February 2024

Ohio Bar Examination

Multistate Essay Examination
Questions & Selected Answers

Multistate Performance Test
Summaries & Selected Answers

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THE SUPREME COURT OF THE STATE OF OHIO

OHIO BAR EXAMINATION

The February 2024 Ohio Bar Examination contained 6 Multistate Essay Examination (MEE) questions. Applicants were given three hours to answer a set of 6 essay questions. These essays were prepared by the National Conference of Bar Examiners (NCBE).

The exam also contained two Multistate Performance Test (MPT) items. These items were prepared by the NCBE. Applicants were given three hours to answer both MPT items.

The following pages contain the NCBE's summary of the MEE questions given during the February 2024 bar exam, along with the NCBE's summary of the MPT items given on the exam. This booklet also contains actual applicant answers to the essay and MPT questions.

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

Copies of the complete February 2024 MPT and its corresponding point sheet are available from the NCBE. Please check the NCBE's web site at www.ncbex.org for information about ordering.


THE SUPREME COURT OF THE STATE OF OHIO

Question 1

QUESTION

In February, Wendy opened Kibble, a store selling dog food made from organic ingredients as well as dog toys and dog grooming products. Wendy operated Kibble as a sole proprietorship. Kibble soon ran into financial difficulties, and Wendy could not pay its bills.

In early April, Wendy asked her friends Mary and Angelo for financial assistance.

On May 1, in response to Wendy's request, Mary delivered to Wendy a check payable to "Kibble." In exchange for this contribution, Wendy agreed in a signed writing to pay Mary 15% of Kibble's monthly profits for as long as Kibble remained in business. Mary also agreed that, if Kibble suffered losses, she would share 15% of those losses with Wendy.

As part of their deal, Mary began working at the store with Wendy and helped Wendy with business planning for Kibble.

On May 2, also in response to Wendy's request, Angelo delivered to Wendy a check payable to "Kibble." On the memo line of this check, Angelo wrote "loan to Kibble." Angelo agreed in a signed writing to accept 15% of the monthly profits of Kibble as repayment of the loan until the total loan amount, including interest, was repaid.

Wendy used the proceeds of the checks from Mary and Angelo to purchase equipment, supplies, and a delivery van in Kibble's name.

Beginning in June, Wendy paid 15% of Kibble's previous month's profits to Mary and another 15% to Angelo.

On October 1, Mary wrote a letter to her son Bob stating that she was assigning to Bob, as a gift, all her interest in Kibble effective immediately. Later that day Mary handed a copy of that letter to Wendy, who immediately read it and said to Mary, "I don't want Bob involved with Kibble." Mary continued to be active in the business operations of Kibble.

Early in November, Wendy distributed the appropriate October profits of Kibble to Mary and Angelo but distributed nothing to Bob.

On November 10, Bob demanded that Wendy distribute Mary's share of Kibble's profits to him and that she also allow him to inspect the books and records of Kibble.

On November 15, Mary learned that Wendy was using Kibble's delivery van on Sundays to transport her nieces to their softball games. Mary demanded that Wendy stop doing so, but Wendy refused, noting that the van was not being used for Kibble's business on Sundays. Not for public distribution. For personal use only.

1. What legal relationships have the parties established through their dealings? Explain
2. Is Bob entitled to Mary's share of the monthly profits of Kibble? Explain.
3. Is Bob entitled to inspect the books and records of Kibble? Explain.
4. Is Wendy entitled to use the delivery van on Sundays to take her nieces to their softball games? Explain.

ANSWER

1. The issue is what are the legal relationships between the parties.

a. Relationship with Mary

Under partnership law, a partnership is formed when two or more people come together as co-owners to carry on a business for profit. The rule of profit sharing creates a presumption that there is a partnership when there is a sharing of the profits and losses of a business.

Here, a partnership was formed when Mary provided a check payable to "Kibble" to Wendy in exchange for payment of 15% of Kibble's monthly profits. Furthermore, Mary's agreement to share in 15% of Kibble's losses, to work at the Kibble store, and to help Wendy with the business planning for Kibble further exemplifies Wendy and Mary's intent to carry on the for-profit business of Kibble as co-owners.

Therefore, the established legal relationship between Wendy and Mary is a partnership.

b. Relationship with Angelo

Under partnership law, when profit sharing is present between two or more people, a partnership is presumed. However, this presumption does not apply if an individual's contribution to a business is in the form of a loan to which his receipt of profits is in repayment of such loan.

Here, Angelo's check delivered to Wendy for Kibble was in the form of a loan which is evidenced by the check's memo line stating, "loan to Kibble." Furthermore, Angelo agreed to loan this money to Kibble in exchange for 15% of Kibble's profits which he would receive until his loan was fully paid off.

Therefore, the established legal relationship of Angelo is that he is a creditor of Kibble.

2. The issue is whether Bob as a transferee has the right to the monthly profits of Kibble.

Under partnership law, each partner has a property interest in the partnership to which they can freely transfer upon notice to the other partners, without the consent of the other partners. Upon such transfer, a transferee does not become a partner to the partnership, but he does have the right to share in the profits and losses of the partnership.

Here, Mary effectively transferred her property interest in the partnership to Bob when she wrote a letter and handed a copy of the letter to Wendy. Although Wendy stated she did not want Bob to be involved with Kibble, the assignment was nonetheless effective as consent of the parties and is only needed to add someone as a partner, not to transfer a partnership interest.

Therefore, Bob is entitled to Mary's share of the monthly profits of Kibble.

3. The issue is whether a transferee has the right to inspect the books and records of Kibble.

Under partnership law, although a transferee has the right to share in the profits and losses of a partnership, he does not have the right to manage or control the partnership, demand profits, nor does he have the right to inspect the books and records of a partnership.

Such rights remain in the transferor of the interest.

Here, Wendy's transfer of her property interest to Bob was effective to which Bob became a transferee. However, as a transferee, Bob only has the right to share in the profits and losses and cannot demand those profits if he is denied them, nor does he have the right to inspect the records and books of Kibble. Those rights remain in the property interest transferor, Wendy.

Therefore, Bob is not entitled to inspect the books and records of Kibble.

4. The issue is whether the van is the property of the partnership.

Under partnership law, partnership property may only be used for the benefit of the partnership and may not be used by the partners of the partnership for personal use or personal gain. If such use does occur, the partner is required to compensate the partnership for the benefit conferred on the partner for the unlawful use of partnership property.

Property is deemed partnership property when the property was bought with partnership funds, bought in the name of the partnership, or used in conducting the business of the partnership.

Here, the delivery van was bought with the proceeds of the checks received from Mary and Angelo which were made to assist "Kibble" with its financial situation. Furthermore, the van was bought under the partnership name "Kibble." Thus, the delivery van is partnership property and partners of Kibble cannot use it for personal use and must compensate Kibble if such use occurs.

Wendy's use of the van on Sundays for her nieces' softball games was a personal use of partnership property and as such, she must stop the use and must compensate the partnership for the times she has already used the van on Sundays for the softball games.

Therefore, Wendy is not entitled to use the delivery van on Sundays to take her nieces to their softball games.

Question 2

QUESTION

A wealthy art collector recently died, leaving her entire collection of artworks to Grandson. After receiving the artworks from the estate, Grandson, who did not share his grandmother's interest in art, decided to sell them. With the help of art appraisal experts, he prepared a catalog describing each of the artworks that he hoped to sell. The catalog, a copy of which was given to each person who expressed interest in buying any of the artworks, identified one painting as an early work by Artiste, a prominent American artist who died in 1956 at the age of 78.

Buyer, an art collector who loves the work of Artiste, read the catalog and was intrigued by the possibility of acquiring the painting described as one of Artiste's early works, so he asked to see it in person. Grandson allowed Buyer to examine the painting only visually for up to 30 minutes.

Buyer visually examined the painting for 30 minutes and did not notice anything that caused him to doubt that the painting was a genuine Artiste.

Buyer then told Grandson that he would be willing to pay $350,000 for "the Artiste painting." Grandson agreed to that price. Grandson and Buyer then executed an "Art Purchase Agreement" prepared by Grandson's lawyer. The Art Purchase Agreement identified the item being sold as a "painting by Artiste" and stated the price as $350,000. The Art Purchase Agreement also contained a number of conspicuous provisions labeled "Terms and Conditions of Sale." One of those provisions stated that "Seller disclaims all warranties, express or implied."

Shortly after Buyer and Grandson executed the Art Purchase Agreement, Buyer electronically transferred $350,000 to Grandson's bank account, and Grandson delivered the painting to Buyer.

Three weeks later, Buyer read a news article reporting that several counterfeits of Artiste paintings had recently been sold. The article reported that these counterfeit paintings were of such high quality that mere visual inspection could not detect the counterfeiting; only a chemical analysis could do so. Buyer consulted a professor of art history, who arranged for a chemical analysis of the paints used in the painting bought from Grandson. The analysis revealed that the painting was not the work of Artiste. Because it was not an authentic Artiste painting, it was worth only $500.

Buyer has sued Grandson, seeking either to recover damages on the theory that Grandson breached an express warranty that the painting was the work of Artiste or, alternatively, to rescind or avoid the purchase contract on the basis of a mutual mistake of fact. Each party has stipulated that the other believed in good faith that the painting was a genuine work of Artiste.

1. Has Grandson breached an express warranty? Explain. (Do not address any remedies to which Buyer may be entitled.)

2. Does Buyer have the right to rescind or avoid the contract on the basis of a mutual mistake of fact? Explain.

ANSWER

Number 1

The preliminary issue for the essay is whether the contract is governed by common law or Article 2 of the UCC.

Common law governs contracts for service whereas the UCC governs contracts for the sale of goods. Goods are objects that are movable.

Here, the sale of the artwork is governed by Article 2 of the UCC as the painting is a movable item and therefore is considered a good.

UCC Article 2 applies to the contract for the sale of the painting.

The issue is whether the grandson has breached an express warranty.

Under the UCC, an express warranty is affirmation, statement, or promise of fact that becomes part of the basis of the bargain. Part of the basis of the bargain means that it is one of the reasons that the individual entered into the contract. While warranties can be disclaimed under the UCC, express warranties once made, cannot be disclaimed. Express warranties can be oral or written.

Here, the grandson did make a written express warranty when the contract he provided for the sale identified that the item being sold was a painting by Artiste. This is a written affirmation that the painting in the transaction is one that was painted by Artiste. Furthermore, the statement was part of the basis of the bargain as Grandson was told by Buyer that he would purchase the Artiste painting. Artiste is a painter that passed away and therefore is no longer making art, so it was part of the basis of the bargain that the item was a painting by Artiste. Finally, even though the contract had a conspicuous disclaimer stating that the seller disclaimed all warranties, express or implied, the express warranty still exists because once an express warranty is made it cannot be disclaimed.

Grandson breached an express warranty.

Number 2

The issue is whether Buyer has a right to rescind or avoid the contract on the basis of mutual mistake of fact.

Under the UCC, parties are still given common law defenses such as mutual mistake of fact and can avail themselves of the remedies that are provided for those common law defenses. Mutual mistake of fact is a defense to a contract that provides that where both parties are mistaken as to a fact of the contract and that fact is one that strikes at the heart of the bargain. If mutual mistake does occur, then the parties can rescind the contract which means that the parties go back to the original positions as they were before the contract, or they can avoid the contract which means that neither party must perform their duties provided for under the contract.

While the contract is governed by Article 2 of the UCC, the parties can still avail themselves of the common law defense of mutual mistake of fact. Here both parties had a good faith belief that the painting sold was a genuine work of Artiste; there was nothing that indicated to the art collector that the painting was not a genuine Artiste work when he inspected the painting for 30 minutes.

Furthermore, the art appraisal expert who worked with Grandson did not indicate that the work was not genuine. Therefore, both parties were mutually mistaken that this artwork was a genuine Artiste work. The mistake does go straight to the heart of the contract as the main reason that Buyer was buying this painting was because he believed it to be a genuine Artiste work and Artiste is prominent American artist who passed away in 1956 and therefore there are no new paintings of his. Because there was a mutual mistake of fact as to the genuineness of the painting, the UCC provides that the parties can avail themselves of the common law remedies that are associated with the defense of mutual mistake of fact. Buyer has a right to rescind or avoid the contract on the basis of mutual mistake of fact.

Question 3

QUESTION

Cara filed a civil suit against Dana, her former coworker, alleging that Dana had stolen Cara's cell phone from her locker at a gym. The jurisdiction has adopted rules of evidence that are identical to the Federal Rules of Evidence.

At trial, Cara testified during her case-in-chief, stating:

> On October 18, I worked out at the gym. After I completed my workout, I returned to the locker room to change clothes and retrieve my belongings from my assigned locker (#344). My locker (#344) was near the entry door to the locker room, and when I walked into the locker room, I saw Dana hurriedly closing the door to my locker. I am positive it was Dana because it was cold and rainy that day and Dana was wearing a heavy, bright orange coat. I had seen Dana wearing that coat several times before at work and the gym. When I got to my locker, my cell phone was not there.

Dana also testified at trial during her case-in-chief, stating:

> I definitely worked out at the gym on October 18 because I was training for a marathon. I don't recall seeing Cara at the gym that day. For several reasons, I am also positive that I was not wearing a heavy, bright orange coat. First, I ran on the outdoor track that day because the weather was overcast but not cold and not rainy. Second, as I always do for my track workouts, I ran in shorts and a T-shirt; I never wear a coat or jacket while running on the track. Third, I never take my coat or jacket into the gym; I always leave it in my car so it doesn't take up space in my locker.

Dana also testified as follows:

> I'm not surprised that Cara lost her cell phone at the gym. She's pretty careless. At work she often misplaced it, or forgot it in the conference room after a meeting or in the break room after lunch.

Cara objected to this testimony, asserting that it constituted inadmissible character evidence. The judge overruled the objection.

During her rebuttal case, Cara asked the court to take judicial notice of the weather on October 18 based on a certified public record from the federal government's National Weather Service agency. The record was a weather report for October 18 in the area where the gym was located and at the time Cara testified that she was at the gym. According to the record, on October 18 it had rained all day and the high temperature was 41 degrees Fahrenheit (5 degrees Celsius) in the area of the gym.

Dana objected to Cara's request and asked for the opportunity to present an argument that taking judicial notice would be improper. The court immediately overruled Dana's objection and denied her request to be heard. The court took judicial notice of the weather as detailed in the public record.

1. Did the trial court err by denying Dana an opportunity to be heard before it took judicial notice of the weather on October 18? Explain.
2. Assuming that the trial court did not err by denying Dana an opportunity to be heard, did the trial court err by taking judicial notice of the weather on October 18? Explain.

3. Was Dana's testimony that Cara was "careless" inadmissible character evidence? Explain.
4. Was Dana's testimony that Cara often misplaced or forgot her cell phone inadmissible character evidence? Explain.

ANSWER

I. Dana's Opportunity to be Heard on Judicial Notice.

The issue is whether the court is required to consider Dana's opposition to the weather being judicially noticed in the civil trial.

Judicial notice occurs when a party to a case asks the court to accept a matter as factually established. When a court takes judicial notice of such a fact, the judicial notice does not supplant the party's burden of proving that fact or the element of the action that the fact relates to. When a court takes judicial notice of a fact that is disputed by the parties, both parties must be heard on the fact before the judge takes notice. In a civil case, this is especially important, because when judicial notice is taken, the jury is instructed that it must accept the fact as true and established.

Here, both parties disputed the weather on October 18. The weather conditions are relevant to the case because Cara claims that she identified Dana by her coat, while Dana maintains that she was not wearing a coat on that day because of the weather. Dana asserts that the weather was overcast, but nice enough to work out outside without a coat; however, Cara claims the weather was cold and rainy. Accordingly, this fact is material and disputed between the parties. Cara offered evidence of a certified copy of the National Weather Service agency in support of her request for the court to take judicial notice. This document established that on October 18, it "rained all day", which conflicts with Dana's testimony. Therefore, before the jury was instructed that it must accept that it was raining the entire day on October 18, Dana should have had the opportunity to be heard on the issue. By overruling her objection, Dana was prevented from properly asserting her defense.

Thus, the court erred by denying Dana the opportunity to be heard on the issue of the weather.

II. Judicial Notice

The issue is whether the court properly took judicial notice of the weather after evidence was presented to establish the weather.

A court may take judicial notice of a fact that cannot be disputed. To take such notice, the fact must be established conclusively by the party seeking judicial notice.

Here, Cara sought judicial notice of the weather on October 18 and provided evidence in support of this request. The evidence from the federal agency was reliable to as to the weather. However, Dana objected to the fact being judicially noticed. Because this case was a civil matter, the court had to instruct the jury that it must consider the fact as established conclusively. The report offered by Cara likely supports this, and there is no evidence in the facts to the contrary, other than Dana's testimony.

Thus, the court likely did not err in taking judicial notice of the weather on October 18.

III. Character Evidence: "Carelessness"

The issue is whether Dana's characterization of Cara as careless was improper character evidence.

Character evidence is inadmissible in civil cases unless character is an essential element of the crime charged (fraud, for example). Character evidence is offered to show a trait or propensity of a person and that on a certain date and time, the person's actions conformed to that character trait. Character evidence may be offered when a party puts their own character at issue. Evidence of someone's character may be admissible to show a party's motive, plan, intent, or habit.

Here, Dana testified that Cara was "careless." This trait was offered to show that on October 18, Cara acted in conformity with her careless trait because she misplaced her phone. This case is civil, so character evidence is generally barred. Testimony about Cara's carelessness is likely considered improper character evidence. However, Dana may argue that the trait was not offered as character evidence but was instead habit evidence. Dana testified that Cara "often" misplaced her phone, forgetting it frequently throughout the typical workday.

Thus, if offered as character evidence, Cara's trait of being careless is likely improper.

IV. Character Evidence: Habit

The issue is whether Dana's testimony about Cara frequently misplacing her phone is admissible as habit evidence.

Habit evidence can be distinguished from character evidence in that a person's day-to-day habits are probative that on a certain day, they acted as they typically do. Habit evidence is admissible, while character evidence is not. See above for applicable rules.

Here, Dana testified that Cara "often" misplaced her phone. Although Dana may argue that this is enough to establish a habit, it is likely too unspecified and regular to be considered a habit. Her testimony does not allege that Cara left her phone a meeting room every day, or even weekly. This vague amount of time that Cara engaged in the act of leaving her phone is likely not frequent enough to be considered a habit.

Thus, the testimony related to Cara often misplacing her phone is likely inadmissible character evidence.


THE SUPREME COURT OF THE STATE OF OHIO

Question 4

QUESTION

On November 1, 2020, a landlord leased an apartment to Tom for $1,300 per month based on a signed, written "term-of-years lease" for a three-year term to begin on January 1, 2021, and end on December 31, 2023. The lease provided that Tom could neither assign nor sublet the apartment "without the landlord's prior written consent." The lease included no provision stating what would happen if Tom remained in possession beyond the term.

On January 1, 2021, Tom attempted to move into the apartment but could not do so because the prior tenant, Helen, whose lease term had ended on December 31, 2020, still occupied the apartment. Tom immediately notified the landlord that Helen remained in possession. The landlord responded, "I will get rid of her as soon as possible." Tom then booked a hotel room expecting that he would be able to move into the apartment within the next few days. On January 4, the landlord told Tom, "The apartment is now vacant, so you can move in immediately. Also, I will reduce the February rent by $100 for your inconvenience." Tom promptly moved into the apartment.

About one year later, in January 2022, Tom found a house that he wanted to rent and told the landlord that he wanted to assign his apartment lease to a friend. The landlord conducted a background check on the friend and learned that the friend had a very low credit rating. The landlord told Tom that she would not consent to Tom's proposed assignment. Tom said, "Okay," and he continued living in the apartment.

On January 1, 2024, the day after the lease termination date, Tom was still in possession of the apartment. On January 4, the landlord sent Tom a letter telling him that she was treating him as a periodic tenant subject to all the terms of their original lease, "including the monthly rent of $1,300," which substantially exceeded the then-current market rate for comparable units. Tom wrote back, "That's unfair. I should have to pay only the current market value. I have remained in the apartment only a few days beyond the lease termination date." The landlord rejected Tom's suggestion and told him that, as a periodic tenant, he would be liable for rent at the rate of $1,300 for each month of the periodic tenancy.

No statute or local ordinance affects either party's position on any issue.

1. (a) If a court were to hold that Tom could have rightfully terminated the lease because Helen held over on January 1, 2021, what rule would the court apply and what would be the rationale for that rule? Explain.

   (b) If a court were to hold that Tom could not have rightfully terminated the lease because Helen held over on January 1, 2021, what rule would the court apply and what would be the rationale for that rule? Explain.

2. Did the landlord rightfully refuse to consent to Tom's proposed assignment of the lease to his friend? Explain.

3. Following Tom's failure to vacate the apartment, could the landlord rightfully treat Tom as a periodic tenant, subject to the provisions of the expired lease? Explain.

ANSWER

1. The issue is what law the court would apply in determining whether Tom had a right to terminate the lease due to Helen still occupying the property.

1a. American Rule

Generally, a landlord has a duty to provide the tenant access to the property on the specified start date. Under the American Rule, the landlord is required to give the tenant physical possession of the property on the start date, or the tenant is entitled to terminate the lease.

Here, if the court follows the American Rule, Tom would have the right to terminate the lease. Based on the lease, Tom was supposed to take possession on January 1, 2021; however, Helen was still occupying the building as a holdover tenant. Under the American Rule, the landlord is required to give physical possession which means he was required to get Helen out prior to the move in date. The landlord failed to do so which would give Tom the right to terminate the lease. The idea is that a tenant is not responsible for another party so by failing to give physical possession the landlord is breaching the terms of the lease.

As a result, the court would be following the American Rule if they held that Tom had a right to terminate the lease because under the American Rule the landlord is required to give physical possession.

1b. English Rule

Generally, a landlord has a duty to provide the tenant access to the property on the specified start date. Under the English Rule, the landlord is not required to give physical possession but merely give access to possession. Under the English Rule, if there is a holdover tenant the new tenant is required to remove them from the premises.

Here, if the court finds Tom could not terminate his lease, they would be following the English Rule. Under the English Rule the landlord was merely required to give Tom access to the building by January 1, which he did. The landlord gave Tom the keys and access on January 1 and therefore he either had to get Helen out himself or had to wait until the landlord removed her. The idea is that the holdover tenant was a trespasser and therefore, the landlord was not consenting to them being there, so they are not breaching the lease for someone else breaking the law.

As a result, the court would follow the English Rule if they hold that Tom cannot terminate the lease because under the English Rule the landlord was merely required to give access on the lease date.

2. The issue is whether the landlord had a right to refuse Tom's assignment to his friend.

Generally, an interest is assignable unless the parties expressly agree otherwise. When parties agree that prior consent is required, there is an implied duty of good faith that the landlord will not unreasonably withhold consent.

Here, the landlord had a good faith reason for withholding his consent. Tom asked the landlord to assign his remaining two years to a friend so he could move into a house. Based on their agreement, the landlord retained the right to consent prior to any transfer. After asking, the landlord did a background check on the friend and found out he had a low credit rating.

As a result, the landlord told Tom he was not consenting to the assignment, and Tom continued to live there. Having poor credit is a valid reason for a landlord to withhold their consent to assignment. The friend likely has low credit rating due to debt and failure to pay creditors. Landlord has valid concerns because this makes it more likely that the landlord will not receive rent payments from the friend. As a landlord, the purpose of renting the building is to receive the monthly rent check so by a potential tenant showing a history of failing to pay the landlord has a valid concern and right to deny the assignment.

As a result, the landlord did not withhold consent in bad faith because the background check showed the friends low credit score which gives landlord valid concern to not allow the assignment.

3. The issue is whether the landlord can treat Tom as a periodic tenant for failing to move out at the end of his lease.

When a tenant fails to vacate the premises on the specified date, the landlord has a few courses of action. The landlord can hold the tenant as a periodic tenant subject to the terms of the original lease or the landlord can evict the tenant and sue for any damages. When a residential term of years tenant fails to vacate the premises, the landlord may hold them to a month-to-month periodic tenancy.

Here, Tom was a residential tenant for a term-of-years lease. The original agreement was for $1,300 a month, starting on January 1, 2021, and ending on December 31, 2023. Tom failed to move out and remained in possession on January 1, 2024. Landlord gave Tom time to move out as well as he did not send a letter until January 4. Tom is going to argue it is unfair to hold him to the terms of the original lease because the rent substantially exceeds the current market rate. However, this argument will fail because the court will hold the parties to the terms of the original lease. As a residential tenant, the holdover tenancy will be a month-to-month periodic tenancy according to the remaining terms of the lease. Even though the lease expired, by staying in possession after the end date Tom was impliedly agreeing to continue his lease terms. The original lease will control all but the dates of the new relationship, and the court will view Tom as a month-to-month tenant.

As a result, Tom can be held as a month-to-month periodic tenant according to the terms of the original lease because he failed to vacate the premise on the end date.

Question 5

QUESTION

City is located in State A adjacent to the border with State B. One evening, a City police officer stopped a driver.

The next day, the driver posted a social-media video, alleging the following:

> Late last night a City police officer stopped my car in City near the state border, supposedly for speeding, and ordered me to get out of the car. The officer made disparaging remarks about a religious sticker on the bumper of my car and ridiculed my religious beliefs. He picked up a rock, threatened me, and asked how fast I could run. I ran about 50 feet and turned to see if he was chasing me. He wasn't, but he threw the rock at me, and it struck me in the face. He laughed and shouted, "Look where you are! There's nothing you can do about it!" I saw that I was standing in State B and the officer was still standing in State A. My lip is busted and swollen. I had to get stitches. I want justice.

The officer was charged with committing various crimes.

City Criminal Charge. A City ordinance provides that "any person who assaults another person because of that person's religious expression commits a serious misdemeanor punishable by up to six months in jail." The City attorney filed a charge alleging that the officer had violated this ordinance by striking the driver with a rock because of the driver's religious beliefs and religious expression.

The officer admitted that the driver's allegations were true and pleaded guilty to the charge filed by the City attorney. The municipal court sentenced the officer to three days in jail.

After his conviction for violating the City ordinance, the officer was charged with four additional crimes. All the additional charges were based on the same incident that led to the officer's prosecution for violating the City ordinance.

State B Criminal Charge. Claiming jurisdiction because the rock thrown by the officer struck the driver in State B, a prosecutor in State B has charged the officer with violating State B's hate-crime statute, which, like City's ordinance, provides for the punishment of "any person who assaults another person because of that person's religious expression." This conduct is a felony punishable by one to two years in prison.

State A Criminal Charges. A prosecutor in State A has charged the officer with two different state-level offenses. First, the officer is charged with violating State A's hate-crime statute, which provides that "any person who assaults another person because of that person's religious expression and thereby causes injury to that person commits a felony punishable by one to five years in prison." Second, the officer is charged with violating a State A assault statute that provides that "any person who assaults another person with intent to cause injury is guilty of a felony punishable by not more than two years in prison."

Federal Criminal Charge. The United States Attorney for the federal district of State A has filed a criminal charge against the officer, alleging that the officer violated a federal statute that makes it unlawful for "any person, acting under color of state or local law, to assault another person because of that person's religious expression." The federal crime is punishable by a term of imprisonment of not more than two years.

1. Is the State B hate-crime prosecution barred by the United States Constitution's double jeopardy clause? Explain.
2. Is the federal hate-crime prosecution barred by the United States Constitution's double jeopardy clause? Explain.
3. Is the State A hate-crime prosecution barred by the United States Constitution's double jeopardy clause? Explain.
4. Is the State A assault prosecution barred by the United States Constitution's double jeopardy clause? Explain.

ANSWER

1. The issue is whether the State B hate crime prosecution is barred by the Constitution's double jeopardy clause based on the conviction and sentencing from the City's criminal charge. The double jeopardy clause prohibits the trying of a criminal defendant for the same offense. Jeopardy attaches in a bench trial when the first witness is sworn in. Jeopardy attaches in a jury trial when the jury is empaneled and sworn in. Thus, double jeopardy has attached in the City criminal case.

The double jeopardy clause does not apply to separate sovereigns; separate sovereigns can try a criminal defendant for violations of a crime arising from the same conduct. Furthermore, a crime is the "same offense" for double jeopardy purposes if each crime requires a separate element that is missing from the other element.

Here, City and State B are separate sovereigns; City is a city within state A and thus is only shares sovereignty with State A. Thus, the double jeopardy clause does not bar the prosecution of the State B hate-crime.

Note that the State B hate crime is not a separate offense from the City criminal charge; indeed they are substantially identical. Each prohibits any person from assaulting another person based on their religious expression. However, City and State B are separate sovereigns, so the double jeopardy clause does not bar prosecution.

2. The issue is whether the federal hate-crime prosecution is barred by the Constitution's double jeopardy clause based on the conviction and sentencing from the City's criminal charge. The double jeopardy clause prohibits the trying of a criminal defendant for the same offense. Jeopardy attaches in a bench trial when the first witness is sworn in. Jeopardy attaches in a jury trial when the jury is empaneled and sworn in. Thus, jeopardy has attached in the City criminal case.

The double jeopardy clause does not apply to separate sovereigns; separate sovereigns can try a criminal defendant for violations of a crime arising from the same conduct. Furthermore, a crime is the "same offense" for double jeopardy purposes if each crime requires a separate element that is missing from the other element.

Here, City and the federal government are separate sovereigns; separate sovereigns can try a criminal defendant for violations of the same crime arising from the same conduct. City is only the same sovereign as State A. Thus, the federal government can prosecute based on the federal offense without violating the double jeopardy.

3. The issue is whether State A and City are separate sovereigns. See above for the definition of double jeopardy clause. The double jeopardy clause does not apply to separate sovereigns. The double jeopardy clause only applies to the same offense. An offense is not the same offense as another if each offense has an element that the other does not include.

A city is not a separate sovereign as the state in which it is located. Thus, City and State A are not separate sovereigns for purposes of double jeopardy. Furthermore, the crimes are not separate offenses for double jeopardy purposes. While the State A hate crime charge includes an additional element--that injury is caused to the victim, a separate element is not found in the

City Criminal Charge. Therefore, because State A and City are not separate sovereigns and because the offenses are not separate, the double jeopardy clause will bar the prosecution of the State A hate-crime.

4. The issue is whether the State A assault statute and the city criminal charge are separate offenses for purposes of the double jeopardy clause. The double jeopardy clause does not apply to separate sovereigns. The double jeopardy clause only applies to the same offense. An offense is not the same offense as another if each offense has an element that the other does not include. This is known as the Blockburger test.

As discussed above, a city is not a separate sovereign as the state in which it is located. Thus, City and State A are not separate sovereigns for purposes of double jeopardy. However, the State A assault statute and the City Criminal Charge are separate offenses for double jeopardy purposes. The state A assault charge requires that the defendant intend to cause injury to another; this is not required by the City hate-crime offense. Furthermore, the City hate crime offense requires that the assault be motivated by the other person's religious expression. This is not required by the State A assault statute. Thus, the offenses are separate for purposes of the double jeopardy clause and the State A assault prosecution is not barred by the United State Constitution.


THE SUPREME COURT OF THE STATE OF OHIO

Question 6

QUESTION

On September 4, 2010, Testator, who had two living children, George and Harriet, properly executed a valid will. The will contained only these dispositive provisions:

1. I give my 200 shares of ABC Corp common stock, which I inherited from my grandfather, to my cousin, Donna.
2. I give my home to my brother, Edward.
3. I give my grand piano to my sister, Faye.
4. I direct that all my just debts be paid before distributing the foregoing devises.

None of the devises were subject to a survivorship contingency. The will contained no residuary clause.

In 2012, ABC Corp distributed 100 shares of its common stock to Testator as a stock dividend.

In 2015, Testator borrowed $125,000 to make home renovations. The 20-year loan was secured by a mortgage on Testator's home. Testator was personally liable on this debt.

In 2020, Testator gave $30,000 to her son, George.

In 2022, Faye, the named beneficiary of the piano in the will, died intestate leaving Testator and Edward as her only heirs.

Three months before Testator died in 2023, her grand piano was substantially damaged. She filed a $10,000 casualty-loss claim with her insurer for the damage, and the insurer approved the claim. The insurer had not made any payment on the claim at the time of Testator's death, and the damaged piano remained in Testator's home. The insurer agrees that Testator's estate is entitled to $10,000 on Testator's claim.

Two months before her death, Testator wrote George a letter informing him that the $30,000 she had given him in 2020 was intended "as an advancement" that would reduce "any share of my estate to which you might ever be entitled."

One month before Testator died, George died survived by his only child, Isaac.

Testator is survived by four relatives: her cousin, Donna; her brother, Edward; her daughter, Harriet; and her grandson, Isaac (George's son).

Testator's estate consists of 300 shares of ABC Corp common stock (the 200 shares she inherited and the 100 shares received as a stock dividend), her home, her piano, $200,000 in cash, and the $10,000 owed by the insurer. Testator's only debt at her death was the mortgage loan on the home she devised to Edward.

Faye's estate is still in administration. Her estate's debts are greater than its current assets, and Faye's personal representative is seeking to recover the piano and the insurance proceeds payable to Testator's estate.

The jurisdiction has adopted the Uniform Probate Code.

How should the assets of Testator's estate be distributed? Explain.

ANSWER

1. At issue is whether the additional shares of ABC stock should be distributed to Donna.

At common law, shares of a stock that are acquired through a dividend are treated as separate property than stocks specifically devised in a will. However, under the UPC, stocks acquired through a dividend may be treated as the same property as stocks specifically devised in a will, so long as the testator's acquisition of those stocks was due to action on behalf of the issuing corporation. In those instances, the devisee of a specific bequest of stocks is entitled to those additional shares.

Here, the facts indicate that this jurisdiction has adopted the UPC. Testator made a specific bequest of the ABC Corp. Stock to Donna, who survived the testator. Although the will only granted Donna 200 shares, in a UPC jurisdiction such as this, the additional 100 shares would be included in the testator's gift to Donna, as the shares were acquired based on actions taken by ABC Corp, rather than testator herself. Furthermore, the additional shares were acquired after the will was made, and there are no other indications that testator did not want Donna to take the additional shares.

Thus, since this is a UPC jurisdiction, the probate court should distribute all 300 shares to her.

2. At issue is whether Edward should take the house with the mortgage, or whether the doctrine of exoneration of liens should apply.

At common law, the doctrine of exoneration of liens held that a devisee of real property was entitled to have the assets of the decedent's estate pay off any encumbrances on the property at the time of the decedent's death. The UPC, however, has abandoned the doctrine of exoneration of liens. Instead, a recipient of encumbered real property is not entitled to have the estate's funds pay off any mortgages on a home at the time of death. However, if a testator specifically requests that estate funds be used to pay off a mortgage, a court in a UPC jurisdiction may give effect to the testator's intent by paying off a mortgage the testator intends to be paid off using estate funds.

Here, this jurisdiction follows the UPC, so the common law doctrine of exoneration of liens is likely not recognized. The testator directed all debts be paid before making the devises in her will. However, at the time the will was made, the testator had not taken out a mortgage on the home. The instruction for all debts to be paid is likely not specific enough to demonstrate a testamentary intent that the mortgage should be paid off, as the UPC would likely require a stronger showing of intent before applying $125,000 of the $200,000 in the estate towards the mortgage.

Thus, because the doctrine of exoneration of liens does not apply, and the testator did not specifically intend for the mortgage to be paid off with estate assets, Edward will likely take the testator's home subject to the mortgage.

3. At issue is whether the letter to George was sufficient to indicate that his gift was an advancement under the UPC.

At common law, all lifetime gifts to a beneficiary or heir were deemed advancements. However, under the UPC, a lifetime gift is only an advancement if the testator declares, in contemporaneous writing, that the gift was meant to be an advancement, or if the beneficiary acknowledges in a writing that the gift is an advancement.

Here, at the time the gift was made to George, Testator did not acknowledge it as an advancement. Testator acknowledged it as an advancement in writing, but years later after making the gift. In order for it to be deemed an advancement under the UPC, the testator would have needed to acknowledge it as an advancement at the time the gift was made. Furthermore, although George could have acknowledged it as an advancement at any time, the facts do not indicate that he ever did so.

Thus, this would likely not constitute an advancement, and George would be entitled to take his intestate share of the estate, not reduced by $30,000 had he survived testator.

4. At issue is whether an anti-lapse statute would prevent George's gift from lapsing since he is related to testator by blood.

Nearly every jurisdiction has adopted an anti-lapse statute. When a beneficiary dies before a testator, their gift lapses, and generally will revert to the residue of the estate. However, when an anti-lapse statute is in place, and the deceased beneficiary is related to the testator by a certain degree of blood relation and leaves issue, the issue can stand in their parent's place and take under the terms of the will. Some jurisdictions also will allow property to pass through an anti-lapse statute through a parentelic approach, whereby if a beneficiary doesn't survive the testator and leaves no issue, but they are related through parents, a beneficiary who is also a descendant of their parents may stand to take their bequest.

Here, George was testator's son, which likely would satisfy the degree of blood relation required in any jurisdiction's anti-lapse statute. Furthermore, Faye also predeceased the testator, causing her bequest of the piano to lapse. Although the testator also has devised property to Edward, whom both testator and Faye are related to, most jurisdictions only apply an anti-lapse statute to beneficiaries who leave issue, rather than siblings.

Thus, an anti-lapse statute would likely prevent George's gift from lapsing, but probably would not prevent Faye's gift from lapsing. Thus, only the bequest to Faye would pass through intestacy.

5. At issue is whether Faye is entitled to the proceeds from the insurer of the piano.

When a bequest is not in the testator's possession at the time of their death, the gift is considered adeemed by extinction. Under the common law, a beneficiary of a bequest which is adeemed by extinction is not entitled to any replacement property or funds obtained from the sale of that property. However, the UPC has a mild presumption against ademption, and generally a court in a UPC jurisdiction will award a beneficiary of adeemed property the proceeds from the sale of that property, or any replacements obtained for it.

Here, the piano was still in testator's possession at the time of her death, so it was not truly adeemed by extinction. However, the piano was substantially damaged and likely not usable at that point. Because the UPC has a presumption against ademption, the beneficiary of the piano would likely receive the funds the insurer had to pay out on it. Thus, if Faye were alive to take the piano, the probate court should distribute the funds for it to her. However, as discussed above, it is likely the gift to Faye either lapsed or would pass to Edward as a blood relation of both testator and Faye, if this jurisdiction's anti-lapse statute allows for siblings to take in the place of each other.

6. At issue is in what order the assets of the estate should be abated.

When the debts of a testator's estate are greater than the assets, absent an alternative indicator of testamentary intent, the gifts will abate and satisfy the debts of the estate in the following order: intestate property, residuary gifts, general bequests, demonstrative bequests, then specific bequests. Intestate property is that which does not pass by will. General bequests are money amounts that may satisfied from any source. Demonstrative bequests are bequests to be satisfied from a specific source (such as a particular bank account). Specific bequests are bequests of identifiable objects to a beneficiary.

Here, the testator does not have a residuary clause, so a part of her estate will pass through intestacy since it is not otherwise disposed of by will. This includes the $200,000 in cash, as this seems to be the only bequest not otherwise devised of in the will. If the court applies the UPC's presumption against ademption, the proceeds from the insurer are a demonstrative bequest, as it is funds to be paid out from a specific source. The home and stocks would be considered specific bequests, as both are identifiable pieces of property.

Thus, if the estate debts are greater than its assets, and property must be abated, the proper order would be to satisfy testator's debts from her $200,000, then from the $10,000 demonstrative bequest, then the specific bequests of the home and stock.


THE SUPREME COURT OF THE STATE OF OHIO

MPT 1

STATE OF FRANKLIN V. IRIS LOGAN (FEBRUARY 2024, MPT-1)

In this performance test, the examinee is asked to draft an objective memorandum assessing whether the Hamilton County district attorney should pursue robbery and felony-murder charges against defendant Iris Logan. According to the testimony at the preliminary hearing, Logan snatched a woman's purse and then left the scene in a vehicle driven by her accomplice, Jeremy Stewart. A short time later, Stewart was killed when their vehicle was hit by an SUV in an intersection. The traffic lights at the intersection were malfunctioning at the time of the crash, and Logan was arrested at the accident site. The examinee's evaluation of the case against Logan should reflect the office policy of not over-charging in cases where the evidence is weak. The File contains the task memorandum, the "be on the lookout" notification, excerpts from the preliminary hearing transcript, and a maintenance report from the highway safety department. The Library contains selected provisions from the Franklin Criminal Code and three Franklin cases: *State v. Driscoll* (setting forth the elements of robbery), *State v. Clark* (discussing when a crime is completed), and *State v. Finch* (discussing the felony-murder rule).

ANSWER

From: Applicant

To: District Attorney

Date: Feb. 27, 2024

Memorandum

Introduction: This memorandum evaluates whether Iris Logan should be charged with robbery and/or felony murder. Based on a review of the case file, Ms. Logan should be charged with robbery and should not be charged with felony murder.

Robbery Analysis

Franklin Criminal Code defines robbery as the intentional or knowing theft of property from another by means of violence or fear.

The case of *State v. Driscoll* outlines 4 elements required for robbery that are consistent with the Criminal Code which include:

1. Intentional or knowing nonconsensual taking
2. Money or personal property
3. From the person of another
4. By means of force (actual or constructive)

The facts show that Ms. Logan approached a victim, Ms. Owens, from behind demanding to have her purse. A physical altercation ensued where Ms. Owens was injured, and Ms. Logan fled with Ms. Owens purse. The fact that Ms. Logan demanded the purse and physically took the purse from Ms. Logan indicates that Ms. Logan had the intent to take the purse from Ms. Owens. Ms. Logan may argue that Ms. Owens let her take the purse because upon the demand, Ms. Owens was silent. However, the force involved in taking the purse would rebut the assertion of consent. Force is not required to take something that is offered. Thus, the first three elements of *Driscoll* are met as the personal property of a purse was taken, from the body of Ms. Owens which is her person, and there is no evidence that the taking was consensual despite Ms. Owens silence.

The bigger issue of robbery in this case is related to the means of force - actual or constructive - used by Ms. Logan. *Driscoll* cites to *Schmidt* stating that robbery requires force that poses an immediate danger to the owner of the property which is met by either putting the victim in fear or by injuring the victim. The facts show that upon examination, Ms. Owens admitted that she was not in fear. In fact, she accepted it was best to cooperate and she just wanted the event over with. However, the facts also show that Ms. Owens was injured by the taking. Ms. Owens screamed for help upon the physical altercation where she sprained her wrist as the purse was pulled off her arm, which was attached to her by a shoulder strap. Furthermore, a witness, Jed Rogers, testified that he saw the purse stolen from Ms. Owens, approaching her from behind and grabbing the purse.

In *Driscoll*, a victim tried to prevent the defendant from taking the victim's laptop. The victim was not injured but the struggle for control of the laptop was sufficient force to constitute robbery. While Ms. Owens did not try to prevent Ms. Logan from taking the purse, like *Driscoll*, that, unlike *Driscoll* did result in an injury to Ms. Owens. Thus, as recited in *Driscoll*, shaking the owner or struggling with the owner (in this case Ms. Owens) while taking the item from the owner (the purse - by Ms. Logan) is robbery.

The weight of the evidence supports a finding that Ms. Logan fulfills all 4 elements from *Driscoll* and meets the criteria in the Criminal Code for robbery and she should be charged with robbery.

Felony Murder Analysis

Franklin Criminal Code defines first degree felony murder as:

- Killing of another
- Committed during perpetration, attempt to perpetrate, or fleeing / attempt to flee from any:
    - » First degree murder, terrorism, arson, rape, robbery, burglary, kidnapping, aggravated child abuse/neglect, or aircraft piracy

In a basic analysis of Ms. Logan's actions, it would appear she is guilty of felony murder, however this analysis will show that there was likely a superseding event that breaks the causal link between her felony of robbery and the death of her accomplice, Mr. Stewart. After Ms. Logan stole the purse from Ms. Owens as discussed above, she gave the purse to Mr. Stewart, as evidenced by the testimony of witness Mr. Rogers. Officer Torres testified that she saw a woman matching the description of Ms. Logan and a man enter a vehicle. Officer Torres followed the vehicle and upon seeing an object thrown out of the vehicle by the driver, turned on the police sirens and pursued the vehicle. Thereafter, the sedan the defendant and accomplice were driving in was struck by an SUV while going through an intersection upon which Mr. Stewart died.

Based on these facts, an application of the criminal code and the robbery analysis above should weigh in favor of felony murder. Ms. Logan was fleeing from the crime of robbery, and during that flight, Mr. Stewart died. The case law from *Clark* states that felony murder does not apply where the defendant reaches a place of safety. In this case, the defendant was fleeing a burglary and hit a pedestrian with their vehicle while not driving recklessly. *Clark* reasoned that that the defendant was in the "immediate flight" from the felony and there was no break in chain of events from the fleeing of the felony wherein the defendant had reached a place of safety. Similarly, Ms. Logan was in pursuit of fleeing the crime of robbery when she and Mr. Stewart were hit by the other vehicle. There are no facts to show they were at a place of safety. *Clark* cites to *Lowery* which is distinguishing because the defendant robbed a store, left, and arrived at home wherein an incident with police ensued where the defendant's wife was shot and killed. *Clark* reasoned that because the defendant had arrived home to a place of safety, there was a break in the chain of events related to the robbery, and thus the defendant was not liable for felony murder due to the death of his wife. The present case likewise distinguishes from *Lowery*, Ms. Logan and Mr. Stewart had not yet arrived at a place of safety, they were on public roads after just committing a robbery, like in *Lowery* but unlike *Lowery* never made it to a home, hotel, or other place of safety.

Rather, like *Clark*, they were fleeing the felony, where the defendant in *Clark* was found guilty of felony murder when the pedestrian was hit by defendant's vehicle during the fleeing.

As such, a defense by Ms. Logan that they were at a place of safety would not be convincing since Mr. Stewart died while they were fleeing the robbery.

Analysis of the defense of intervening / superseding causes

As we will see in this section, Ms. Logan can make a convincing argument of a superseding cause related to the malfunction of traffic lights that would make the traffic lights the legal cause of Mr. Stewart's death, rather than the robbery.

In *State v. Finch*, the court describes that felony murder under the Criminal Code requires a "cause in fact" and a "legal cause" in relating the defendant's actions of the death that took place in commission of a felony for felony murder to attach. Cause in fact requires that that the death would not have occurred but for the felony that took place. Here, this element is met. If Ms. Logan had not been engaged in the felony of robbery, she and Mr. Stewart would not have been fleeing from the robbery, and he would not have been killed.

However, the "legal cause" (or proximate cause) analysis requires that the death would be seen by a reasonable person as a likely result of felonious conduct. This is a requirement of foreseeability, and courts find it unfair to hold defendants responsible for outcomes that are outside contemplation during the offense. In analyzing the legal cause, superseding causes can break the causal chain of events between the felony and the death associated with the felony. *Finch* outlines 4 factors to demonstrate superseding causes, specifically:

1. Effects of the superseding cause must happen after the original criminal acts.
2. Superseding cause cannot be brought about by the criminal acts.
3. The superseding cause must have worked to bring about a result that would not have come from the criminal act.
4. The superseding cause must not have been reasonably foreseen by the defendant.

However, there is no Franklin case law that has applied these elements in a finding for superseding cause to apply. However, our sister jurisdiction Olympia found in *Knowles* that gross negligence on behalf of a superseding cause is operative but ordinary negligence by a superseding cause is reasonably foreseeable and does not strike liability.

In our case, defendant's vehicle was struck by an SUV while going through an intersection. Defendant may argue the events wouldn't have taken place if the officer had not pursued them. In fact, defendant's attorney Mr. Glenn alludes to the fact in examination of Officer Torres that perhaps the officer did not act reasonably in pursuing the defendant with sirens when officer was not aware of a robbery but merely "purse snatching". These facts likely won't be dispositive. What will be dispositive are the malfunctioning lights at the intersection. The defendant's sedan was hit by an SUV. While the SUV and sedan were likely traveling at the rated speed limits, both Officer Torres testified, and the Franklin Department of Highway Safety confirmed that the lights at the intersection in all directions were green. Defendant can argue that the malfunctioning lights are a superseding event that is the legal cause of the death of Mr. Stewart.

Applying the 4 elements of *Finch*, the malfunctioning lights event took place after the original robbery, thus element 1 is satisfied. The robbery could not have possibly brought about the lights that were malfunctioning, thus element 2 is satisfied. The SUV likely would not have run through the intersection had they not had a green light, and the sedan likely would not have run through the intersection had they not had a green light, thus the collision between the two vehicles was brought about by the two green lights, and element 3 is satisfied.

However, the question of the green lights being reasonably foreseen by Ms. Logan, in element 4 needs further analysis. *Knowles*, the Olympia jurisdiction case, found that a victim that suffered a knife wound from a felony committed by defendant died because the treating surgeon was intoxicated during treatment and didn't disinfect victim's wound. As such, the infection resulted in victim's death. The death was found by *Knowles* as a superseding cause that broke the causal chain of the stabbing and the death of the victim. They court cites to Johnson, affirming a standard of "gross negligence" by the doctor as breaking the causal link of the felony to the death. Likewise, we are told that the traffic lights had never malfunctioned previously. Additionally, it is highly unusual for traffic lights to ever show green lights in all directions. As such, a court would likely find that the operation of the lights was gross negligence on behalf of the traffic authority and breaks the link between the felony by Ms. Logan and the death of Mr. Stewart.

Because of the superseding cause from the traffic lights, it is likely Ms. Logan is not the proximate cause of Mr. Stewarts death, and she would not be guilty of felony murder.

Best regards,

Applicant

MPT 2

RANDALL V. BRISTOL COUNTY (FEBRUARY 2024, MPT-2)

This performance test requires the examinee to write a persuasive argument in support of a motion for summary judgment. The client, Olivia Randall, has brought a free-speech claim under 42 U.S.C. § 1983 against her employer, Bristol County. The county suspended Randall for 14 days without pay after she made two public posts on Facebook in which she criticized the county's decision not to seek renewal of a state grant. Randall administers a workforce-development program funded by the grant. She has already served the suspension; the purpose of the lawsuit is to restore her pay, expunge the discipline from her employment record, repair her reputation, and deter the county from future retaliatory actions. The File contains the task memorandum, the firm's guidelines for persuasive briefs, the letter of suspension from the county personnel office, a letter from the county attorney, Randall's Facebook posts, and excerpts from the depositions of the county executive and of Randall. The Library consists of two public-employee First Amendment cases from the Fifteenth Circuit of the US Court of Appeals.

ANSWER

I. Captions

[omitted]

II. Statement of Facts

[omitted]

III. Legal Argument

A. The standard for summary judgment has been met and Ms. Randall has met her burden in proving that she is entitled to First Amendment protections.

Plaintiff, Olivia Randall, is entitled to the protections of the First Amendment because although she was a public employee of Bristol County, her Facebook posts involved her speaking as a private citizen on a matter of public concern. Her employer, Bristol County, violated these First Amendment protections when they suspended her for two weeks without pay due to her Facebook posts regarding the non-renewal of a grant that funded her program to provide support for citizens to obtain their GED.

The plaintiff in a First Amendment free speech case has the burden of proving that their speech is entitled to First Amendment protections. *Smith v. Milton School District* (15th Cir. 2015). If that burden is met, the court then balances the interests of the employee and the employer. *Garcetti v. Ceballos*, 547 U.S. 410 (2006), cited in *Smith v. Milton School District* (15th Cir. 2015). A public employee does not surrender all First Amendment rights merely because of the employment status. *Garcetti v. Ceballos*, 547. U.S. 410 (2006), cited in *Dunn v. City of Shelton Fire Department* (15th Cir. 2018). In order to display that speech is protected under the First Amendment, the public employee must show that (1) the speech was made as a private citizen, and (2) the speech addressed a matter of public concern. *Dunn v. City of Shelton Fire Department* (15th Cir. 2018). Ms. Randall was speaking as a private citizen through use of her own personal Facebook, on a matter of public concern, the renewal of a grant that funds her program to encourage citizens to obtain their GED.

(1) Ms. Randall was speaking as a private citizen by posting on her own personal Facebook page.

Ms. Randall is entitled to First Amendment protections because she was speaking as a private citizen, not pursuant to her official duties. "When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti v. Ceballos*, 547. U.S. 410 (2006), quoted in *Dunn v. City of Shelton Fire Department* (15th Cir. 2018). Whether the employee made the speech pursuant to their ordinary job duties is important to determine. *Lane v. Franks*, 573 U.S. 228(2014), cited in *Dunn v. City of Shelton Fire Department* (15th Cir. 2018).

Posting on a personal social media account is typically not considered the ordinary duties of an employee. S*mith v. Milton School District* (15th Cir. 2015). Even if it focuses on a topic related to the employee's workplace, it is not necessarily considered employee speech made for their job. S*mith v. Milton School District* (15th Cir. 2015).

Although the topic was related to her work, Ms. Randall was speaking as a private citizen. She cared for the success of the program that she was advocating for in her Facebook posts. She was not making the posts pursuant to her official job duties. She made the two posts on her own personal Facebook page, not in the course of her employment. In *Garcetti*, the court concluded that the assistant district attorney was speaking on his official duties as a prosecutor, not as a citizen in a memo advising his supervisor. *Garcetti v. Ceballos*, 547. U.S. 410 (2006). Unlike *Garcetti*, Ms. Randall was not speaking by a means of communication required for her job. She was using her own Facebook page.

In *Pickering*, a public-school teacher who wrote letters to an editor that was published in a local newspaper where most people received their news at the time criticized his employer's use of tax revenues. *Pickering v. Board of Education*, 391 U.S. 563 (1968). The teacher was speaking as a citizen. *Id.* Ms. Randall was similarly speaking as a citizen, calling to the attention of all Bristol County residents by stating "Hey, fellow Bristol County residents!"

Bristol County may argue that Ms. Randall was speaking pursuant to her ordinary job duties. Ms. Randall is in charge of the county's Workforce-Readiness Program. As part of her job, she develops the curriculum and lesson plans for the GED program that she spoke about in her Facebook posts. She also creates the materials describing the eligibility requirements. In Dunn, a firefighter made two Facebook posts that were limited to an audience of first responders in the city discussing and criticizing the education requirements. *Dunn v. City of Shelton Fire Department* (15th Cir. 2018). These posts were considered to be made pursuant to his employment responsibilities because part of his position was consulting with the chief on continuing education requirements and issues. *Id.* This case is unlike *Dunn* because unlike the firefighter in *Dunn*, Ms. Randall was not consulted on the continuation of the grant program as was the chief in *Dunn*. The speech may be related to her job and employment, but it was not made in furtherance of her official duties. The speech was made to a wide audience, not solely her colleagues as in *Dunn*. Thus, Ms. Randall's speech was made as a private citizen.

(2) Ms. Randall was speaking on a matter of public concern because she wanted the Workforce-Readiness Program to continue to be funded by the grant.

Ms. Randall was speaking on a matter of public concern to afford First Amendment protections., To determine if speech was made as a matter of public concern, the Court should consider three things: (1) the content of the speech; (2) the nature of the speech; (3) context in which the speech occurred and employee's motive for the speech. *Dunn v. City of Shelton Fire Department* (15th Cir. 2018); see also *Smith v. Milton School District* (15th Cir. 2015). Matters of public concern can include topics such as school district finances, public corruption, discrimination, and sexual harassment by public employees. *Smith v. Milton School District* (15th Cir. 2015). Mere complaints about work conditions are not public concerns. *Smith v. Milton School District* (15th Cir. 2015).

Ms. Randall was speaking on a matter of public concern by the content of the posts. She was not merely complaining about work conditions. She was speaking on a topic that had great interest to the public. The content of her speech included the desire for the Workforce-Readiness Program to be continued and the reasons it should be continued.

The nature of Ms. Randall's posts show that it was a matter of public concern. In Smith, the speech at issue made by a teacher focused on school policies rather than personal complaints or issues related to the classroom. *Smith v. Milton School District* (15th Cir. 2015). The tweets were made to a public audience and the content and context raised concerns regarding the education of children. *Id.* Thus, they were considered to be speech made as a public concern. *Id.* This case is similar to Ms. Randall's case because she was raising concerns regarding the renewal of the grant. She made her posts on Facebook to a public audience like the teacher in Smith.

The context in which the speech occurred shows that it was a matter of public concern. Ms. Randall encouraged the Bristol County residents to call the county executive, Marie Cook, in order to encourage her to renew a grant from the state of Franklin that helps citizens who didn't finish high school and did not obtain their GED. She made an additional post that provided more information to the public to describe the benefits of the grant.

In *Dunn*, the firefighter's speech did not address a matter of public concern because his motive was personal. *Dunn v. City of Shelton Fire Department* (15th Cir. 2018). He did not explain the new hiring qualifications and how they affected the public but used phrases such as "toughen up" to show that he was not happy with the requirements. *Id.* His comments were attributed to those of a "disgruntled employee." *Id.* The audience of his posts were also only first responders - there was a limit as to who could access his posts. This shows that it was not a public concern. *Id.*

Unlike *Dunn*, the audience from Ms. Randall's Facebook posts are all Bristol County residents. This is shown through the October 15, 2023, post which states, "Hey, fellow Bristol County residents!" She also admitted that anyone could read the posts as they were publicly posted. She was not motivated as a disgruntled employee as the speaker was in *Dunn*. She may have stated that the non-renewal was a "bad call," but this does not rise to the level of complaining about her work. Her motive was to encourage the continuation of the program and the passage of the grant.

B. Because Ms. Randall is entitled to First Amendment protections, the balancing test shows that her interest in free speech outweighs Bristol County's interest.

Ms. Randall's right to free speech outweighs Bristol County's interest in effective employment. If the employee spoke on a matter of public concern, a balancing test is then used to weigh the interests of the employee in their expressions against the employer's interest in promoting effective and efficient public service. *Dunn v. City of Shelton Fire Department* (15th Cir. 2018). According to the 15th Circuit and Franklin Court of Appeals, courts have "tended to favor public employers over public employees." *Kurtz. v. Orchard School Dist.* (Fr. Ct. App. 2009), cited in *Smith v. Milton School District* (15th Cir. 2015). Although this may be true, the balance tilts in favor of an employee calling attention to an important matter of public concern such as a budget of a school district or tax revenue. *Pickering v. Bd. of Education*, 391 U.S. 563 (1968), cited in *Smith v. Milton School District* (15th Cir. 2015). Mere annoyance or embarrassment of the employer is not enough to favor the employer in the balancing test. *Smith v. Milton School District* (15th Cir. 2015).

Bristol County was simply annoyed and embarrassed by Ms. Randall's posts. Thus, their interest does not rise to the level of protections required by the First Amendment for Ms. Randall's speech. Ms. Randall attempted to contact the executive in charge of the program, Ms. Marie Cook, numerous times to discuss the application for the renewal of the program. Ms. Cook did not respond, nor did she consult Ms. Randall, the woman in charge of the program before terminating it. She had no choice but to take her concerns to the public because she was not being heard at work. She had a great interest in hearing what the public had to say about the non-renewal of the grant program that she felt strongly about.

Marie Cook simply alleges that she was " embarrassed" by the Facebook posts. She alleges and will likely argue that she wasted time having to "deal with the public" regarding the Facebook posts. Although this may be true, she only received "maybe a dozen" inquiries from the public regarding the posts. She was able to respond to all of the inquiries and that their concerns were addressed once she told them her new plan to end unemployment. There were no further disruptions in the office of the county. Ms. Cook and Bristol County did not have any issue in providing the effective and efficient public service on account of Ms. Randall's posts. Ms. Cook had to merely attend to a few members of the public to calm their worries about the program. Her embarrassment and annoyance do not weigh in favor of the employee.

In *Smith*, the tweets regarding education that were a matter of public concern did not have any effect on the morale of the school or create any issue between the teacher who tweeted and the school's administration. *Smith v. Milton School District* (15th Cir. 2015). This made the interest of the teacher's speech outweigh the interest of the school district in efficient operation. *Id.* Similarly, the Facebook posts did not have any effect on the morale of Bristol County or create any further issues that were not able to be solved by additional explanation. Thus, when balancing the interests, it is clear that Ms. Randall's interest in free speech outweighs the County's interest in effective public service.

C. Ms. Randall's Facebook posts were the motivating factor in her suspension.

The employee must additionally show that the speech was a motivating factor in the action of the employer. *Dunn v. City of Shelton Fire Department* (15th Cir. 2018). There must be a nexus between the speech itself and the decision not to continue employment or any adverse action of the employer. *Smith v. Milton School District* (15th Cir. 2015). In *Smith*, the speech was a motivating factor in the decision not to renew his contract with the school which is shown by the fact that his past performance as a teacher and reviews were all positive. *Smith v. Milton School District* (15th Cir. 2015). The speech itself was a motivating factor in the decision not to renew Mr. Smith's contract. *Id.*

In this case, Ms. Randall was suspended due to her Facebook posts. In a letter dated November 4, 2023, Attorney Susan Burns stated that "Ms. Randall was suspended because of her Facebook posts." She further stated that the posts do not deserve any First Amendment protections. Although Ms. Cook argues that her suspension was due to her insubordination, Ms. Cook does not explain this reasoning beyond the fact that she was "not a team player." Her Facebook posts were clear motivation for her suspension.

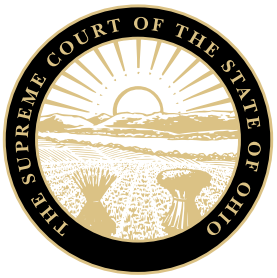
Bristol County may argue that because she is still employed by the county and her job is not threatened, there are no mitigating factors for adverse action. Although this is true, Ms. Randall's reputation has seriously been injured by this suspension. She has lost her reputation and prestige that comes with her job position. She has also lost two weeks' pay and now has a less than perfect employment record. Thus, her speech was a motivating factor in her suspension.

IV. Conclusion

Based on the foregoing analysis, there is no issue of material fact that Bristol County violated Ms. Randall's First Amendment rights by suspending her. Ms. Randall was speaking as a private citizen, on a matter of public concern which entitled her to First Amendment protections. Her interest of free speech outweighs Bristol County's interests. Her speech was a mitigating factor that caused her suspension. Thus, Bristol County violated Ms. Randall's First Amendment rights.

On the cover:

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



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