots serves. Little Tots is the only child care center in the neighborhood that serves low-income families, and is open more hours than most child care centers so that parents who work early or late shifts can use the center. If her license to operate Little Tots is revoked, she will not only lose income from the business, but low-income families in the neighborhood who send their children to Little Tots will also be affected. Enjoining FDCF from revoking her license will prevent this from happening.

While FDCF may argue that Baker does will not likely succeed given that the FAC and FCCCA explicitly give FDCF the power to revoke Baker's license upon non-compliance with certain standards, this argument should fail. As discussed in *Lang*, a party only needs to demonstrate that her claims for relief are better than a mere possibility. Notably, as regards penalties for noncompliance with standards, the FCCCA does not provide that a license will be automatically revoked. Instead, the FDCF is given a range of penalties, from fine to revocation, depending on its determination of the case. Thus, there is basis to prevent FDCF from revoking Baker's license. Consequently, Baker has demonstrated a fair question regarding her rights to operate Little Tots and the likelihood of receiving a remedy at trial.

II. Baker stands to suffer irreparable harm from the said revocation given that the revocation of the license to operate Little Tots will result in damages that cannot be adequately compensated or measured by any certain pecuniary standard,

An alleged harm or injury is irreparable when the injured party cannot be adequately compensated by damages or when damages cannot be measured by any certain pecuniary standard. [*Lang v. Lone Pine School District* (Franklin Court of Appeal 2016)] Here, Baker stands to suffer irreparable harm because if she forced to close, she will be without any income and will lose the government grant. With loss of income, she will not be able to repay her business loans, and will risk losing her clients during the pendency of the motion. She may not be able to make a living or reopen the child care center even if she got her license back.

While FDCF may argue that the harm here is not "irreparable" in that Bakery may reopen the center later on, the damage would have already been inflicted by that time. By revoking her license to operate Little Tots, Baker would be immediately stood to suffer losses not only monetary losses and expenses (i.e., she would lose income and also foot the expenses for closing the center) but also reputational damages. Parents may be hesitant to bring their children to Little Tots after it has ceased to operate because of the reputational damage resulting from the revocation. The government would also be hesitant to give her another grant to Baker because her license was revoked. This type of damage cannot be measured by a certain pecuniary standard. Thus, Baker stands to suffer irreparable harm.

III. A balance of benefits and hardships will show that the benefits of enjoining FDCF from revoking the license as opposed to the potential hardships weigh in favor of Baker, given that the benefit of allowing Baker to continue her business is greater than the hardship to FDCF if does not revoke the license.

As regards balance of benefits and hardships, the court must weigh the benefits of granting the injunction against the possible hardships to the party opposing the injunction.[*Lang v. Lone Pine School District* (Franklin Court of Appeal 2016)] The court must determine whether greater injury would result from refusing to grant the relief sought than from granting it. [*Id.*]

Here, it is clear that the balance of benefits and hardships weighs in favor of Baker. As discussed above, Baker has only been operating the business for eight months, and has been trying her best to meet state standards. In fact, a perusal of the Notice of Deficiency reports issued by the FDCF will show that Baker has been improving all along. For instance, the Notice of Deficiency Report dated July 16, 2018 showed that (a) Enrollment forms of 37 children were incomplete, (b) there was no documentation indicating that a background check on four teachers had been conducted, and (c) the staff/child ratios in the 2-year-old and 3-year-old rooms exceeded what is allowed. On the Notice of

Deficiency Report dated October 19, 2018, (a) the incomplete enrollment forms dropped to that of 16 children (from 37), (b) the missing documentation for teacher background checked dropped to two (from four), and (c) only one room exceeded the staffing ratio. Finally, in the Notice of Deficiency Report dated January 23, 2019, the incomplete enrollment forms dropped to that of five children (from 16). Despite additional minor breaches, Baker also committed to staffing compliance and ensuring supervision in the food area. If her license is not revoked, Baker will have more time to ensure compliance with standards and continue to operate Little Tots. This will benefit Baker in terms of being able to continue her business, as opposed to revoking the license, which will only result in undue hardship. As demonstrated above, Baker has been trying her best, in good faith, to comply with the standards.

On the other hand, FDCF may argue that it stands to suffer hardship from revoking Baker's license because it will not be able to ensure the safety and well-being of children of the State of Franklin through enforcement of minimum standards for child care centers. [FCCCA §1(a)]. It may also argue it is advocating for the needs of the children in the community, who will suffer from health and safety risks if standards are not complied with. However, it can be argued that the risk here is low given that, based on the Notice of Deficiencies; Baker has managed to gradually address the violations, and given just a few more weeks, should be able to fully comply with legal requirements. Revocation of Baker's license is too heavy a penalty to impose on the owner of a government-funded business that caters to low-income neighborhoods and has demonstrated efforts to achieve compliance. In view of the foregoing, it is clear that the benefits of granting the injunction are in favor of Baker.

IV. The issuance of the preliminary injunction will serve public interest because both parents and children of low-income families will be able to benefit from the operation of Little Tots.

Finally, the court must consider whether the issuance of the preliminary injunction serves the public interest. The FCCCA explicitly sets forth the policy of the State of Franklin to ensure the safety and well-being of preschool-age children of the state. The FCCA provides that "there is a need for affordable and safe child care centers for the care of preschool-aged children whose parents are unemployed." [FCCA §1(b)] It also recognizes that "there is a need for affordable and safe child care centers for low-income parents in underserved and economically depressed communities." [FCCA §1(c)] and that "by providing for affordable and safe child care centers, the State of Franklin encourages employment of parents who, without these child care centers, could not be employed." [FCCA §1(d)].

The foregoing policies encapsulate the public interest that will be served by enjoining FDCF from revoking Baker's license. To emphasize, Little Tots is the only low-income child care center located in the neighborhood and is the only child care center that meets

schedules of parents who work full time. It is also affordable because of the discounted rates offered by Baker. It is a better place for children than relying on relatives who get sick or have busy schedules, and offers a good program for children. In fact, the State University Early Learning Center If Little Tots has been sending students to observe the program. If Baker's license to operate Little Tots is revoked, Little Tots will no longer be able to operate and serve the needs of low-income families. Some parents who work full time will have to quit their jobs to be able to take care of their children, which will have an effect on their income and ability to support their children.

Clearly, the issuance of the preliminary injunction will serve public interest. Thus, the license should not be revoked.

ANSWER TO MPT 1

Fisher & Mason Law Office

To: Gale Fisher

From: Examinee

Date: March 1, 2019

Re: Motion for Preliminary Injunction to enjoin the Franklin Department of Children and Families from revoking the license to operate Little Tots Child Care Center

Statement of the case: [omitted]

Statement of Facts: [omitted]

Body of the Argument

PRELIMINARY INJUNCTION STANDARD

A party seeking a preliminary injunction must satisfy: 1) the moving party is likely to succeed on the merits, 2) that the moving part will suffer irreparable harm if the injunction is not granted, 3) that the benefits of granting the injunction outweigh the possible hardships to the party opposing the injunction, and 4) that the issuance of a preliminary injunction serves the public interest.

1. A PRELIMINARY INJUNCTION SHOULD BE GRANTED BECAUSE MRS. BAKER HAS SHOWN SUBSTANTIAL IMPROVEMENTS IN THE CRITICAL STANDARDS OBSERVED AT THE LITTLE TOTS CHILD CARE CENTER IN

THE AREAS OF ENROLLMENT PROCEDURES, STAFF QUALIFICATIONS AND STAFFING, AND IT WOULD BE DISSPROPORTIONATE TO THE HARM REVOKE HER LICENSE

For the past eight months, Mrs. Baker has done nothing but try to make the cost of child care more affordable to the low-income community that the facility resides in and expand its territory in order to service more families. While Mrs. Baker took over Little Tots Child Care Center from an owner who made it very hard for the parents to afford it, she has completely transformed its affordability to parents and made it a safe and thriving environment for children. As several changes had to be made in the midst of expansion, some levels of compliance fell a little below state standards. However, Mrs. Baker has taken substantial steps in finding remedies to these compliance issues and has complied with most. In a mere six months, Mrs. Baker has taken the non-compliant enrollment procedures forms of 37 children to now 5. However, the five outstanding forms have been tendered to the parents and just awaiting return. Mrs. Baker was diligent in making sure that all parents knew the importance of these forms. Mrs. Baker took the same applicable steps in making sure that any employees she hired had a thorough background check, with the exception of one holdover employee whose paperwork should have been done under her predecessor and one newly hired replacement teacher. The number of non-compliant personnel files have gone from four to one, which will be handled. Also, pursuant to 34 Franklin Administration Code Section 3.13, Mrs. Baker has complied with the adequate staffing to student ratio of all of her rooms, with the exception of one two year old room that will be in full compliance once the student moves away in one week. Mrs. Baker has taken substantial measures in making sure that she takes the compliance issues seriously and is working hard for the jobs that she loves.

It can be argued that Mrs. Baker's January 23, 2019 observation was inadequate because the critical standards were not completely met and an added lack of meals and nutrition supervision. However, this argument would fail because according to 34 Franklin Administration Code Section 3.37, a child requiring a special diet due to some form of personal circumstance "shall be provided with meals and snacks according to the written instructions of the child's parents or legal guardian." However, this gives no indication to the need of a special monitoring requirement which was the key criticism cited in the January 23rd observation. The child in question, in fact, "[knew] he's allergic to milk and can't drink it. He's never tried to take the milk." Therefore, Mrs. Baker should not be penalized for not monitoring something that the child was not given and was taught to avoid.

Therefore, for the foregoing reasons, the preliminary injunction should be granted because everything can be remedied immediately and there is a fair likelihood of remedy on the merits at trial.

2. IF A PRELIMINARY INJUNCTION IS NOT GRANTED, LITTLE TOTS CHILD CARE CENTER WILL BE FORCED TO CLOSE RESULTING IN A SUBSTANTIAL LOSS IN ITS REPUTATION, SEVERAL PARENTS WILL BE FORCED TO LEAVE THEIR JOBS, AND DOZENS OF CHILDREN WILL BE WITHOUT A PLACE WHERE THEY CAN LEARN AND GROW WITH THEIR PEERS, WHICH ULTIMATELY RESULTS IN IRREPARABLE HARM

A. Irreparable harm is when "the injured party cannot be adequately compensated by damages or when damages cannot be measured by any certain pecuniary standard." *Lang v. Lone Pine School District*. When it comes to the livelihood of an organization or service that deals with a critical community such as children, which has so much reliance on trust and safety, the implication of something such as a shut down or license revocation can have an extreme adverse effect on its future sustainability. Little Tots Child Care Center is the only center of its kind in the neighborhood and the parents of the children it services rely heavily on knowing that when they leave their children with the staff day after day, everything will be just fine. Not only is Little Tots the only Child Care Center in the neighborhood, but they provide an extra layer of service because it accommodates the needs of the low-income community. Due to the fact that Mrs. Baker applied and was granted a grant that allowed her to hire more staff and subsidize the fees for families that were compliant with the grant's standards, parents are able to afford the child care for their children without having to burden other outlets such as family members. Little Tots also carries out the legislative intent, as stated in the Franklin Child Care Center Act, of fulfilling the "need for affordable and safe child care centers for low-income parents in underserved and economically depressed communities." Therefore, if a revocation is issued, the trust factor from parent to child care provider becomes breached, despite the months of adequate service. It would be a letdown and parents will be forced to find other substitutes for their child care needs which could prohibit them from wanting to return once reopened.

It can be argued that due to the noncompliance of standards found at Little Tots, that the reputation has already been harmed, but this argument would fail because even during the midst of critical standards observations by the State of Franklin Department of Children and Families, Mrs. Baker's Little Tots Child Care Center has receiving excellent recognition from the State University Early Learning Center which has sent students to observe and learn from the practices being done at the facility.

B. Little Tots Child Care Center allows parents to go to work freely without the worry of cost or care for their children. Mrs. Baker's facility governmentally subsidized and unlike the facility's previous owner who made the fees unaffordable, she has not only made the cost manageable but has extended the hours so that parents do not have to drastically alter their work schedules. Without Little Tots, parents would be forced to quit in order to ensure that their children are being tended for adequately and safely. However, Little Tots provides that assurance to them because "the children are safe and are thriving."

It can be argued that the harm could be mitigated because there are other outlets such as family members who could watch the children while the parents are at work, however, this argument would fail because that places an undue burden on the reliance of those family members. Unlike a facility, such as Little Tots, that hires individuals who are sole designated to aide and care for the children in the facility, family members and friends are subject to sickness and are not obligated to care for the children. If someone at Little Tots becomes ill and needs to take off, that child's care is not compromised because there are other workers in the building who could fill in. However, in the case of family members, parents will be forced to take off and tend to the children themselves which results in loss wages and possible adverse effects on their employment. This would also not go along with the Franklin Child Care Center Act Legislative intent that states, "by providing for affordable and safe child care centers, the State of Franklin encourages employment of parents who, without these child care centers, could not be employed." This means, that facilities such as Little Tots are essential because they allow parents to be effective in their roles as providers and they can be cared for in areas such as health care, clothing, school expenses and any other extracurricular activities that they deserve.

C. If Little Tots Child Care Center is forced to close, its children will be left without a place to go and it will have a negative effect on their social development and growth. Jacob Robbins, parent of one of the children of Little Tots, gives an account of how his child used to be "really shy and hesitant to plat with other kids but has overcome all that since he started attending Little Tots." This goes to show that it is critical during a child's early formative years, such as the ages serviced at Little Tots (2-5yrs old), that they are able to be around others who can aide in their development and add to their growth. To stunt this growth would be a hardship on not only the parents, but the children themselves which could lead to even greater harms as they grow.

It can be argued that the children could find other ways to advance their cognitive and social development; however, this argument would fail because Little Tots is the only facility within 15 miles of the low-income community that it serves. Therefore, not only would the children be uprooted from what they know and are familiar with, but the parents of the children will have to find a facility that would not only drastically affect their commute but also their economic abilities. Children need to be around other children so that they can learn from them and grow.

Just as in the *Lang v. Lone Pine School District* case, where a young child who was in the need of a disability accommodation in the form of a dog, it was testified that "service animals provide a similar benefit to disabled students...as well as a positive educational lesson for all students." Although, this is not the care of a service animal accommodation, the same contention of the importance of children learning from other children who are different from them can be imputed to the need for the Little Tots children to remain at that facility rather than kept at home being watched by their families.

For the foregoing reason, the Little Tots Child Care Center will suffer an irreparable harm on its reputation, parental loss jobs, and a negative effect on child development, if a preliminary injunction is not granted because no amount of money could be granted to substitute those crucial needs.

3. IF A PRELIMINARY INJUNCTION IS NOT GRANTED, THE COMMUNITY WILL LOSE A FACILITY THAT THEY HEAVILY RELY ON FOR THE CHILD CARE OF THEIR CHILDREN AT AN AFFORDABLE PRICE AND THE GOVERNMENT WILL HAVE TO PROVIDE MORE ASSISTANCE TO SUPPORT FAMILIES LACKING INCOME WHICH WILL BE A SUBSTANTIAL HARDSHIP

The low-income service that the Little Tots Child Care Center provides allows parents and families to be able to afford child care that they otherwise would not be able to afford. Therefore, if they cannot afford child care for their children, parents will be forced to quit their places of employment which would result in the government having to lend more assistance to those low-income families. Because the facility is affordable, the hardship of spending too much is not so much of a burden and parents have the liberty to work freely. If Mrs. Baker's license is revoked, not only will her facility be shut down, but the grant that she applied for and received will fail and money will be lost. Mrs. Baker will be without a job, her 19 employees will be without a job, as well as 96 children who will be left with nowhere to go. The benefit of keeping Little Tots open will substantially outweigh the burden of shutting it down and having to uproot so many lives. As in *Lang v. Lone* the burden of not permitting the service animal to attend school with the student was greater than the stress of the student not being able to overcome his disability. Here, we see that Mrs. Baker has already found an educational program for child care workers on food safety that she is going to implement among her staff to provide training that will add to the improvements of the facility. This would not burden the state with training methods, and it will allow her to be more compliant with the state standards of review.

It can be argued that the harm of shutting down the facility and possibly opening it back up would not be a hardship. However, that argument would fail because it would cost more for Mrs. Baker to find all new staff, re-train them, and gain the trust back in her reputation. Not to mention, parents would have to try to get their old jobs back, all while the state would still have to provide further assistance to keep them afloat during their job search. The "well-being of preschool age children of the state of Franklin" would be compromised and it would take substantial measures to return back to the thriving position it is in now.

Therefore, for the foregoing reasons, the preliminary injunction should be granted because the facility running as is a greater benefit to the children, parents, and the state.

4. IF A PRELIMINARY INJUNCTION IS NOT GRANTED, DOZENS OF PARENTS WILL HAVE TO QUIT THEIR JOBS OR TRAVEL FAR AND FAMILY STRUCTURES WILL BE COMPROMISED BECAUSE CHILDREN WILL NOT BE ABLE TO BE SERVED

The ultimate statutory purposes of the law are to ensure the well-being of the children. That means keeping them with a consistent environment for them to learn and grow. The revocation of Mrs. Baker's license will only cause parents and children to be uprooted and underserved in an already underserved community. The Public interest is at risk because if the only child care facility in the area is removed then there will either be an overcrowding in other facilities miles away or parents will be forced to give up their rights to work as a result of no child care. Also, revocation is not the most narrow way of ensuring that compliance is met. According to the Franklin Care Act, a Director "May, after notice, impose penalties including but not limited to a civil fine of at least \$500 but not more than \$10,000." Therefore, to avoid further hardship, the Director can indeed just issue a fine to Mrs. Baker, because there is no requirement that revocation be put in place. Equally, according to section 3 of the same Act, "the Director shall inspect each licensed facility at least once each year to determine the facility is in compliance with the standards of the Department." However, Director Carla Ortiz has not observed Little Tots once. Instead three other inspectors made their own observations which call in to question whether they are complying with what she established was necessary in child care compliance.

Little Tots Child Care facility is the only one of its kind in the area. Not only will families suffer from it being shut down but the government will not be doing its due diligence in ensuring that the families in the low-income community are receiving the aide the need in order to live sustainable lives. All of the non-compliant terms are not difficult to be enforced and impose no dangers on the children that Mrs. Baker is servicing. Instead, they were just hurdles she had to get over while she was trying to advance the Centers effectiveness in the community that desperately needed what she had to offer. If the facility does not remain open, it will uproot many families and disrupt the community as a whole.

FINAL CONCLUSION

Therefore, for the foregoing reasons, the Motion for the Preliminary Injunction to enjoin the Franklin Department of Children and Families from revoking Ms. Baker's license to operate Little Tots should be granted because she is likely to succeed on the merits, will suffer irreparable harm if not granted, the benefits outweigh any hardships on the opposing party, and it will serve the public interest to remain open.

ANSWER TO MPT 2

MEMORANDUM

TO: Susan Daniels

FROM: Examinee

DATE: February 26, 2019

RE: Andrew Remick matter

To establish a viable cause of action in negligence, a plaintiff's complaint must allege the following four elements: (1) duty; (2) breach of that duty; (3) causation; and (4) damages. *Fisher v. Brawn* (Franklin Sup. Ct. 1998). A duty must be recognized by law and must obligate a defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. *Id.* Rule 28 of the Franklin Rules of Civil Procedure provides that a defendant can give notice that a person[] not a party to the action is allegedly wholly or partially at fault for the purpose of determining the respective liability of all actors under Franklin's comparative negligence laws. *Thomas v. Baytown Golf Course* (Franklin Ct. of App. 2016). The jury is required to consider the fault of all persons who contributed to the alleged injury, regardless of whether the person was, or could have been named as a party to the suit. *Id.* Once a defendant designates as a nonparty at fault by filing the appropriate notice with the trial court, the defendant can offer evidence of the nonparty's negligence and argue that the jury should attribute some or all fault to the nonparty. *Id.* Although Mr. Dunbar was not the driver of the car that ultimately injured Mr. Remick, it is likely that Mr. Remick has a viable negligence claim against Mr. Dunbar.

Duty

In order to establish a viable cause of action in negligence, the plaintiff's complaint must allege that he was owed a duty. A duty is the legal obligation requiring the actor to conform to a certain standard of conduct. *Fisher v. Brawn* (Franklin Sup. Ct. 1998). Mr. Dunbar owed Mr. Remick a legal duty.

A duty is established under Restatement (Third) of Torts §42 by, "an actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if: (a) the failure to exercise reasonable care increases the risk of harm beyond that which existed without the undertaking or (b) the person to whom the services are rendered . . . relies on the actor's exercising reasonable care in the undertaking. The Court in *Weiss v. McCann* concluded that "the language of

§42 envisions the assistance of a private person to a person in need of aid" and therefore it applied to the homeowner. *Weiss v. McCann* (Franklin Ct. of App. 2015). Furthermore, Restatement (Third) of Torts §44 states, "an actor who, despite no duty to do so, takes charge of another who reasonably appears to be: (1) imperiled; and (2) helpless or unable to protect himself or herself has a duty to exercise reasonable care while the other is within the actor's charge." Section 44 applies "whenever a rescuer takes charge of another who is imperiled and incapable of taking adequate care," including "one who is rendered helpless by his or her own conduct..." §44, comment g; *Weiss v. McCann* (Franklin Ct. of App. 2015). The Court in *Weiss v. McCann* found that the homeowner who voluntarily took charge of the plaintiff when she fell and hit her head right in front of him, who was therefore imperiled and helpless, owed the plaintiff a duty of reasonable care. *Weiss v. McCann* (Franklin Ct. of App. 2015). Even if it is assumed that the plaintiff is helpless, the plaintiff must show that the defendant took charge through affirmative action and assumed an obligation or intended to render services for the plaintiff's benefit. *Boxer v. Shaw* (Franklin Ct. of App. 2017).

In the case at hand, Mr. Dunbar owes a duty to Mr. Remick under both Sections 42 and 44 of the Restatement (Third) of Torts. Under Section 42, Mr. Dunbar owed Mr. Remick a duty of reasonable care because he undertook to render mechanical services to Mr. Remick knowing that the services would reduce the risk of physical harm to him by getting Mr. Remick's car started and out of the middle of the road. Mr. Dunbar ultimately failed to exercise reasonable care and increased the risk of harm beyond that which existed by: (1) refusing to push the car up the road; and (2) refusing to set up the flares in order to alert oncoming cars. Mr. Remick also relied on the actor's exercising reasonable care in the undertaking because he stated that he was a mechanic and when Mr. Remick asked that Mr. Dunbar push the car up the road or set up the flares, Mr. Dunbar told him not to worry and proceeded setting up his jumper cables while the cars were in the middle of the road. Similar to the court in *Weiss v. McCann*, the court will likely find Section 42 applies to Mr. Dunbar as a private actor. Moreover, under Section 44, Mr. Dunbar owed Mr. Remick a duty of reasonable care because Mr. Dunbar, without a duty to do so, voluntarily took charge of Mr. Remick who was clearly imperiled and helpless. Mr. Remick's car died in the middle of the road by no fault of his own and Mr. Dunbar drove up next to him, offered him his help, assured him not to worry multiple times and insisted that Mr. Remick would be out of harm's way in a short amount of time. Mr. Remick's car was in the middle of oncoming traffic and he was in the backseat with an injured ankle unable to remove himself or his car from the situation. Although the court in *Boxer v. Shaw* stated that "the mere fact that the plaintiff's car was being repaired did not render him helpless [and] the fact that a person may be distraught about a situation does not render that person helpless without additional evidence of actual impairment, Mr. Remick was clearly impaired by his injured ankle that he acquired by trying to move the car out of the way himself and no service for him to call for help. Like the homeowner in *Weiss v. McCann*, the court will likely find that Section 44 also applies to Mr. Dunbar as a voluntary actor. Unlike the plaintiff in *Boxer v. Shaw*, Mr. Remick can show that Mr.

Dunbar through affirmative action assumed an obligation or intended to render services for Mr. Remick's benefit. Therefore, the required duty is present.

Breach of Duty

In order to establish a viable cause of action in negligence, the plaintiff's complaint must allege that there was a breach of the duty owed to the plaintiff. A breach of duty is unreasonable conduct in light of foreseeable risks of harm. *Fisher v. Brawn* (Franklin Sup. Ct. 1998). Mr. Dunbar ultimately breached his duty under Sections 42 and 44 of the Restatement and failed to exercise reasonable care by engaging in unreasonable conduct in light of foreseeable risks of harm by: (1) refusing to push the car up the road; and (2) refusing to set up the flares in order to alert oncoming cars. Mr. Remick even made Mr. Dunbar aware of his concerns and the asked for him to push the car up the road or set up the flares to alert oncoming cars but Mr. Dunbar unreasonably refused to act upon Mr. Remick's justified concerns. Therefore, a breach of duty is present.

Causation

In order to establish a viable cause of action in negligence, the plaintiff's complaint must allege that there was causation. Causation is a reasonably close causal connection between the actor's conduct and the resulting harm. *Fisher v. Brawn* (Franklin Sup. Ct. 1998). Mr. Dunbar's unreasonable conduct and the resulting harm have a reasonably close causal connection. Although Mr. Dunbar did not put him in a worse position than he already was like the actor in *Thomas v. Bayville Golf Course* because he was on the shoulder of the 2-lane highway, his failure to act reasonably and move Mr. Remick's car out of the road or alert oncoming drivers with Mr. Remick's flares is a reasonably close causal connection between the actor's conduct and the resulting harm. Mr. Dunbar chose to leave Mr. Remick's car right where it was while he attached jumper cables and refused to start up the signal flares. Therefore, there is causation present.

Damages

In order to establish a viable cause of action in negligence, the plaintiff's complaint must allege that there were damages. Damages include at least one of the following: wages, pain and suffering, medical expenses, or property loss or damage. *Fisher v. Brawn* (Franklin Sup. Ct. 1998). Unlike the plaintiffs in *Thomas v. Baytown Golf Course and Boxer v. Shaw*, the plaintiff did not die from his injuries. However, the plaintiff did suffer from lost wages, pain and suffering, and medical expenses. The impact of the collision dislocated Mr. Remick's shoulder, broke his arm, and gave him a minor concussion. The doctors recommended Mr. Remick undergo surgery to repair the damage to his shoulder and the broken arm will not heal for three to four weeks. The doctors also recommended Mr. Remick undergoes physical therapy for several months to regain full function in his left arm and shoulder. Mr. Remick owns a landscaping

business that requires mostly physical activity and cannot work due to his injuries. Similar to the plaintiff in *Weiss v. McCann*, Mr. Remick suffered damages from Mr. Dunbar's conduct. Therefore, damages are present.

Conclusion

In conclusion, all four of the required elements of negligence have been met in Mr. Remick's claim against Mr. Dunbar. Under Sections 42 and 44 of the Restatement, Mr. Dunbar owed Mr. Remick a duty; he then breached that duty through unreasonable conduct. Mr. Dunbar's unreasonable conduct was a causal connection of Mr. Remick's injuries and he suffered damages. Therefore, Mr. Remick has a viable negligence claim against Mr. Dunbar.

ANSWER TO MPT 2

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

MEMORANDUM

II. STATEMENT OF FACTS [OMMITTED]

III. EVALUATION OF REMICK'S NEGLIGENCE CLAIM AGAINST LARRY DUNBAR

In order to establish a viable cause of action in negligence, a plaintiff's complaint must allege the following four elements of negligence: (1) duty: a legal obligation requiring the actor to conform in a certain standard of conduct; (2) breach of duty: unreasonable conduct in light of foreseeable risks of harm; (3) causation: a reasonably close causal connection between the actor's conduct and the resulting harm; and (4) damages, including at least one of the following: lost wages, pain and suffering, medical expenses, or property loss or damage. *Weiss v. McCann*, (Fr. Ct. App. 2015) citing to (*Fisher v. Brawn*, (Fr. Sup. Ct. 1998)). A person has an affirmative legal duty to act only if created by statute, contract, relationship, status, property interest, or some other special circumstance. *Ellis v. Dowd*, (Fr. Sup. Ct. 1995). Ordinarily, under common law there is no affirmative duty to act, unless the act is a voluntary act, or the actor assumes the duty

to use reasonable care. Id. The voluntary act giving rise to an affirmative duty to act and the assumption of a duty to act is often referred to collectively as the "affirmative duty" or the "Good Samaritan" doctrine, and is codified in the Restatement (Third) of Torts §§ 42 and 44 (2012). However, and in this case, it appears that Remick has a viable claim for negligence against Larry Dunbar, who had an affirmative duty to exercise reasonable care and failed to do so causing Remick's injuries.

1. Duty: Larry Dunbar had an affirmative duty to act with reasonable care as a rescuer with intent to render assistance to Remick.

Under the Restatement Third of Torts, § 42 states that a duty is created based on an undertaking. An actor who undertakes 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, when (a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking; or (b) the person to whom the services are rendered relies on the actor's exercising reasonable care in the undertaking. *Restatement § 42(a),(b)*. An undertaking occurs when an actor knowingly and voluntarily renders services on behalf of one another to reduce the risk of harm, or when circumstances would lead a reasonable person to believe that the actor is doing so for those purposes. Thus, a person rendering services to aid another and who knows or should know that the services will reduce risk of physical harm, the actor rendering the services must exercise reasonable care. The standard of reasonable care can be breached by an act of commission (misfeasance), or an act of omission (nonfeasance). *Restatement § 42 Comment [c]*. However, even when a person does not have a duty to act, and that person "takes charge" of another person.

Here, Dunbar voluntarily stopped his truck alongside Remick's car got out of the car and asked Remick if he needed assistance. Remick's car had just stopped working while driving and would not restart, nor would the dashboard illuminate, nor would the hazard lights work. Larry responded that he was a mechanic and offered to help Remick and intentionally did so. Dunbar voluntarily undertook a service to Remick, and knew or should have known that Remick was currently had a risk of physical harm, and that the services Dunbar intended to render would reduce Remick of the risk of physical harm. Dunbar likely knew this because Remick had told Dunbar about his injuries that he sustained from his own actions while attempting to move the car off the road. Dunbar knew or should have known that Remick was in a great risk of physical harm because Remick's car was still located in the road, on an active roadway. Here, Dunbar began to attempt to fix the car at approximately 5:15 p.m., at which point it started getting dark, Remick was concerned that the presence of his car on the road was dangerous especially with him still inside it. Remick asked Dunbar to push the car off the road onto the shoulder, and told Dunbar that he had emergency flares in the trunk, however, Dunbar refused these other options and repeatedly told Remick "not to worry." Furthermore, Remick was relying on Dunbar to exercise reasonable care because Dunbar stated that he

was a mechanic, and a reasonable person would believe that a mechanic would know about road safety or that the problem should be fixed relatively quickly before the risk increased any further. Thus, Dunbar had a duty to exercise reasonable care because Remick relied on Dunbar for assistance, and reasonably would believe that Dunbar was doing so because Remick could not do so himself and was in an increasingly risky situation, and Dunbar knew or should have known that his services would reduce the risk of harm to Remick because the quicker he got the car started the quicker Remick could drive instead of being stalled in the middle of the road.

Under the Restatement Third of Torts, § 44 states that even when no duty to act exists, an actor may have a duty to exercise reasonable care when the actor takes charge of another person who reasonably appears to be: (1) imperiled; and (2) helpless or unable to protect himself or herself. However, this section is limited to instances in which an actor takes steps to engage in a rescue by taking charge of another who is imperiled and unable to adequately protect himself or herself. *Restatement § 44 Comment [c]*. Furthermore, the duty is limited in scope and duration to the peril which the other is exposed and requires that the actor voluntarily undertake a rescue and actually take charge of the other. *Id.* A person may be rendered helpless by the innocent or tortious conduct of another, or by his or her own conduct. *Restatement § 44 Comment [g]*. However, the rescuer must take charge of the helpless individual with the intent of providing assistance in confronting the then-existing peril. *Id.*

Here, even if Dunbar had no duty to act, he likely assumed the obligation to act by taking charge of Remick who was imperiled and helpless. Remick was imperiled because his car was stalled and stuck in the middle of an active roadway. Remick rendered himself helpless and unable to protect himself (which is allowed under § 44) when he attempted to push his car off the road and twisted his ankle and could not put any weight on it or move, sufficient for actual impairment. Here, Dunbar's actions are consistent with an assumption of a duty to act with reasonable care because his affirmative actions to intend to render services for Remick's benefit by fixing his car. The Franklin Court of Appeals ruled in *Thomas v. Baytown Golf Course*, that in order to show a defendant "took charge" there must be a showing that through affirmative action an obligation was assumed or that services rendered were intended for the benefit of the plaintiff. *Thomas v. Baytown Golf Course*, (Fr. Ct. App. 2016). Here, Dunbar offered assistance and immediately took charge to fix Remick's car and Remick had no direction over what Dunbar was doing. In *Boxer v. Shaw*, the Franklin Court of Appeals found that because the defendant did not have direction or control over what the defendant and plaintiff did, that the defendant did not actually "take charge" of the plaintiff. Here, Dunbar had absolute control over the circumstances and situation and Remick was helpless and could not move, despite Remick's pleading to have Dunbar move the car off the road or to use road flares, Dunbar still went on with what he was doing and did not listen to Remick. Thus, Dunbar voluntarily took charge of Remick as an imperiled and helpless individual and was required to exercise reasonable care, extending only to the scope and duration of the risk

that Remick was under and the risk that made Dunbar voluntarily to undertake rendering services to Remick. Here, this risk is the risk that Remick was stuck in his stalled car in the middle of a roadway, the risk inherent with an active roadway is that other cars may crash into a stalled car on the roadway. Here, Dunbar was attempting to fix Remick's car to get him off the roadway. Thus, Dunbar had an obligation to act with reasonable care and his obligation and liability extended to the harm that actually occurred, Remick's car being struck by another car. Thus, in order for Dunbar to have breached his duty of reasonable care, Dunbar's actions must be contrary to reasonable care under the circumstances.

2. Breach: Larry Dunbar breached his duty of reasonable care to Remick by failing to exercise reasonable care failing to use a road flare.

In *Fisher*, the court stated that a duty must be recognized by law and must obligate a defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. In this case, Dunbar's duty was to act with reasonable care. In order for Dunbar to have breached his duty of reasonable care, Dunbar's actions or omissions must have failed to conform to the standard of reasonable care to protect others against unreasonable risks of harm. Here, Dunbar failed to act with reasonable care because his rendering of services left Remick in a worse position than when he found him. After Dunbar found Remick it started to get dark, the risk of a car hitting Remick's car in the middle of the road increases as it gets darker, Remick's car had no lights or hazard lights, and Dunbar did not put his hazard lights on, on his truck. Dunbar, if he had acted with reasonable care, would have used one of Remick's road flares, or at the very least pushed Remick's car off the road onto the shoulder, as Remick suggested. The use of road flares or Dunbar's truck's hazard lights or moving Remick's car off the road would have substantially decreased the risk of harm that Remick was already under. Thus, because Dunbar conduct amounts to nonfeasance of an affirmative obligation that Dunbar had to act with reasonable care and failed to do so, it is likely that Dunbar breached an affirmative duty to Remick.

3. Causation: Larry Dunbar caused Remick's injuries through conduct amounting to nonfeasance that resulted in Remick's injuries.

The Franklin Court of Appeals, in *Weiss*, determined that causation is a reasonably close causal connection between the actor's conduct and the resulting harm. Here, Marsha Gibson stated that she did not see Remick's car, because it was unlit, until it was too late and even her immediate stopping on the brakes did not stop her car from colliding into Remick's car. As a result, it is a logical conclusion that if Remick's car was illuminated that Gibson would have seen the car and been able to stop earlier and not have collided with Remick's car. However, the evidence states that Remick's car was around a bend in the road, whether Remick's car was lit or unlit may not have had an effect on the amount of time Gibson had to stop. Although Gibson's statements makes it seem likely that it

would. Therefore, had Dunbar used the road flares, or turned on his own hazard lights, or pushed the car off the road, Remick's injuries would not have occurred. Thus, it may be said that there is a reasonably close causal connection between Dunbar's lack of conduct and Remick's injuries.

4. Damages: Larry Dunbar caused Remick's injuries, which Remick can prove.

The Franklin Court of Appeals in *Weiss* determined that damages include at least one of the following: lost wages, pain and suffering, medical expenses, or property loss or damage. Here, Remick can prove damages that resulted from the car accident as a result of Dunbar's actions. Remick cannot sue for damages for injuries he sustained to himself, including the twisted ankle, unless there is sufficient evidence that the car accident aggravated that injury in a determinable severity. However, Remick can likely prove that Dunbar is liable for the damages stemming from the car accident including, the medical expenses for the dislocated shoulder, broken arm, and minor concussion. Remick also likely has a claim for lost wages which are of dire concern right now because Remick is unable to operate his construction business, which is currently failing, and the reason why he can't operate the construction business is due to the fact that Dunbar caused these injuries to his extremities, which he needs to work on the construction site. Remick also likely has a claim for damages to his property, his car, because Gibson would not have crashed into the car if Dunbar had used the road flares or otherwise illuminated the scene.

IV. CONCLUSION

Therefore, and for the reasons stated above Remick likely has a viable claim for negligence against Dunbar.