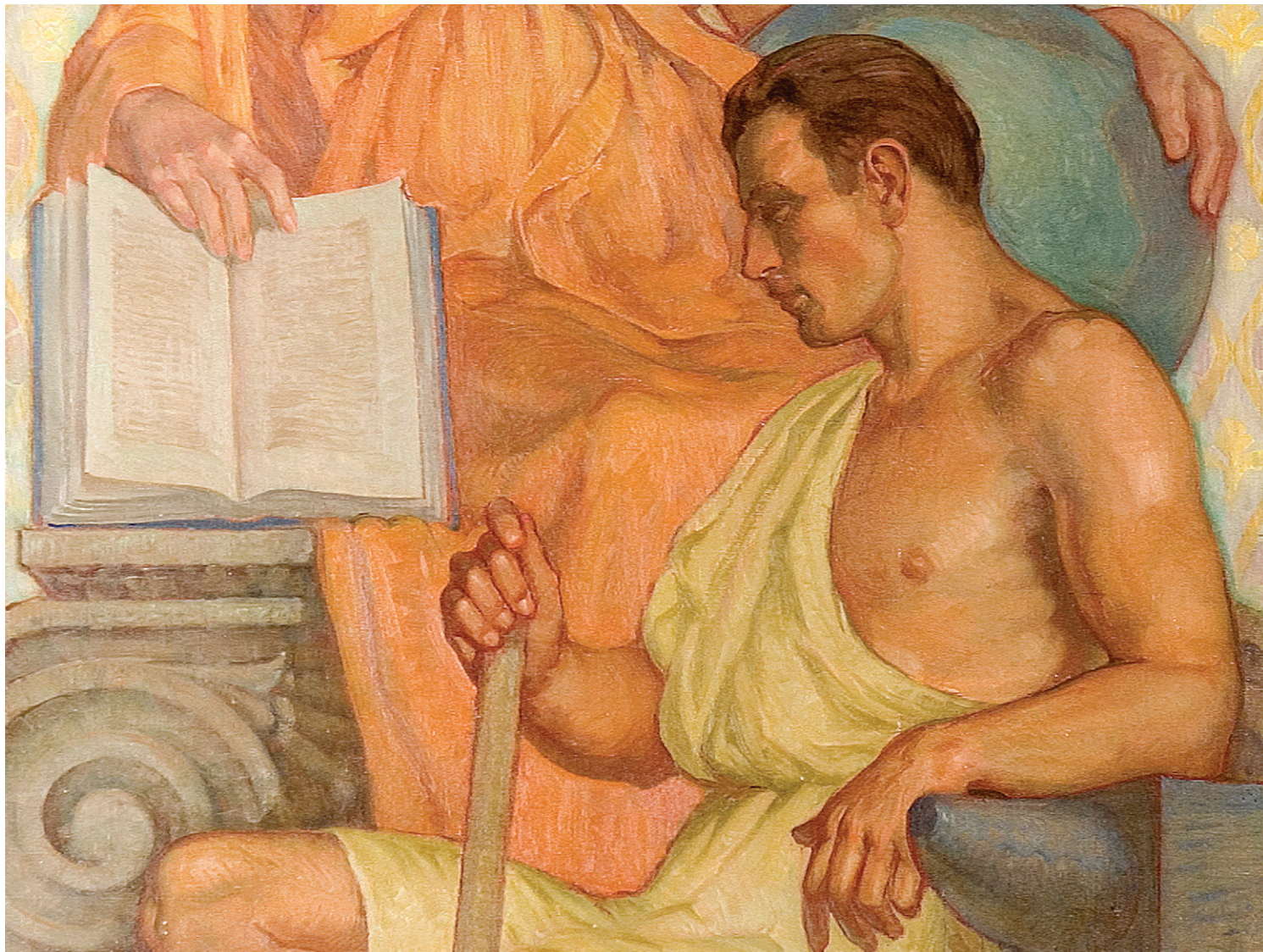


THE SUPREME COURT *of* OHIO



July 2021 OHIO BAR EXAMINATION

Multistate Essay Examination
Questions & Selected Answers

Multistate Performance Test
Summaries & Selected Answers

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OHIO BAR EXAMINATION

The July 2021 remote Ohio Bar Examination contained six Multistate Essay Examination (MEE) questions. Applicants were given 90 minutes to answer a set of three 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 also were prepared by the NCBE. Applicants were given 90 minutes to answer each MPT item.

The following pages contain the NCBE's summary of the MEE questions given during the July 2021 remote 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 are not necessarily complete or correct in every respect. They were written by applicants who passed the exam and consented to the publication of their answers. See Gov.Bar R. 5(C). The answers selected for publication were transcribed as written by the applicants. To facilitate review of the answers, the bar examiners may have made minor changes in spelling, punctuation, and grammar to some answers.

Copies of the complete July 2021 MPT and its corresponding point sheet are available from the NCBE. Check the NCBE's website at www.ncbex.org for information about ordering.



QUESTION 1

QUESTION

A mother was shopping with her six-year-old son at Big Box store. The son was visually impaired, so his mother, concerned about crowding and jostling by other patrons, restrained him by placing her hand on his shoulder and instructed him to remain in her grasp. Despite his mother's efforts, the son broke free of her grasp and ran toward a nearby candy display. Because he was running and visually impaired, the son did not notice some cheesecake on the floor in the store's self-serve dining area; the cheesecake was flattened and dirty. The son slipped on the cheesecake and fell to the floor, suffering physical injury. Another customer unsuccessfully attempted to help the son to stand, worsening the son's injury by negligently twisting his arm.

Big Box had in place a policy instructing employees to take steps to promptly clean known hazards on the floor, but it did not assign an employee to monitor floor conditions. Big Box employees do not know when any employee had most recently inspected the floor or when the floor had last been cleaned. The self-serve dining area includes displays that contain takeout food, including cheesecake. These displays had last been stocked several days before the son slipped on the cheesecake. On the day the son slipped and fell, a store employee had walked by the self-serve dining area before the son slipped, but had not noticed the cheesecake on the floor.

The mother filed a negligence claim on her son's behalf against Big Box and the customer who attempted to help the son. Both Big Box and the customer claim that the son was negligent.

1. Under the applicable standard of care, are the facts sufficient for a jury to find that the son acted negligently? Explain.
2. Under the applicable standard of care, are the facts sufficient for a jury to find that Big Box acted negligently? Explain.
3. Can the customer be held liable for enhancing the son's injury? Explain.
4. Assuming that only Big Box and the customer were negligent and can be held liable, can the son recover the full amount of damages from Big Box only? Explain. Do not address the effect of any "Good Samaritan" statute.

ANSWER

Son's Negligence

The first issue is whether a visually impaired child is negligent if they run into a crowded area. In order to be found negligent, a person must have had a duty to exercise reasonable care under the circumstances, breach that duty, and cause damages to another as a result of their breach. To determine whether a person acted reasonably under the circumstances, a court will look to the ordinary standard of care a reasonable person would apply under like circumstances. However, if the negligent actor is a child, the reasonableness of their conduct is assessed against a reasonable child of the same age, education, experiences, and intelligence. Regardless of whether the actor is a child or an adult, the court will consider any physical limitations the person has in determining if they acted as a reasonable person.

Here, the son is a 6-year-old child who is visually impaired. Therefore, whether he acted negligently will be assessed compared to other reasonable 6-year-old children with similar education, experiences, and intelligence. In this case, the boy was instructed, by his mom, to remain in her grasp because they were in a crowded area. But instead, the boy broke free from his mother's grasp and ran toward a candy display. A court would likely conclude that it is not reasonable for a visually impaired child to run into a crowd, without their parents, when they cannot see. Thus, a court could easily find that the boy's action of running under these circumstances breached his duty of care and, therefore, find the son negligent.

Big Box's Negligence

The second issue is whether Big Box can be held negligent for failing to monitor the area where the cheesecake was displayed.

In addition to people, stores can also be held liable for negligence. However, a store is not liable for every harm that occurs within it. A store will only be liable for negligence when they have a duty, breach that duty, and their breach causes damages. But, a store that invites customers into it for business purposes (bring invitees) is held to a higher standard of care as to those invitees that are in the selling area of the store. Generally, courts require places where invitees are to be regularly inspected for matters that reasonably could cause injuries. This does not require constant monitoring, but some form of consistent monitoring is usually required. Further, where there is a dangerous artificial condition, the store has a duty to either fix the condition or warn of it.

Here, there are sufficient facts for a jury to conclude that Big Box acted negligently. As a store, Big Box invited customers to it in order for them purchase things from it. This is why the son and his mom came to the store. Thus, the son and mom were invitees and Big Box owed a standard of care to them. This standard included monitoring for dangerous conditions. However, Big Box failed to put in place any consistent monitoring system for their store. Because of this, Big Box was unable to discover the cheesecake which had been flattened and dirtied. This is an artificial and dangerous condition that they would know about if they had been monitoring the area. Although a Big Box employee did walk through the area with the cheesecake and failed to discover it, this alone does not excuse Big Box's liability in negligence because the fact that employee happened to be in the area, with no duty to monitor, does not fulfill the store's obligations to its invitees. Thus, the Big Box store

had a duty to survey for dangerous conditions and they failed to implement such a survey. As a result, there was a cheesecake left on the floor, which the son slipped on and injured himself. Therefore, a jury could find that Big Box acted negligently.

Customer's Liability

The third issue is whether the customer who came to the son's aid can be held liable, without a discussion of the Good Samaritan laws.

Generally, a person is not liable for a harm caused to another unless they themselves committed a tort or acted negligently. As previously stated, a person is not liable for negligence simply because they caused harm to another. Rather, there must be a breach of some duty. Generally, strangers and bystanders do not owe one another a duty. Someone who rescues another is generally not liable for injuries to the other person, unless they acted negligently in rescuing the person. But simply seeing a person injured does not create a duty to rescue.

Here, a customer saw that the son had fallen in the store and came to help the son stand up, but in the process, the customer negligently twisted the son's arm and further injured him. Although there is no evidence that the customer hurt the son themselves (no tort) and there is no evidence of a duty between the two, the customer was negligent in rescuing the son. In helping the son to his feet, the customer negligently twisted the son's arm further injuring him. Therefore, although there was no duty between the customer and son, as they are not related to one another and the customer did not create the peril, because the customer was negligent in the rescue of the son, they can be held liable for such negligence.

Son's Recovery from Big Box Only

The final issue is whether the son can receive damages from just Big Box, as both the negligent actions of Big Box and the Customer each contributed to the son's injuries.

A negligent actor is liable for all of the damages they directly cause, as well as damages that are the foreseeable result of their conduct. Additionally, where two parties act negligently, they are jointly and severally liable for the damages to the plaintiff. This means that the plaintiff may go after one or both parties for payment of their damages. Under such circumstances, if only one party pays the plaintiff, they may go after the other negligent party for contributions. However, the plaintiff need not sue both negligent parties in order to recover from one.

Here, the mother, on her son's behalf, could recover from just Big Box under joint and several liability. This is because Big Box caused the son to fall by failing to inspect their store, and it was foreseeable that others would come to the son's aid and potentially worsen his injuries. Thus, because the original injury and exacerbation of that injury were actually and proximately caused by Big Box, and resulted in damages to the son, the plaintiff may recover from just Big Box. Big Box is also able to seek contributions from the customer after.

QUESTION 2

QUESTION

Carlos, Diana, and Ethan own all the shares of Winery Inc., which is incorporated in State A. They are equal shareholders of the corporation and the only members of its board of directors. They share responsibilities in the corporation's vineyard and winery. They have no shareholders' agreement.

Recently, Carlos and Diana decided that it would be a good idea to change the corporation's business model. In addition to producing wines from the corporation's own small vineyard using sustainable, organic farming methods, they believe that the business should expand to buy grapes from local vineyards that produce grapes using such methods. They believe this new focus will allow them to attract new customers interested in organic wines. They also see this change and expansion to their business as a way to promote environmentally sustainable organic grape cultivation in their region.

To make this shift in the corporation's business, Carlos and Diana have decided that the corporation should become a "benefit corporation." A benefit corporation, authorized by many states, is a type of for-profit corporation that defines in its articles of incorporation a social or environmental purpose. Benefit-corporation law insulates directors from liability for making business decisions that serve this defined social or environmental purpose, even when their decisions may negatively impact shareholder profits.

State A has adopted the Model Business Corporation Act, which does not explicitly provide for benefit corporations. State A courts have held that domestic corporations must seek to maximize shareholder profits.

State B, which is adjacent to State A, also has adopted the Model Business Corporation Act, but has modified its corporate statute to provide for the formation of benefit corporations. To form a benefit corporation, the articles of incorporation must indicate that the corporation has opted to be a benefit corporation and must state a social or environmental purpose for the corporation. The State B statute insulates directors from liability for claims that they did not seek to maximize shareholder profits if their decisions are consistent with the corporation's stated social or environmental purpose.

Carlos and Diana have decided that they can best carry out the new business plan by creating a benefit corporation in State B to operate in State A with the stated social and environmental purpose of "promoting sustainable and organic vineyard, winery, and production practices." They will incorporate the new benefit corporation as Organic Wines Corp. and be its only initial shareholders. Once this corporation is created, they will cause Winery Inc. to merge into it with all the Winery Inc. shares converted into shares of Organic Wines Corp.

Ethan is opposed to the plan, but Carlos and Diana support it.

1. Can Ethan block the merger of Winery Inc. into Organic Wines Corp. by voting against it? Explain.
2. If Winery Inc. merges into Organic Wines Corp., does Ethan have a right to demand that he receive payment in cash (instead of receiving shares in Organic Wines Corp.) equal to the fair value of his shares in Winery Inc.? Explain.

3. Assume that Ethan becomes a shareholder of Organic Wines Corp. Could Ethan successfully sue the Organic Wines Corp. directors in State A for promoting sustainable and organic practices at the expense of maximizing shareholder profits? Explain. Do not discuss whether that suit would have to be direct or derivative.

ANSWER

Ethan cannot block the merger of Winery Inc. into Organic Wines Corp. by voting against it.

A merger is a fundamental change that generally requires (1) director approval; and then (2) shareholder approval. Director approval requires that the board give notice to all parties and hold a meeting to vote on whether the merger is a good idea. A quorum of directors is a majority of the directors. If the majority of the directors are present, then a majority of the present directors must vote in favor. Quorum can be broken if a director isn't present. If it passes, this process is repeated for shareholders. The board must notify all shareholders entitled to vote and there must be a vote. A quorum of shareholders is a majority of the outstanding shares. If present, the vote must receive a majority of the outstanding shares entitled to vote (or in some jurisdictions, actually voted). Quorum is generally not lost if shareholders leave the meeting. Once this is done, a document of the change must be filed with the secretary of state reflecting the change.

Here, Carlos and Diana want to change the whole business model and create a new business and merge the old one into it. This is a fundamental change and will require approval by the board and the shareholders. Here, Carlos, Diana, and Ethan own all the shares of Winery, Inc. and are the only members of the board of directors. Therefore, at both a board vote and a shareholder meeting vote, Ethan will be outvoted.

Thus, Ethan does not have the ability to block the merger of Winery Inc. into Organic Wines Corp. by voting against it.

If Winery Inc. merges into Organic Wines Corp., Ethan has a right to demand that he receive payment in cash (instead of receiving shares in Organic Wines Corp.) equal to the fair value of his shares in Winery, Inc.

Generally, a dissenting shareholder to a merger may demand a buyout if the corporation is small and closely held (i.e., not a publicly traded company). Generally, to preserve the ability to do this, the shareholder must (1) give notice to the board of its disapproval; (2) vote against or abstain from voting in the meeting to merge; and (3) make a request for payment after the vote is finalized. If this is done properly, then the shareholder has a right for the corporation to buy back its shares for fair-market value. If the parties cannot agree as to the fair-market value, then they can petition the court for an appraisal.

Here, it is a small and closely held company (only three shareholders) and there is no indication that it is publicly traded. Therefore, so long as Ethan properly preserves the right by notifying the board and voting against the decision to merge, Ethan can demand the corporation buy back his shares in the company for fair-market value. In that case, Ethan will sell his shares in Winery Inc. back to them instead of being a part of the merger. If they can't agree on fair value, they can petition the court to appraise it.

Assuming that Ethan becomes a shareholder of Organic Wines Corp., Ethan may not successfully sue the Organic Wines Corp. directors in State A for promoting sustainable and organic practices at the expense of maximizing shareholder profits.

Generally, the law of the state where a corporation is incorporated controls the corporation's affairs. This is known as the internal affairs doctrine. This is true no matter where the operations are carried out. All the corporation has to do is register with the state in which it is operating, but the laws governing the affairs – such as shareholder profit distributions – are going to be governed by the state of incorporation.

Here, State A, where Winery, Inc. was incorporated, is controlling. The State A law does not provide for benefit corporations. However, if Organic Wines Corp. (the new company) is incorporated properly in State B, then State B will control, and then benefit corporations are permissible and insulate directors from liability for claims that they did not seek to maximize shareholder profits, if it is consistent with their purpose. Therefore, Ethan will not be able to bring a claim because promoting sustainable and organic practices is their corporation's purpose and the directors are not liable even at the expense of maximizing shareholder profits.

Thus, Ethan may not successfully sue the Organic Wines Corp. directors in State A for promoting sustainable and organic practices at the expense of maximizing shareholder profits.



QUESTION 3

QUESTION

Fifteen years ago, a woman moved to State A for a temporary job. Shortly after moving to State A, the woman met and briefly dated a man who lived in State A.

Eight months after her relationship with the man ended, the woman, still living in State A, gave birth to a daughter. She then moved to State B with her daughter. The woman was certain that the man was the daughter's father because he was the only person she had sexual intercourse with while she was living in State A, but she did not contact him to tell him of her pregnancy or the daughter's birth. The woman had no other children. She and the daughter lived together as a two-person household exclusively in State B. The woman told her family and her daughter that the daughter's father had been killed in a car accident.

Two months ago, the daughter, age 14, overheard a conversation between the woman and her oldest friend. The friend said, "Your daughter's father is now an important scientist. His most recent research is in today's newspaper. Don't you think your daughter should meet him?"

The daughter, shocked, found the newspaper and emailed the scientist whose research was described in the paper. In the email, she identified her mother, recounted the conversation she had overheard, and suggested DNA testing. The man agreed to cooperate, and the test confirmed that he was the daughter's biological father. The daughter told the man that she wanted to live with him at his home in State A. The man, wanting to get to know his daughter better, agreed and sent her a bus ticket, which she used without her mother's permission.

Three weeks after the daughter's arrival in State A, the man sued in a State A court to establish his paternity, to gain sole custody of the daughter, and to obtain child support from the woman. The man had the woman served personally in State B.

Under State A's long-arm statute, the State may exercise personal jurisdiction over a nonresident for purposes of determining paternity, child custody, and child support if "the individual engaged in sexual intercourse in this State and the child may have been conceived by that act of intercourse." State A's paternity statute permits the "mother or alleged father to establish paternity at any time during the mother's pregnancy or within 21 years after the child's birth."

The woman moved to dismiss the man's suit, arguing that State A's exercise of personal jurisdiction over her would violate her rights under the due process clause of the Fourteenth Amendment. The trial court denied her motion, and the woman made a special appearance, preserving her right to appeal on the jurisdictional issue. At a hearing on the merits, the woman argued, based on a series of United States Supreme Court opinions, that a putative father may not establish his paternity years after his child's birth unless he registered with a putative father registry or actively participated in his child's care. She also argued that the court lacked authority to issue either a child custody or a child-support order.

1. Did the State A court's exercise of personal jurisdiction over the woman violate her rights under the due process clause of the Fourteenth Amendment? Explain.
2. Assuming that the State A court properly exercised personal jurisdiction over the woman, and that the man's paternity is undisputed, does the court have subject-matter jurisdiction to:
 - a. Award the man sole custody of the daughter? Explain.
 - b. Require the woman to pay the man child support? Explain.

ANSWER

Issue 1: Did State A's court exercise of personal jurisdiction over the woman violate her rights under the due process of clause of the 14th Amendment?

Rule: For a court to exercise personal jurisdiction over an individual, the state must have sufficient minimum contacts, defined by the state's long-arm statute, with that individual such that it does not violate their 14th Amendment right. Minimum contacts may be found when a defendant purposefully avails themselves to the laws of the state, or engages in some transaction within the state that allows for minimum contacts to be found. Even after minimum contacts are found, the court must still determine whether or not it is interested in hearing the case based on the burden to the defendants and its interests in justice.

Application: Here, State A's long-arm statute specifically provides a transaction under which the woman may be haled into court, as it is likely that she had intercourse in State A, and because a child may have been conceived by that act of intercourse in State A, meeting the requirements for State A's long-arm statute and constituting minimum contacts with the state. Furthermore, State A has an interest in protecting the rights of one of its citizens, that of the father, and the burden does not appear to be great on the defendant because she has already made an appearance to contest personal jurisdiction, and, thus, it should find that State A's exercise of personal jurisdiction does not violate the woman's 14th Amendment rights.

While the woman may have only spent a short period of time in State A for a temporary job, that short period of time was when she met and briefly dated the man in State A. The result of this dating period was a daughter, also born in State A. It was only after the daughter was born that she moved to State B. Furthermore, the woman was confident that the man was the father, because he was the only person she had sexual intercourse with while she was living in State A. Thus, under the long-arm statute of State A, she meets both elements. She had both sexual intercourse within the state, and a child was conceived by that act. There are no other facts to indicate that she had sexual intercourse with the man anywhere outside of State A, nor is the child's paternity in question.

Therefore, State A's exercise of personal jurisdiction is proper.

Issue 2: Assuming that State A's exercise of personal jurisdiction was proper, and that paternity is undisputed, does the court have subject-matter jurisdiction to:

a) Award the man sole custody of the daughter? UCCJEA

Rule: When issues of custody develop, courts utilize a statute called the UCCJEA to determine whether or not they have the right to exercise subject-matter jurisdiction. The UCCJEA defines three types of states that, in order, have a right to exercise subject-matter jurisdiction. First, home states are defined as those in which a parent and the child have lived within for the last 6 months, even if the child is temporarily absent from that state.

Second, the significant connection state, which allows a state to exercise jurisdiction if there is no home state, but another state has a significant connection to the parties and substantial evidence related to the child may be found within that state. Finally, a default state may exercise jurisdiction

in the absence of both a home and significant connection state, where it has appropriate connections to the parties. Once a state has made a determination regarding custody, that state has exclusive jurisdiction until either all parties consent to jurisdiction in another state, or the parties no longer reside in the state. In certain situations where the court determines that a child is in danger, it may exercise emergency jurisdiction to make a ruling.

Application: Here, the woman's argument that State A lacks subject-matter jurisdiction has merit because the State A's court should find that although the child was born and conceived in State A, State B has home-state jurisdiction and it would be improper for State A to issue a judgment concerning child custody. The woman has lived with the daughter in State B since after her birth in State A, and the daughter is now 14 years old, meeting the requirements of a parent plus child living in the state for 6 months. Although the child was in State A for three weeks, this temporary absence does not destroy State B's home-state jurisdiction because the mother still lives there, and the mother's special appearance in court to contest jurisdiction does not nullify the fact that both her, and the daughter's home state is State B.

The father may argue that the court should exercise emergency jurisdiction because the mother in bad faith hid the father's existence from the daughter and vice versa, but this is not likely to be a winning argument because the child is not in immediate danger or under threat of harm. While the mother has lied to the family, saying the daughter's father died in a car crash, that likely does not rise to the level of an emergency under which it would be proper for a court to exercise jurisdiction. Therefore, State B has home-state jurisdiction which should be respected by State A, and State A cannot exercise emergency jurisdiction. Therefore, State A lacks subject-matter jurisdiction to hear the claim.

b) Require the woman to pay the man child support? UIFSA

Rule: The UIFSA allows for a jurisdiction to be found against out-of-state parents regarding child support. A court will determine whether or not child support is required based on the best interests of the child. The law generally requires parents to provide child support, either via the income-share model (assumes the parents are married), or the net-income model, where a certain percentage of net income of the parent is dedicated to child support. Child support judgments are presumed to be correct, and a judge must provide explanations for any deviations from the formula.

Here, if a court finds that in the best interests of the child, the woman must pay the man child support, then it will do so. Although the man's paternity has only recently been proven, he is holding himself out as wanting to take care of the daughter and assume fatherly responsibilities. This is why the father sent her a bus ticket so that she could visit him in the first place. Further, State A's paternity statute permits a mother or father to establish paternity at any time during the mother's pregnancy, or within 21 years of the child's birth. Here, the child is only 14, so the father is within his right to establish paternity, and, if the child eventually lives with him and a court deems it in the best interests of the child, then the man is entitled to child support from the woman.



QUESTION 4

QUESTION

A police officer patrolling in his squad car after dark saw a woman lying on the sidewalk near an intersection. A teenage girl standing near her yelled, “Help! That guy just knocked this woman down and took her purse!” The girl pointed toward a man carrying a white purse and sprinting away from the scene.

The officer jumped out of his squad car and shouted, “Stop! Police!” He ran after the man down an alley and between houses. The man leapt a series of backyard fences and ran onto a back porch. The officer, following behind, jumped over a low fence, heard the man fumbling with keys, and saw him unlock the back door of a house. The man rushed inside and slammed the door. The officer tried to open the door, but it was locked. From inside the house, the man yelled, “Get off my porch!” The officer kicked the door open. The man was standing just inside the door, out of breath, and a white purse was on the floor near his feet.

The officer handcuffed the man, grabbed the purse, and walked the man back to the intersection where the woman was sitting on a nearby bench. The teenage girl was gone.

The woman immediately said, “That’s my purse.” Then she asked the officer, “Is that the guy who took it? I never saw anything. Someone pushed me hard from behind, knocked me down, grabbed my purse, and took off. I was dazed and just lay there until some girl helped me up.”

The officer told the man that he was under arrest and placed him in the backseat of the squad car.

Another officer arrived, and a few minutes later the teenage girl returned. The girl began speaking with the second officer, saying, “I was right there. It happened really fast. One second I was waiting for my bus and reading text messages. The next second I heard a woman scream and saw some big guy running past me with a purse.”

The girl then noticed the man handcuffed in the backseat of the squad car. She shouted, “Oh my gosh! Hey, I think that’s the guy! It was dark, and it happened fast, but, wow. He’s right there in the car. I’m pretty sure that’s the guy.”

The state charged the man with one count of robbery under a state statute that defines the crime as it was defined under the common law.

Relying only on his rights under the United States Constitution, the man has moved the trial court to suppress evidence of the purse and the officer’s testimony about where the officer recovered it. The man argues specifically that the officer’s entry into his home without a warrant violated his constitutional rights. The man has also moved the court to prohibit any witness from discussing the girl’s on-the-scene identification of him and to prohibit her from identifying him in court during trial. He argues specifically that allowing evidence of the teenage girl’s identification would violate his constitutional rights.

1. Did the officer's warrantless seizure of the man and warrantless seizure of the purse in the man's home violate the man's Fourth Amendment rights? Explain.
2. Would the trial court violate the man's constitutional due-process rights by admitting testimony that reveals the girl's on-the-scene identification of the man or by allowing her to identify him in court? Explain.

Do not discuss any confrontation clause issues.

ANSWER

Issue 1: Was the officer's warrantless seizure of the man and the warrantless seizure of the purse in the man's home a violation of the man's Fourth Amendment rights?

The officer's warrantless seizure of the man and the warrantless seizure of the purse in the man's home did not violate the man's Fourth Amendment rights as the officer was in hot pursuit of the man and had probable cause.

Generally, police officers are required to have a search warrant to search an individual's premises. A warrant is issued by a neutral magistrate based on a finding of probable cause. In addition, probable cause that a crime has been committed is necessary to arrest an individual. However, there is an exception to the warrant requirement for exigent circumstances. For example an officer in hot pursuit is not required to get a warrant prior to entry of a home. Once in the home, the officer is permitted to arrest the man and seize items in plain view and conduct a protective sweep.

Seizure of the Man

To seize an individual, police officers need either an arrest warrant or probable cause that a crime has been committed. An individual is considered seized if they are in custody of the police and not free to leave.

The officer had probable cause to believe that the man had committed robbery (the taking and carrying away the personal property of others by force or threat of force or from someone's person) and therefore did not need an arrest warrant to seize the man. The police officer found a woman lying on the sidewalk near an intersection while patrolling in his car. A teenage girl nearby yelled "Help! That guy just knocked this woman down and took her purse!" while pointing toward a man carrying a white purse and running from the scene. This was sufficient to establish probable cause. Here, the officer had probable cause to believe that a crime had been committed, as a woman was laying injured and a nearby bystander informed the police officer that a man had taken the injured woman's personal property by force.

In addition, the police officer had probable cause to believe that the man in question committed the crime. The man was pointed out to the officer by the young girl and was near the scene. When the police identified himself, the man continued running. While running away alone is insufficient to find probable cause, the fact the man ran away coupled with the identification of the man gives rise to probable cause that the man committed the crime.

The police officer was permitted to enter the house to seize the man, as he was in hot pursuit and, therefore, an exigent circumstance existed. See below for more discussion on the hot pursuit.

Thus, there was probable cause to seize the man and the officer was permitted to enter the house based on exigent circumstances.

Seizure of the Purse

To justify a warrantless search of a premises there must be exigent circumstances, including hot pursuit of a suspect. This arises when an officer is actively chasing a subject and does not have the time to stop and seek a search warrant from the court for fear of losing the evidence. An officer searching a house in hot pursuit may look for the evidence of the crime in plain view and

conduct a protective sweep of the premises. In addition, the police officer is allowed to seize anything that from a legal vantage point is plainly illegal or contraband.

The officer was in hot pursuit of the man and was therefore permitted to enter the home and seize the purse without a warrant. Here, the officer was chasing the man and the man jumped over a series of backyard fences before running into a back porch. The officer followed the man and saw the man unlock the door and rush inside. The man then yelled “Get off my porch!” However, the police officer kicked the door down and discovered the man standing just inside the door and the white purse on the floor near his feet. The officer was permitted to break into the house, because he was in hot pursuit of the suspect. Had the officer left the scene for a warrant, the man could have been long gone and so would any evidence of the crime.

In addition, the purse was in plain view as the officer was legally permitted to enter the home to arrest the man. The purse was right next to the man’s feet and appeared to be the purse the man was holding when he ran from the scene and when the teenage girl indicated that the man robbed the woman. Thus, it was plainly evident that the purse was contraband and could be seized. Further, the purse actually was the woman’s. After the officer walked the man back to the intersection, the woman immediately identified her purse. It is irrelevant that the woman could not identify the man as her attacker, as there was sufficient probable cause without her identification.

Thus, the officer was permitted to seize the purse.

Issue 2: Would the trial court violate the man’s constitutional due-process rights by admitting testimony that reveals the girl’s on-the-scene identification of the man or by allowing her to identify him in court?

The trial court would not violate the man’s constitutional due-process rights by admitting testimony that reveals the girl’s on-the-scene identification of the man or by allowing her to identify him in court because the witness has actual knowledge, and the identification was not impermissibly suggestive.

Defendants are entitled to constitutional protection of their due-process rights under both the Fifth and Fourteenth Amendments of the United States Constitution. One way to violate a defendant’s due-process rights in a criminal context is to permit an impermissibly suggestive and tainted identification of the man into court. However, prior out-of-court identifications are permitted to be used in court if they are fair identifications.

On-the-Scene Identification

An impermissibly suggestive identification is not allowed to be admitted into evidence, unless the state can prove that even without the suggestiveness, the individual would have picked that person. The opposing side must be given a chance to cross examine the individual who gave the out-of-court identification for due process to be satisfied.

Admission of the teenage girl’s on-the-scene identification would not violate the man’s due-process rights, as the identification was not unfairly influenced and was spontaneous. Here, while placing the man in custody creates a suggestive atmosphere, the girl’s identification was spontaneous and, therefore, admission would not violate the man’s due-process rights.

Here, a few minutes after the officer had arrested the man, the teenage girl arrived and began speaking to a second officer and stated, "I was right there. It happened really fast. One second I was waiting for my bus and reading text messages. The next second I heard a woman scream and saw some big guy running past me with a purse." After the girl noticed the man, she shouted, "Hey, I think that's the guy! It was dark, and it happened fast, but wow. He's right there in the car. I'm pretty sure that's the guy." Thus, the girl spontaneously identified the man. The cops did not ask her if the individual they arrested was the man, and, therefore, even though the environment might have been suggestive, the police did not create or cause the suggestive environment.

However, if the on-the-scene identification is permitted in court, the fact that the girl was not entirely sure that the man arrested is the correct man must be included. She never definitively stated that the man in custody was the attacker, and thus, it cannot be stated with specific certainty that she identified the man at the scene.

Thus, the out-of-court identification is permitted subject to the girl being available for cross-examination on her out-of-court statement.

Identify Him in Court

Out-of-court identifications that are tainted do not necessarily prevent an in-court identification. In-court identifications do not violate due process, as they are based on personal knowledge.

The girl can identify the man in court as the person she likely saw. However, unless she later remembers that the man is exactly who the suspect was, she is limited to the identification she made at the scene. She may only testify based on her personal knowledge. At the time of her original identification, her personal knowledge only extended to the thought that the man was the suspect in question and that she was pretty sure. Thus, absent a clearer memory, the girl cannot later testify that the man is exactly who attacked the woman.

Thus, the in-court identification is permitted.

QUESTION 5

QUESTION

Eight years ago, a testator validly executed a will. The will, in pertinent part, provided:

1. I give my house to my friend Doris.
2. I give my residuary estate, in equal shares, to my friend Alice, if she survives me, and to my friend Bill, if he survives me.
3. If any beneficiary under either of the foregoing two provisions of this will predeceases me and my will does not expressly provide otherwise, the heirs of the deceased beneficiary shall take the beneficiary's bequest.

Three years ago, Bill and Doris died.

Doris died testate, bequeathing her entire estate to a charity. If Doris had died intestate, all of her probate assets would have passed to her nephew, her sole heir.

Bill died intestate, and his entire probate estate passed to his daughter, his sole heir.

Last week, the testator died a domiciliary of State A, leaving a probate estate consisting of her house and a bank account with a balance of \$250,000. The testator died with no debts.

State A's anti-lapse statute provides in its entirety:

Unless the decedent's will provides otherwise, if a bequest is made to a beneficiary who predeceases the decedent leaving issue surviving the decedent, the deceased beneficiary's share passes to the issue of the deceased beneficiary.

The testator is survived by Doris's nephew, Bill's daughter, and Alice. The only relative of the testator who survived the testator is her sister. The charity to which Doris bequeathed her estate still exists.

4. Does the state anti-lapse statute or Clause 3 of the testator's will determine who takes the share of a beneficiary who predeceased the testator? Explain.
5. Assuming that Clause 3 of the testator's will applies, who is entitled to the testator's house? Explain.
6. Does the residuary bequest to Bill lapse because of the express survivorship requirement in Clause 2 of the testator's will? Explain.
7. Who is entitled to Bill's one-half share if the bequest to Bill lapses? Explain.
8. Who is entitled to Bill's one-half share if the bequest to Bill does not lapse? Explain.

ANSWER

1. Application of Anti-lapse Statute or Clause 3:

The issue here is whether a state's anti-lapse statute or a specific clause in a testator's will that expressly states where a bequest should go in the event a beneficiary predeceases testator governs. Here, it is likely that Clause 3 of the testator's will governs rather than the state's anti-lapse statute. Anti-lapse statutes are enacted in states to prevent a testator's bequest from lapsing to the residuary estate and instead passing to the beneficiary's heirs or issues. In the present case, State A has an anti-lapse statute that includes the language, "unless the decedent's will provides otherwise." Here, testator's will expressly says what should happen if one of the beneficiary's predeceases the testator. Thus, the anti-lapse statute does not apply and the testator's estate should be distributed pursuant to the will and its Clause 3. Clause 3 states that in the event a beneficiary predeceases a testator, the heirs of the beneficiary take the bequest. As such, any of the gifts that are subject to Clause 3 shall be governed by Clause 3 and not the anti-lapse statute.

2. Testator's House:

Here, testator's house was left as a specific devise to Doris, but Doris has predeceased the testator. Under Clause 3 of the testator's will, the gift will go to her heir. While Doris left her estate to charity, the charity is likely viewed as a devisee of Doris, not an heir. For this reason, it is likely that the house will pass to Doris' nephew as he is Doris' nearest relative and therefore heir. The language of the testator's will says heir rather than devisee, so it is likely that testator intended for any gifts made in her will to stay in the family of the beneficiaries.

3. Residuary Bequest to Bill:

The question here is whether the wording, "if he survives me," should be construed as being a requirement to a gift. As already determined, the testator's will suggests that the any gift to a beneficiary who passed before the testator should go to the deceased beneficiary's heirs. However, it is unclear whether the testator's language, "if he survives me," suggests that surviving the testator is a condition for Clause 3 to apply. Since it appears that the language presents a condition, it is likely that the gift will lapse in a state without an anti-lapse statute. However, because of the anti-lapse statute in State A, the gift could be saved and passed to his heir (discussed further below). Even though the anti-lapse statute likely does not apply to most of the testator's estate because of Clause 3, it is likely that the court will save any gift that is not protected by Clause 3 under the anti-lapse statute.

4. Bill's One-Half Share if the Bequest Lapses:

The question here is what happens to a bequest that lapses. Generally, a gift that lapses goes into the testator's residuary estate. The residuary estate is made up of the remaining assets of a testator not generally or specifically gifted, and not used to pay off any remaining expenses. Since the testator died without debt, the entirety of the one-half bequest to Bill will lapse to the residuary estate. Here, the residuary estate is specifically gifted (to Bill and Doris). Thus, Bill's one-half share will likely pass to Alice. However, if a court interprets the will to suggest that the gift is to be construed as meaning Alice is only entitled to one-half of the residuary and nothing more, Bill's one-half

of the residuary would pass in accordance to State A's intestacy statute. Since the testator is survived by her sister and is unmarried and without any issue, any intestate statute would likely result in the sister, as the daughter of the testator's parents, receiving any intestacy property.

5. Bill's One-Half Share if the Bequest Does Not Lapse:

The question here is regarding when a bequest does not lapse, but the beneficiary predeceases the testator and dies intestate. In the event that Bill's one-half share does not lapse, his bequest of one-half of the residuary estate will pass to Bill's sole heir, his daughter. Regardless of the intestate statute of State A, his daughter will take because she is the issue of Bill, as well as the only surviving heir of Bill. Thus, the daughter will take in the event that the testator's gift to Bill is construed such that it does not lapse.

QUESTION 6

QUESTION

A 55-year-old woman had been employed for 30 years as a paralegal at a law firm in State A. One year ago, a 28-year-old male attorney became the firm's paralegal manager.

The attorney began criticizing the woman's work and berating her on a nearly daily basis. He made derogatory comments about her and her work to the other paralegals and attorneys in the firm. He nicknamed her "grandma" and told people that "it's time for a new generation to take its place here."

Three months after he took over as paralegal manager, the attorney fired the woman. To replace her, he hired a 22-year-old paralegal. He explained the firing to his coworkers by stating that the woman had stolen valuable supplies from the firm and was neither honest nor trustworthy.

After exhausting all prerequisite administrative remedies, the woman filed an action in the U.S. District Court for the District of State A. Her lawsuit was against the attorney who had fired her. The woman's complaint states two causes of action. First, the complaint asserts that the attorney fired her because of her age, in violation of the federal Age Discrimination in Employment Act (ADEA) of 1967 (under which the attorney is considered an "employer"). Second, the complaint alleges that the attorney made defamatory comments about the woman to other employees of the law firm, thereby committing a tort under State A law. In particular, the woman's complaint alleges that the attorney made comments to others "to the effect that [the woman] was dishonest and a thief," and that "such comments were false and defamatory." The woman's allegations include the approximate dates of the comments and the identity of persons to whom they were made, but the complaint does not recite the exact allegedly defamatory language used by the attorney.

The attorney and the woman are both citizens and domiciliaries of State A, where the law firm's offices are located and where all the events in this matter took place. State-A-pleading rules require a plaintiff's defamation claim to "allege the time and place where the allegedly false statement was made, the persons to whom it was made, and the particular words constituting defamation." State A courts apply these rules strictly and dismiss complaints seeking damages for defamation if the specific words that are alleged to be defamatory are not stated in the complaint.

The attorney concedes that the court has federal-question jurisdiction over the woman's ADEA claim, but has moved to dismiss her defamation claim. The motion to dismiss argues, (i) that the federal court lacks jurisdiction over the defamation claim because it is based entirely on state law, and (ii) that the woman did not allege the "particular words constituting defamation" as required by State A.

1. Should the federal court grant the attorney's motion to dismiss the woman's defamation claim on the ground that the federal court lacks jurisdiction over that claim because it is based entirely on state law? Explain.
2. Should the federal court grant the attorney's motion to dismiss the woman's defamation claim on the ground that the woman did not allege the "particular words constituting defamation" as required by State A? Explain.

ANSWER

1. The federal court should not grant the attorney's motion to dismiss the woman's defamation claim on the ground that the court lacks jurisdiction because the court has supplemental jurisdiction over the claim.

Under the federal rules of civil procedure, a federal court has subject-matter jurisdiction over a case when it arises out of federal law. Further, a federal district court may have supplemental jurisdiction over other claims within the same lawsuit that it would not have subject-matter jurisdiction over by itself when the original claim and the supplemental claim have a common nucleus of operative facts. Where a plaintiff brings her original claim under federal-question jurisdiction, she may also bring supplemental-state-law claims under supplemental jurisdiction, even when the parties are not diverse from one another.

Here, the woman brings a claim under federal law (ADEA). It is undisputed that the court has subject-matter jurisdiction over this claim. Further, the woman's state-law claim for defamation will likely be found to arise from a common nucleus of operative facts as the woman's federal-question claim. The woman's federal-question claim arises from the attorney firing the woman from her job of 30 years on the basis of her age. Further, the state-law-defamation claim also arises out of her firing from the law firm by the attorney because the defamatory statements made by the attorney deal with the reasons for firing the woman from the firm. Thus, although federal law is being applied in one claim, and state law is being applied in another claim, the two claims share a common nucleus of operative facts because they deal with the reasoning for firing the woman.

Further, a federal court has discretion in exercising supplemental jurisdiction by weighing factors. The factors are: (1) whether the state law claim is a novel or complex state law; (2) whether the court still has jurisdiction over the original claim; (3) whether the state-law claim predominates over the original jurisdiction claim; and (4) other extraordinary reasons.

Here, defamation is not a novel or complex state-law issue because it is recognized in almost all jurisdictions. Further, the federal court in this case has not dismissed the ADEA federal-law claim and neither the federal-law claim nor the state-law-defamation claim predominates over the other one. Thus, it is unlikely that the federal district court would have a reason to exercise its discretion in not taking the supplemental jurisdiction claim of defamation in this case.

Therefore, the federal court should not grant the attorney's motion to dismiss the woman's defamation claim because it has supplemental jurisdiction over the claim.

2. The federal court should not grant the attorney's motion to dismiss the woman's defamation claim on the ground that the woman did not allege the "particular words constituting defamation" as required by State A because the federal rules of civil procedure govern the drafting of complaints.

Under the FRCP, only in diversity cases is the Erie doctrine applied. Further, when a procedural rule is on point, the federal procedural rule should be applied. A federal procedural rule governing complaints in federal court states

that all claims should be pled generally, should state a claim for relief sought, and the grounds for subject-matter jurisdiction.

Here, the woman's defamation claim is being brought in a complaint where the court has subject-matter jurisdiction under federal-question jurisdiction and supplemental jurisdiction. Further, the federal procedural rule as to how to plead complaints in federal court is on point with how the plaintiff should plead. Although State A's courts apply the rules in complaints that would make the woman's complaint invalid, State A's state-court laws do not govern in this situation.

Because the woman pled in her complaint the general nature of her claim against the attorney explaining what the attorney called her, and she pled the elements of defamation within her complaint, she met the federal requirement of pleading her claims generally.

Therefore, the federal court should not grant the attorney's motion to dismiss the woman's defamation claim because the woman correctly pled the defamation claim pursuant to the federal rules of civil procedure, which governs.

MPT 1

*WINSTON V. FRANKLIN T-SHIRTS INC.
(JULY 2021, MPT-1)*

In this performance test, the plaintiff photographer sued for copyright infringement after the defendant printed 2,000 t-shirts for a political campaign using a photo from 1985 taken by the plaintiff. The photo depicted a university student being led away in handcuffs after a political protest. Decades later, when that student ran for mayor, the defendant created and sold the t-shirts. In the current lawsuit, the defendant will move for summary judgment arguing that its use of the photo qualifies as fair use, an affirmative defense codified in the Copyright Act, which excuses acts that otherwise would be infringing. As the law clerk for the federal judge hearing the case, the examinee is asked to prepare a bench memorandum for the judge analyzing the defendant's claim of fair use under the four fact-specific factors identified in the Act and discussing the arguments that each party will likely make with respect to each factor. The File contains the instructional memorandum and the parties' agreed statement of facts. The Library contains excerpted sections of the Copyright Act, 17 U.S.C. §§ 106 and 107, and three U.S. District Court cases.

ANSWER

MEMORANDUM

To: Hon. Joann Gordon

From: Examinee

Date: July 27, 2021

Re: *Winston v. Franklin T-Shirts Inc.*, Case No. 21-CV-0530

Per your request and our prior discussions, I have prepared an analysis of the fair-use claim as presented in this case. I have analyzed each element of a fair-use claim in anticipation of the motion for summary judgment to be made by the defendant. Please find my analysis and conclusions below:

Under 17. U.S.C. § 106, the owner of copyright under the title has the exclusive right to do and authorize a number of things with relation to their copyrighted work. However, 17 U.S.C. §107 provides an exception for such exclusive rights in the form of fair use. The fair use of copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research is not a copyright infringement. In determining whether the use made of a work is fair, there are four factors to be considered (at the discretion of the court). Each of the four factors is outlined and discussed below.

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit-educational purposes:

The first factor to be considered by the court in determining whether or not use of a copyrighted work falls under the fair-use exception is the purpose and character of the use of the work. While the primary considerations are whether the use was commercial or for nonprofit educational purposes, courts have also considered political uses (*Brant v. Holt*, 1998), whether a use applied additional creative expression in order to transform the original work (*Allen v. Rossi*, 2015), and whether the use was for shedding light on an issue of great public concern and significance (*Klavan v. Finch Broadcasting Co.*, 2017).

Winston is likely to argue that Franklin T-Shirts was using her image as a means of making money in a commercial enterprise without her permission. She will say that such commercial use mitigates in favor of non-fair use. In addition, she will argue that there was no transformative work done with her original photograph. Generally, the courts favor transformative uses over non-transformative uses when it comes to fair-use analysis, and here Franklin T-Shirts did nothing besides reprint a copy of her complete image on the t-shirts.

While her argument regarding the commercial nature of the use is not dispositive as outlined below, she has a strong point in arguing that Franklin T-Shirts's use was non-transformative. As the Supreme Court held in *Campbell v. Acuff-Rose Music, Inc.*, 1994, "[Transformative] works that lie at the heart of the fair-use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." Citing this holding, the court in *Allen*, held that using only a portion of a photograph depicting animals gathered around a watering hole for a larger collage was transformative and, therefore, closer to fair-use intent.

Here, Franklin T-Shirts utilized the entirety of Winston’s photograph and simply stamped the words “Arrested & Convicted” across the photograph and captioned it with “Barrows is a Hypocrite!” While this was the reproduction of the entire work, it may be considered to be transformative if the t-shirt is “different in character and meaning from the original.” (*Rodgers v. Koons*, 1992)

However, Franklin T-Shirts, Inc. is likely to argue that while they are a commercial business, their use of Winston’s photograph on a t-shirt that was sold to the public was not a commercial purpose as they sold the t-shirts at cost and made no profits from the sale. In addition, they will likely point out that their purposes were for encouraging political discourse and highlighting an important historical fact of significant public concern regarding an individual running for public office.

These are strong arguments to make. In *Brant*, a political candidate used a famous musical artist’s song in its entirety throughout his entire campaign as a means of conveying an uplifting message and drawing support for his causes. While the court in that case found his use to fall outside the fair-use exception, it was not based on its political purposes. The court agreed that “political discourse” is vital to the essence of our democracy, and uses for that purpose should, absent other factors, weigh heavily in favor of fair use. In addition, in *Campbell v. Acuff-Rose Music, Inc.* 1994, the Supreme Court held that commercial uses do not necessarily weigh in favor of the copyright holder and can be considered fair. Applying that logic, the court in *Klavan* found that commercial uses can be fair if the issue is one of “significant importance to the populace of Franklin City.”

Here, while Franklin T-Shirts’s use of the photograph could arguably be considered “commercial” and non-transformative that is not necessarily dispositive of the first factor. Their argument that the intent was to encourage political discourse and to shed light on an issue of significant importance to the citizens of Franklin weighs slightly in favor of a finding of fair use.

2. The nature of the copyrighted work:

The second factor to be considered by the court is the nature of the copyrighted work – namely whether it was published or unpublished work. As the court has stated in the past, this factor usually does not significantly figure in most fair-use analyses (*Brant*), though the issue does come into play during certain cases. Courts generally find in favor of fair use with published works as the author of such work has had the opportunity to dictate its use in one sense.

Another consideration regarding the nature of the work is whether it is more informative or artistic. Creative, artistic works generally weigh against fair use more so than informative pieces.

Winston is likely to argue that her photograph is a creative work rather than an informative one, therefore mitigating against a fair-use finding. However, the court has previously found photographs to fall under the fair-use exception. The court held in *Allen* that, “although photographs are intrinsically creative works,” a photograph that is arguably more informative than artistic (in addition to being published) weighs in favor of fair use. In addition, in that case the court found that the fact that the artistic merit of the photograph of the animals at the watering hole is limited and is reflected by the fact that it has had such limited use since it was taken.

Along those lines, Franklin T-shirts is likely to argue that Winston's photograph was simply an informative depiction of what happened on the day it was taken. There was little artistic value to the photograph. In addition, it was sold only two times – once to the newspaper reporting on the story and once as a collection of other photographs she took for a coffee table book depicting the history of Franklin. Since that time, there has been no additional use of her photograph. For these reasons, in addition to the fact that it is a published work, their use of her photograph falls within the fair-use exception.

In addition, Franklin T-Shirts will argue that the photograph depicts a significantly newsworthy event, and it was the only visual record of that event. In *Klavan*, the court found that a news station's use of the only video record of a significant event involving a political representative of the city fell under the fair-use exception for just these reasons. It was the only video record available and the event was of significant importance to the public. Franklin T-Shirts will argue the same is true here: Winston's photograph is the only visual depiction available of the arrest and he is currently running for political office so the public will be highly interested in what happened.

While Winston makes a strong argument regarding the creative merit of her photography, Franklin T-Shirts likely has the stronger argument to be made. The event depicted in the photograph is of significant importance to the current political race and is the only photo available. That, in addition to the limited use of the photograph since it was taken, and the fact that it is informative in nature, weighs heavily in favor of fair use.

3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole:

The third factor to be considered by the court is the amount and substantiality of use. Courts will consider both the quantitative and qualitative use of the work. *Brant*. While oftentimes using only a portion of a work rather than the whole thing weighs in favor of fair use, there are also times when using the whole work can qualify as well. In addition, it is not strictly the quantity of the work that matters, but also the quality – whether the portion used was the substantially important part of the entire work. (*Klavan*)

Here, Franklin T-Shirts used the entirety of Winston's image. Winston will argue that this was both quantitatively and qualitatively the substantial part of her work. Franklin T-Shirts did not take a part of her photograph and add artistic value in order to fall under fair use. They used the entire photograph and reprinted it on a t-shirt in order to make a political message.

Franklin T-Shirts will argue that their use of the entire picture is not dispositive. As the court stated in *Brant*, there are circumstances where use of an entire work can amount to fair use – such as when the entire work is necessary for a commentary or news report.

Winston has the stronger argument to make with regard to the third factor. Franklin T-Shirts used her entire image, which was the entire substance of her work. Franklin T-Shirts does not have much of an argument to make against that. For this reason, factor three weighs in favor of Winston and against fair use.

4. The effect of the use upon the potential market for or value of the copyrighted work.

The fourth and final factor to be weighed by the court is the effect of the use upon the potential market for or value of the copyrighted work. Here, the prime consideration is whether the use of the work will decrease the market for the copyrighted work or will decrease its value. Courts often consider this factor to be of great importance as one of the purposes of copyright is to protect the economic interests of the copyright owner. (*Brant*) As the court held in *Brant*, the “statute speaks not merely of actual harm, but also of harm to the ‘potential’ market for or value of the copyrighted work.”

Winston will argue that the use of her photograph in such a political way could severely limit the potential uses of her photograph in the future as it is now associated with a very strong negative political message. Since the photograph has now been primarily used by supporters of Barrow’s opponent, those in support of Barrow are going to be less likely to want to associate with such a depiction or use it in other productive ways. This could limit her future profits from her copyright and impact her economically.

However, the court has previously found in *Allen* that when the rights to a photograph have been sold in very limited circumstances, there is little potential effect on any possible market in the future. As Franklin T-Shirts will argue, Winston licensed the photograph only twice – for minimal profit. And there has been no commercial use of the photograph in over 25 years. Any use he makes of the photograph will have little economic impact on Winston, much like the court found in *Allen*.

In addition, they will likely argue that the use of the photograph may actually bring it back to the minds of potential consumers and enhance its value. As the court discussed in dicta in *Klavan*, bringing something to the public’s attention can arguably create a market for it. While the subject of Winston’s photograph has retired from public life, this argument may not have a lot of merit as its future uses may be limited. However, while there may not be additional value created, there is unlikely to be a decrease in value for a photograph that hasn’t been used in over 25 years.

Considering the impact on Winston’s economic interests in the photo, the fourth factor weighs heavily in favor of fair use.

While the court has discretion in how to weigh each of these four factors, courts in the past have given less weight to the second factor and considerable weight to the fourth factor. Factors one, two, and four seem to fall in favor of a finding of fair use while the third factor mitigates against it. Taking all four factors as a whole, there may be grounds for granting the defendant’s motion for summary judgment as most of the factors seem to fall in favor of fair use. As the parties have agreed, a finding of fair use is an affirmative defense to the copyright infringement claim. If fair use is found, as it seems it will be, the defendant’s motion should be granted.

Please let me know if you have any additional questions or if I can be of any further assistance with regard to this matter.

MPT 2

IN RE CANYON GATE PROPERTY OWNERS ASSOCIATION

(JULY 2021, MPT-2)

In this performance test, the client, Canyon Gate Property Owners Association, seeks legal advice on whether to uphold the denial of a home improvement application submitted by Canyon Gate homeowners Charles and Eleanor Stewart. The Stewarts sought approval (1) to construct a new 600-square-foot structure adjacent to their existing house, connected by a covered walkway, and (2) to install an eight-foot-tall fence to create a separate backyard for the new structure. The Association's Architectural Control Committee (ACC) has denied the application, and the Stewarts have appealed the decision to the Association's board of directors. Examinees' task is to draft an opinion letter to the board analyzing and evaluating (1) whether the board should uphold the ACC's denial of the Stewarts' application and (2) if the board affirms the ACC's denial and the Stewarts sue the Association, what the likely outcome and potential remedies would be. The File contains the instructional memorandum, the law firm's guidelines for drafting opinion letters, a summary of the client interview, the ACC's denial letter, excerpts from the Association's Covenants, Conditions, and Restrictions, and a file memorandum defining certain terms at issue. The Library contains excerpts from the Franklin Property Code and two Franklin appellate cases.

ANSWER

July 27, 2021

FAWCETT & BRIX LLP
Attorneys At Law
425 Lexington Ave, Suite 100
Hayden, Franklin 33054

Recipient: Canyon Gate Property Owners Association Board

Re: Improvement application denial of Charles and Eleanor Stewart

Dear Board Members:

The present letter is to discuss the denial of the improvement application of Charles and Eleanor Stewart. As you may be aware, the Stewarts' application for the requested improvement of a structure and a fence has been denied by the ACC because it would violate the association's deed restrictions. The Stewarts will be attending the next association board of directors meeting to appeal the ACC's denial of their application, which is scheduled for Aug. 10, 2021.

In this letter, we will analyze whether the board should uphold the ACC's denial of the Stewarts' application for a structure and a fence, and also if the board affirms the ACC's denial and the Stewarts sue the Association, then the likely outcome and the potential remedies available. The questions will be addressed individually below.

Should the board uphold the ACC's denial of the Stewarts' application for a structure?

The board should not uphold the ACC's denial of the Stewarts' application for a structure, and should grant said application because the structure is not an outbuilding because it is connected to the main home.

The ACC denied the Stewarts' application for the structure citing Section 5C of the Canyon Gate Property Owners Association Declaration of Covenants, Conditions and Restrictions, which specifically states that the request exceeds the maximum allowable limit per acreage. Section 5C specifies the criteria for buildings other than residences. It specifically states: "The maximum allowable square footage of all outbuildings shall not exceed 100 square feet per acre of a homeowners' lot."

Under section 403 of the Franklin Property code, it states that a restrictive covenant may not be construed to prevent or restrict the use of a property as a family home.

According to the *Black's Law Dictionary*, an outbuilding is a detached building such as a shed or garage within the ground of a main building. Further an outbuilding is not connected with the primary residence on a parcel of property, including a shed, garage, or barn. According to a common meaning of "residential building," this phrase does not mean only the occupying of a premises for the purpose of making of one's usual place of abode; but a building is a residence if it's a place of abode.

Based on this definition, the Stewarts have a good argument that the structure should not be considered an outbuilding. The structure that the Stewarts will be building is not an outbuilding because it will be connected to their home. The Stewarts' plan is to build the structure within 12 feet of their home and the building would be connected to the existing home with a roof-covered walkway without walls. The breezeway roof would extend from the edge of the structure roof to the edge of the house. The structure is not being built for the use of a garage or a shed, rather as an extension to their home as an in-law suite. Therefore, the building is not considered an outbuilding and should therefore not be subject to the limitations of Section 5C. Finally, the structure is a residential building because it will be a place of abode because the Stewarts' 72-year-old mother will be residing there. The structure is a residential home because it will have a living and sleeping area and a restroom.

Finally, based on Section 403 of the Franklin property code, a denial of the Stewarts' structure would prevent or restrict the use of their property as a family home because the Stewarts want to take care of their elderly mother, and this denial is a clear violation by the ACC of the property code.

Therefore, the structure requested by the Stewarts is not an outbuilding because it is a residential home that will be connected to their home. Thus, the board should not uphold the denial and should therefore grant said application request.

Should the board uphold the ACC's denial of the Stewarts application for a fence?

The board should not uphold the ACC's denial of the fence and should grant the Stewarts' variance request due to their compelling reasons of taking care of their elderly mother and the safety of her dog.

The ACC denied the Stewarts' application for the fence citing section 7A of the Canyon Gate Property Owners Association Declaration of Covenants, Conditions and Restrictions, specifically stating that fences taller than six feet are not permitted. Section 7A specifically states: fences are limited to a maximum height of six feet. No fence having a height greater than six feet shall be constructed or permitted to remain in the subdivision.

The Stewarts' purpose of this fence is to prevent their mother's dog from wandering in their two-acre lot and to prevent the dog from being injured or lost. This is a great purpose; however, the Stewarts may accomplish this purpose in protecting the family dog by requesting and building a six-foot-tall fence. The denial of this request will not prevent or restrict the Stewarts' use of their home for a family residence.

On the other hand, the Stewarts also mentioned that a variance should be granted for the denial of the fence. According to Section 10 of the Associations Covenants, variances to the design standards and development criteria shall be granted only for a compelling reason and only if the general purpose and intent of the covenants and design standards are substantially maintained. The general purpose of the covenant was for the purpose of creating and carrying out a uniform plan for the improvements to lots within the subdivisions. Further, those lots shall not be used for business or commercial, manufacturing, or apartment purposes and only has a one-family residence.

Here, the Stewarts' have a very good reason for requesting a variance. The Stewarts will be taking care of their 72-year-old mother and her dog. The Stewarts will not be renting the property, nor converting it into a business. The Stewarts and their mother are considered one family and the right to reside with family is a right protected by the constitution.

Therefore, the board should not uphold the denial and should grant the application based on the variance request.

If the board affirms the ACC's denial and the Stewarts sue the Association, what outcome is likely and what potential remedies are available?

If the board affirms the denial, the Stewarts will prevail on the structure application because it is in violation of the Franklin Property Code due to it being a residential home and not an outbuilding. The Stewarts will not prevail on the fence issue.

Potential Remedies

Section 404 of the Franklin Property Code states that a property owner's association may initiate, defend, or intervene in litigation or an administrative proceeding affecting the enforcement of a restrictive covenant or the protection, preservation, or operation of property subject to a restrictive covenant. Section 404b states that the court may assess civil damages for the violation of a restrictive covenant in an amount not to exceed \$200 per each day of violation.

Should the Stewarts proceed with the improvements on their home, despite being denied, the association may be able to recover civil damages for said violations. Further, the court would have the authority to grant injunctive relief to enforce the restrictive covenants contained in the deed restrictions, and obtain a declaratory judgment to affirm the Associations' authority to enforce the restrictive covenant. Finally, the court may also award the association attorney's fees and cost, per *Foster v. Royal* case held in 2017.

The Stewarts may argue that the ACC refusal was arbitrary, capricious, and/or discriminatory.

The Stewarts may claim that the ACC's refusal to grant a variance was arbitrary, capricious and/or discriminatory. In the case *Foster v. Royal* (2017) the court of appeals determined that an association's application of a properly interpreted restrictive covenant in a particular situation is presumed to be proper, "unless the court determines that the association acted in an arbitrary, capricious, or discriminatory manner." If the Stewarts make this claim, they will have the burden at trial to prove this by a preponderance of the evidence. Further, in a previous case, *Mims*, the court held that the association acted in an arbitrary, capricious and discriminatory manner in denying them the construction of a carport when the association stated that they would deny the request no matter what and the ACC did not review the carport plans or even have contact with the homeowner to discuss the dimensions of the proposed structure.

Here, in contrast, the Stewarts will not be able to establish or claim that the ACC acted in an arbitrary, capricious or discriminatory manner. In this case, the ACC took careful consideration and review of the Stewarts' application, plans, and specifications submitted. The ACC had an on-site meeting with the Stewarts to inspect the proposed location of the improvement.

Finally, the denial letter from the ACC specifically states the reasons why the application was denied, and it is because the proposal deviates from the restrictions of the covenants. Therefore, this possible claim by the Stewarts will not prevail.

The Stewarts may argue that the ACC waived its right to enforce the restrictions because the HOA allowed other homeowners to bypass the fence restrictions with no consequences.

The courts have determined that to demonstrate a waiver of a restrictive covenant, a party must prove that the violations then existing were so extensive and material as to reasonably lead to the conclusion that the restrictions had been waived. (*Larimer v. Salazar*) The Franklin Courts have repeatedly found that the evidence was insufficient to support a finding of a waiver when 1% to 10% of properties violated the restrictive covenants at issue. (*Powell v. Westside*, 2019)

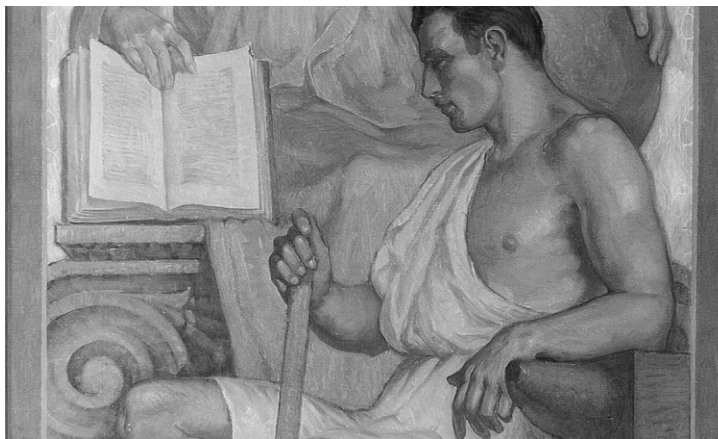
In this case, the Stewarts may argue that the ACC has waived the enforcement because there are other neighbors that are in violation of the restrictive covenant in regard to the fence restrictions. Per our conversation with Ms. Mendoza, she did inform us that a few homes in the community have a non-conforming fence with regard to the fence height, color, and material and that she was not aware how many homes there were. As we know in this association, there are 45 single-family homes, and we need to know the exact number of homes that are non-conforming. If the number exceeds 10% of the 45 homes, then the Stewarts' claim will prevail in court. It is recommended that the board investigates this information and takes action to enforce the restrictive covenants by sending letters to all of those who are in violation.

In conclusion, it is our firm's opinion that the board should not uphold the denial of the structure building because it's not an outbuilding. The board should not uphold the denial of the fence and should grant the Stewarts' variance request due to their compelling reasons.

We thank you for your attention to this matter. Should you have any questions or concerns, do not hesitate to contact me.

Truly yours,

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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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