# July 2025

## 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 July 2025 Ohio Bar Examination contained six Multistate Essay Examination (MEE) questions. Applicants were given three hours to answer a set of six 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 July 2025 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 MEE 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 July 2025 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

Lin and Bo are chemists. Over the course of two years, working together, they invented a new kind of antibacterial soap that reduces bacteria on skin for much longer than ordinary antibacterial soap. They shared ownership of the soap formula equally.

Lin and Bo agreed to start a business to manufacture, distribute, and sell their antibacterial soap. First, they formed a limited liability company (LLC) in State A, which has enacted the current version of the Revised Uniform Limited Liability Company Act (RULLCA). Lin and Bo did not enter into a written operating agreement for the LLC and did not discuss altering any of the default rules for limited liability companies. After forming the LLC, they contributed their soap formula to it; they agreed that the formula was worth $20,000 at the time of their contribution. Bo also contributed $5,000 to the LLC, which the LLC used to buy soap ingredients and advertise its product.

During the LLC's first year of operations, Bo contributed an additional $2,000 to it. After this contribution, neither Lin nor Bo made any other contributions to the LLC.

During its first two years of operations, the LLC made a total profit of $5,000. Through the end of the second year of its operations, the LLC made no distributions to Lin or Bo.

At the start of its third year of operations, the LLC had $5,000 in cash, the proprietary soap formula now worth $40,000, supplies worth $1,000, and no debt. At that point, Lin and Bo disagreed about the company's direction. Lin did not want to expand the business beyond soap. Bo wanted to expand the business into other consumer products.

Lin and Bo are at an impasse about whether to expand the business.

1. Whose preference will prevail—Lin's preference not to expand the business into other products or Bo's preference to expand the business? Explain.
2. If the parties agree to dissolve the LLC, how would the LLC distribute its assets between Lin and Bo? Explain.
3. If the parties do not agree to dissolve the LLC and one party seeks judicial dissolution, is a court likely to order a dissolution? Explain.

# ANSWER

**Lin's preference not to expand the business will prevail.**

In a Limited Liability Company, the default rule is that the members have equal voting rights unless specified otherwise in the operating agreement. Further, when decisions are to be made for the company, the default rule is that a majority vote is needed for ordinary business decisions; however, extraordinary business decisions require a unanimous vote.

Here, Lin and Bo did not file an operating agreement and have not otherwise specified any deviation from the default rules under RULLCA. As a result, they each have equal voting rights in the company. The decision on whether to expand the company beyond the scope of its original purpose is an extraordinary business decision. As a result, for that to be true, both parties would have to agree to the expansion. The fact that Bo has contributed more financially to the company does not in and of itself grant him more power in the decision making of the company. Because the parties are unable to reach a unanimous vote to expand the company, the business will not expand, and Lin's preference will prevail.

**Upon dissolution, the LLC will repay the capital contributions paid by its members and then split the rest evenly.**

Under the default rules for LLCs under the RULLCA, profits are to be shared equally, and losses are to be divided the same way the shares are. When an LLC dissolves and there is not another arrangement made to purchase the rights to the company from the other member, the assets are usually liquidated or sold. Then the debts of the LLC are paid, any capital contributions made by the members will be reimbursed, and the rest is divided among the members pursuant to their ownership interest.

As mentioned above, no other agreement has been made regarding the default rules of RULLCA; therefore, all profits and losses will be split evenly. Further, the LLC owes no debt and both Bo and Lin have equal ownership rights in the company. However, Bo has contributed $7,000 since the start of the company. Currently, the LLC has a total value of $46,000. Because there is no debt, the LLC will first pay Bo $7,000 for the capital contributions, and the remaining $39,000 will be split evenly between Lin and Bo. As a result, Lin will get $19,500 and Bo will get $26,500.

**The court will likely not order Judicial Dissolution.**

Under the RULLCA, a court may order judicial dissolution for a number of reasons, including if the parties have reached an impasse, making it impossible for the business to carry on. However, the court often requires the parties seeking to maintain the business to have the opportunity to buy the party seeking dissolution out of their share.

Here, the parties have reached an impasse; however, the impasse is not such that would make it impossible to carry on the business. The purpose of the LLC was to manufacture, distribute, and sell their antibacterial soap. Bo and Lin do not disagree on whether or not to continue to make and sell this soap. Rather, the disagreement is about whether to expand the business beyond the original scope. Further, if one party seeks to dissolve and the other wishes to maintain the business, the court is unlikely to order judicial dissolution unless the maintaining party refuses to buy out the dissolving party.

Here, we have no indication that such has happened. As a result, the court is unlikely to grant judicial dissolution based on this impasse.

# Question 2

# QUESTION

Pete lives in the northern United States. In the winter months, he earns his living by clearing snow from driveways and parking lots.

One morning, following a particularly heavy snowfall, Debbie contacted Pete and asked him to come to her residence and clear the snow from her driveway. Debbie was not a regular customer of Pete's. They had the following exchange via email:

> Debbie: Hi, Pete. Can you come to my house and clear the snow from my driveway? I live at 10 Arbor Lane, right here in town. What would you charge?
>
> Pete: I'm pretty busy today clearing snow for all my regular customers. I'm not sure I could get to you at all today, but if things go well, I could be there around 4 p.m. I charge $300 for a normal-size driveway.
>
> Debbie: Well, I have a plane to catch tonight, and I must leave the house by 5 p.m. I'm desperate. If you can get the snow cleared from my driveway before 5 p.m., I'll pay a premium price of $500.
>
> Pete: I will do my best, but I can't make any promises.

Pete worked extra hard and fast that day to finish clearing snow for his regular customers. To further ensure that he got to Debbie's house in time to get her driveway cleared by 5 p.m., he passed up an opportunity to clear a parking lot for $400. He was able to finish all his work for regular customers by 3:30, which left him plenty of time to get to Debbie's house and clear her driveway.

However, when Pete arrived at Debbie's house at 4 p.m., he saw that the driveway had already been cleared.

Pete left his truck, went to the front door of Debbie's house, and rang the doorbell. When Debbie appeared, he said, "I'm Pete. I accept your offer to clear your driveway. I'll get started right away." Debbie said, "Sorry, someone came by and offered to do the job for $300, so I paid him to do it. As you can see, it's already done." Pete replied, "I still want my $500." Debbie told Pete that she owed him nothing, and she shut the door.

Pete believes that, in light of the email exchange with Debbie, the fact that he passed up the opportunity to clear the parking lot, and the fact that he showed up at Debbie's house in time to clear her driveway by 5 p.m., he was entitled to clear Debbie's driveway and be paid $500.

1. Did the exchange of emails form a contract? Explain.
2. When Pete traveled to Debbie's house and said to her, "I accept your offer to clear your driveway," did that form a contract? Explain.
3. Assuming that no contract was formed under Question 1 or 2, does Pete have a claim based on his reliance on Debbie's statement that she would pay a premium price of $500 if he cleared the snow from her driveway by 5 p.m.? Explain.
4. Assuming that Pete has a valid claim against Debbie under Question 3, how much could he recover? Explain.

# ANSWER

**1. Contract Formation Through Emails**

The issue is whether the exchange of emails formed a contract. In order for a contract to be formed there has to be both offer and acceptance. An offer is an objective manifestation of an intent to enter into a contract with another. Acceptance occurs when a person objectively manifests their intent to enter into a contract based on the offer. Under the common law, which is the appropriate law for service contracts, acceptances must comply with the mirror image rule, which requires that an acceptance not change any material terms of the offer. Additionally, with common law, all offers must have the following terms: parties, price, and quantity.

Here, Debbie's initial email to Pete was not an offer because it contained no price term. Instead, Debbie gave Pete an invitation to deal when she asked how much Pete would charge. Pete's response to the email in which he gave Debbie a price for the service also does not constitute an offer. His statement of not being "sure" that he could complete the service is not an objective manifestation to enter into a contract because it was not clear if he had the capacity to or not. Debbie's second email that said "if you can get the snow cleared from my driveway before 5 pm, I'll pay $500" is an offer to enter into a unilateral contract. It contains all material terms and shows an objective intent to enter into a contract. However, Pete did not accept this offer through email because he said "I can't make any promises." This does not indicate an intent to enter into a contract. Therefore, the exchange of emails did not form a contract.

**2. Offer Revocation**

The issue is whether Pete telling Debbie that "I accept your offer to clear your driveway" formed a contract. An offer may be revoked at any time. Once an offer is revoked, it cannot be accepted. At common law, the only exception to this is if the offeree has paid consideration to have the offer stay open for a set period of time. Offers can be revoked through a variety of means, including expiration, offeror's death, or it becomes impossible for the offeree to accept. One way that it could become impossible to accept is if the offeror makes it so that the contract cannot be performed by an offeree by clearly manifesting it to the offeree. One example of this is when an offeror extends an offer to someone to buy a house, but before the offer is accepted, sells to another.

Here, by having someone else do the snow plowing job, Debbie revoked her offer to Pete. Because Pete did not pay any consideration to keep the offer open, Debbie was free to revoke the offer to Pete at any time. Pete was able to see that the offer had been revoked by seeing her cleared driveway, which should have put him on notice that the offer had been revoked. Therefore, Pete's statement that he would accept the offer to clear the driveway after the offer had already been revoked does not form a contract.

**3. Promissory Estoppel**

The issue, assuming no contract was formed, is whether Pete has a claim on his reliance on Debbie's statement. Promissory estoppel is a legal principle which provides for equitable relief even when no contract has been formed. To recover under promissory estoppel, there must have been a promise made, the plaintiff needs to have detrimentally relied on that promise, and the plaintiff's reliance on the promise must have been foreseeable.

Here, Debbie made a promise to Pete that if he cleared the snow before 5 pm, he would get paid $500. Furthermore, Pete detrimentally relied on this statement. In order to be able to clear Debbie's driveway by 5 pm, he gave up a $400 job that he regularly worked at. Debbie could have foreseen that Pete would give up this job because she was aware that he had a lot of regular customers that day. However, Pete did indicate that he would do his best to clear her driveway, and Debbie could argue that there was no way for Debbie to foresee that he would give up regular clients in order to clear her driveway. Nevertheless, Debbie did offer Pete $500, which she knew was $200 higher than the price he usually charged, and thus it was foreseeable that he would forego one $300 job to work at a $500 job. Therefore, Pete likely has a claim on relying on Debbie's statement.

**4. Reliance Damages**

The issue is how much could Pete recover from Debbie. In calculating reliance damages, courts will look at the amount of damages incurred as a result of the reliance, and will make them whole again. This is different than regular contract damages, which are expectation damages and are designed to put the breached party where they would have been if the contract had been formed. Here, Pete would not be entitled to $500 because that would be expectation damages. Instead, Pete is entitled to recover $400 since that is his loss due to relying on Debbie.

# Question 3

# QUESTION

Testator was born in 1880 in a rural area of State A. At the age of 5, he was enrolled in the local one-room schoolhouse and remained in school there until he graduated at age 18. There were no more than 30 students in the school at any one time. All four students in Testator's graduating class attended State A University. In 1902, Testator graduated from State A University with a degree in business. Over the next 20 years, he was extremely successful financially.

In 1922, Testator died leaving a substantial estate. He had never married and had no children. His closest living relative at his death was his first cousin, with whom he'd had little contact since his childhood.

Under his probated will, Testator bequeathed a total of $500,000 to several art museums throughout the United States, $250,000 to Capital City Concert Hall, and $1,750,000 to the business college at State A University. He bequeathed the balance of his estate ($2,500,000) to a valid perpetual charitable trust, with Bank X in State A named as trustee. Under the terms of the trust, all trust income was distributable annually to pay the education expenses of any persons, as selected by the trustee, who had graduated from a one-room schoolhouse in State A and were attending State A University while under the age of 25.

For many years, the trustee had no difficulty identifying potential beneficiaries under the terms of the trust. Over time, however, there was a substantial decrease in the number of students graduating from one-room schoolhouses in State A. By 2010, there were no such students attending State A University, and the remaining one-room schoolhouse in State A permanently closed. There are now no longer any persons to whom the trustee can distribute trust income in accordance with the terms of the trust.

The value of the trust assets is $10 million, earning roughly $500,000 of trust income annually.

Bank X would like to resign as trustee and recommends that a court appoint Bank Y as trustee. Bank Y is a reputable bank with extensive experience in trust administration and is willing to assume the trusteeship but only if the terms of the trust are modified to allow it to distribute trust income to graduates of any rural public high school in State A attending State A University.

Fred, the closest relative of Testator now living and the sole surviving descendant of Testator's first cousin, believes that the trust can no longer continue and should be terminated, and that the principal should therefore be distributed to him.

Capital City Concert Hall, having recently learned of these facts, believes that the trust principal of $10 million should be held exclusively for its benefit with trust income payable only to it.

State A has adopted the Uniform Trust Code. There are no other applicable statutes.

1. Does Bank X need judicial approval to resign as trustee? Explain.
2. Does Fred have any interest in the trust? Explain.
3. Can the trust's terms be judicially modified? Explain.

4. Assuming that Bank Y has been appointed trustee and that the trust terms can be judicially modified, between the suggestions offered by Bank Y and Capital City Concert Hall, which suggestion would a court be more likely to adopt? Explain.

# ANSWER

**1. Judicial Approval to Resign. The issue is whether Bank X needs judicial approval to resign as trustee.**

Under the Uniform Trust Code, which State A has adopted, when an entity is assigned as a trustee and initially accepts the position, it must receive approval to resign so that it can be assured that the trust is carried out effectively. Approval comes from the testator, if living; through express trust instructions with the consent of all the beneficiaries; or if the testator is dead and without beneficiaries, then through judicial approval. Additionally, this must be done so there is no breach of the fiduciary duties owed to the beneficiaries – meaning that the trust must be carried out with the reasonable care that a prudent trustee would use in like circumstances and in the best interest of the beneficiaries.

Here, neither the testator's trust nor will provide for appointment of a trustee in case the original trustee is no longer able to continue adequately representing the trust and beneficiaries. Because there is no indication Bank X sought approval from the beneficiaries and because the testator is dead, Bank X will need judicial approval.

Because there is a willing and able alternative trustee, the court will grant Bank X's request for judicial approval to resign so the testator's trust can be carried out.

**2. Does Fred Have an Interest in the Trust? The issue is whether Fred, the sole descendant of testator, has an interest in the trust. He does not.**

A valid trust must have ascertainable beneficiaries who can enforce the trust's purpose, and a lack of ascertainable beneficiaries will cause the trust to fail and fall into the residuary estate or pass intestate. If the trust were to fail, then the trust income would either be distributed by will or intestate succession – passing to the descendants of the testator per state statute. However, when a trust's purpose is for charitable purposes and those specific charitable purposes cannot be carried out per the testator's wishes because of some intervening force, then under the Cy Pres Doctrine, the court may (under the UTC it must do this) find an alternative charity that closely aligns with the testator's charitable purpose.

Here, although Fred is the sole surviving descendant of testator, he has no interest in the trust currently. It is clear by not only the trust, but also the will, that the intent of testator was to bequeath his entire estate for charitable purposes as he did not leave any of his estate to beneficiaries, friends, or other persons. Only if testator's trust were to fail, would Fred potentially have an interest in the trust. However, because courts lean towards ensuring a testator's intent is followed even if the trust fails, it would either be modified under the Cy Pres Doctrine or fall into the residuary estate of testator's will and be distributed among the beneficiaries within it. Fred will argue that because the trust's purpose was to distribute funds to students annually to pay for the education of those who graduated from one-room schoolhouses in State A – and because the state no longer has such schools – that the trust's purpose fails for lack of ascertainable beneficiaries. However, because courts attempt to carry out the clear wishes of testators, it is likely the court will apply the Cy Pres Doctrine to find an alternative method that closely aligns with the testator's intent to supply funds for education.

Because it is clear testator wanted the trust funds to be used for educational purposes, especially for those who grew up much like himself with a one-room schoolhouse, the court in State A will apply the Cy Pres Doctrine because it follows the UTC, which requires the court to find an alternative charitable purpose that closely fits the goals and intent of the testator when originally gifting the trust for charitable purposes. Therefore, Fred does not have an interest in the trust.

**3. Modification of the Trust. The issue is whether the trust is modifiable.**

A trust is generally modifiable if the settlor agrees or the beneficiaries consent. However, a trustee can seek to modify a trust when the trust's purpose is no longer possible – meaning the material terms/purposes of the trust can no longer be sufficiently carried out due to some intervening force. If the trust is no longer able to be carried out, the trustee has fiduciary duty of care and loyalty to seek judicial modification so that the trust can be carried out as provided by the testator. See Cy Pres discussion in Answer 2. When the trust's purpose is charitable, the court will apply the Cy Pres Doctrine to find an alternative charitable purpose that meets the same goals and intent of the original purpose.

Here, the trust's purpose, as stated above, was to provide educational funds for students who attended one-room schoolhouses. Unfortunately, the state no longer has such schools; therefore, there are no beneficiaries the trust can supply funds to in order to carry out such purpose. The court will apply the Cy Pres Doctrine and find an alternative method to apply the funds for a charitable purpose.

**4. Cy Pres. The issue is whether Bank Y or the Concert Hall's charitable purposes align more with the testator's intent.**

Under the Cy Pres Doctrine, when the trust's purpose is for charity and the original charity/organization/guidelines fails due to some intervening force, such as the organization failing to exist or there being no ascertainable beneficiaries, instead of causing the trust to fail, the court can assign another charity that reasonable relates to the testator's original charitable purpose. The court will consider the interests of the testator and the purpose for creating the trust.

Here, it is clear that when the testator created the trust, he considered his own past, graduation from a one-room schoolhouse with no more than 30 students and was able to earn a business degree and be extremely successful financially. It is likely that because of his own experiences, he wanted to supply people in similar situations with an opportunity to receive an education so they too could be successful. Therefore, his intent and purpose of setting up the trust was to supply students from State A who attended one-room schoolhouses with the opportunity to receive an education. Because trustee Bank Y intends to modify the terms to distribute the funds to graduates of any rural public high school in State A, this suggestion is likely to be adopted by the court. It is most aligned with testator's clear purpose of supplying educational resources to those from rural communities. The purpose of Capital City Concert Hall, although charitable, does not align with testator's purpose. As a beneficiary of his will, if he had wanted Capital City to receive trust income, the testator would have included it in his trust, or he would have created a trust for the charitable purpose related to concert halls, which he did not. Bank Y's intended modification most aligns with testator's intent and purpose of

creating a trust for the education of students. Additionally, because his will left $1,750,000 to a business school in State A and only $250,000 to a concert hall and $500,000 to an art museum, it is clear that testator intended the majority of his estate to go to the purpose of education.

Bank Y's suggestion of how the trust should be modified will be adopted by the court rather than Capital City's.

# Question 4

# QUESTION

Last year, Congress passed the "Economic Incentive Act" (Act), which the President signed into law. The preamble of the Act states that it was passed pursuant to Congress's power to regulate interstate commerce, and no legislative history indicates any other purpose.

The Act contains two substantive provisions. First, the Notice Provision prohibits "any employer with more than 100 employees from terminating an employee's employment without cause on less than 30 days' notice." The Notice Provision states that it applies to employees of both private businesses and state and local governments.

Second, the Housing Provision of the Act creates a federal program that provides grants to private developers of new low-income housing projects meeting the Act's requirements. The Housing Provision directs designated municipalities to administer this federal grant program by accepting applications for grants, reviewing the applications, making decisions, and enforcing the Act's requirements. The Housing Provision authorizes the United States to impose monetary penalties on a municipality that does not administer the grant program.

The last section of the Act provides:

> Any person who is harmed by the failure of any state or municipality to adhere to any provision of this Act may recover actual damages suffered as a result of that failure and may bring an action to recover those damages in federal court. A state or municipality shall not be immune, under the United States Constitution, from suit in federal court under the Act.

A man worked for State A, which employs more than 100 people, and a woman worked for City, a municipality in State A, which employs more than 100 people. State A and City recently terminated the employment of the man and the woman due to budget cuts. The man and the woman each received only one week's notice from their employers.

The man and the woman have filed separate lawsuits in federal district court against State A and City seeking damages for violations of the Notice Provision of the Act. In the suits against them, State A and City have each moved to dismiss on two grounds: (1) sovereign immunity recognized by the United States Constitution bars the lawsuits, and (2) the Notice Provision of the Act commandeers state and local governments in violation of the Tenth Amendment. No provision of State A law indicates that State A consents to lawsuits in federal court.

County is a municipality in State A that has refused to accept grant applications for federal funding as required by the Housing Provision of the Act. The United States, therefore, recently applied that provision to impose a substantial monetary penalty on County. County has filed a federal lawsuit seeking a declaration that the Housing Provision of the Act is unconstitutional because it commandeers municipalities in violation of the Tenth Amendment.

1. Does sovereign immunity bar the man's lawsuit against State A? Explain.

2. Does sovereign immunity bar the woman's lawsuit against City? Explain.

3. Does the Notice Provision of the Act commandeer State A in violation of the Tenth Amendment? Explain.
4. Does the Housing Provision of the Act commandeer County in violation of the Tenth Amendment? Explain.

# ANSWER

**1. The issue is whether sovereign immunity protects State A from suit by the man.**

Sovereign immunity is a protection under the Eleventh Amendment which provides that states and their instrumentalities may not be sued in federal court for a legal claim unless an exception applies. States may be sued if they consent to suit. States may also be sued if their immunity is abrogated by the federal government. A legal claim is one where money damages are at issue, rather than just an equitable claim that would result in injunctive or declaratory relief. Congress generally cannot abrogate state sovereign immunity but may do so to effectuate protections under the Civil Rights Amendments (13th, 14th, and 15th Amendments). Further, Congressional legislation that abrogates state sovereign immunity must be clear, must comply with all other constitutional requirements, and must be made pursuant to an enumerated Congressional legislative authority under Article I.

Here, Congress passed the Act, which along with its requirement for all employers to provide notice before terminating an employee's employment without cause, provided that any person who is harmed by the failure of a state or municipality to adhere to the Act could bring an action against that state or municipality in federal court to recover money damages. This provision allowing individuals to bring a cause of action against a state or municipality to recover money damages is a clear abrogation of the sovereign immunity protections.

States generally would be protected from suit in federal court for money damages under sovereign immunity. However, here, the Act abrogates this immunity pursuant to Congress's authority to enact laws under Commerce Clause authority. This was not abrogated to ensure protections under the Civil Rights Amendments. Congress' only justification for this Act was the Commerce Clause authority. Though there could be some argument that this could enforce the Civil Rights Amendments for certain employees, there are no facts that indicate that the law was focused on achieving that purpose.

Further, there are no facts that indicate that State A consented to the action by the man after terminating him without sufficient notice.

Therefore, because it was not properly abrogated nor did State A consent to suit, sovereign immunity would apply, and the man's lawsuit against State A would be barred.

**2. The issue is whether sovereign immunity protects City from suit by the man.**

As discussed above, sovereign immunity under the Eleventh Amendment prevents legal claims (suits for money damages) against states and their instrumentalities in federal court unless the state consented to suit or if Congress has appropriately abrogated sovereign immunity. These protections only apply to states and instrumentalities (agencies, officials, etc.) but do not apply to localities and municipalities. Congress may only abrogate sovereign immunity to effectuate protections under the Civil Rights Amendments (13th, 14th, and 15th Amendments). Further, legislation that abrogates state sovereign immunity must be clear, must comply with all other constitutional requirements, and must be made pursuant to an enumerated Congressional legislative authority under Article I.

Here, as discussed above, Congress' attempt to abrogate sovereign immunity does not actually function to abrogate, because it was not based on a Civil Rights Amendment, but rather out of authority to legislate under the Commerce Clause.

However, the woman's suit was against City seeking damages for violations of the Act. This was not an issue where she was suing a state but rather was suing the City. Cities are not subject to the sovereign immunity protections of the Eleventh Amendment, but rather on states and their instrumentalities are. Therefore, City is not protected by sovereign immunity and there may be a viable claim.

**3. The issue is whether the Notice Provision of the Act constitutes commandeering in the violation of the Tenth Amendment.**

The Tenth Amendment provides for principles of federalism, whereby the states retain all authority not otherwise granted to the federal government. However, the federal government may be able to influence state action in certain ways. The Tenth Amendment protects states from commandeering by the federal government, where the federal government attempts to force states to either: a) enact certain legislation, or b) requires state officers to enforce federal legislation. When state officers are required to act, the question becomes whether Congress is essentially choosing how the state will act, or whether the state is afforded flexibility in acting.

Here, the Notice Provision of the Act requires all employers, public and private, to provide 30 days' notice before terminating an employee's employment, where those employers have more than 100 employees. Thus, this provision relates to all employers, though it may frequently apply to state governments, as they employ more than 100 employees.

While this provision requires the state to act in a certain way, it is not a blanket requirement imposed solely on the states, nor is it requiring them to enforce the provision through its officers or enact legislation to support this. Instead, it treats states as employers broadly and regulates the actions of all employers pursuant to its Commerce Clause authority. This is not commandeering due to its broad application to all employers.

Therefore, this Notice Provision does not constitute commandeering in violation of the Tenth Amendment and is a valid exercise of Congressional authority.

**4. The issue is whether the Housing Provision of the Act constitutes commandeering in violation of the Tenth Amendment.**

As discussed above, the Tenth Amendment provides for states to retain all authority not otherwise granted to the federal government. This is federalism. The Tenth Amendment protects states from commandeering by the federal government, where the federal government attempts to force states to either, a) enact certain legislation; or b) requires state officers to enforce federal legislation. Commandeering can also be accomplished through Congress's use of its Spending Clause authority. Congress generally has the authority to spend for the general welfare and may condition states' receipt of federal funds on their compliance with a provision. However, this condition may not be so extreme that it crosses the line where persuasion turns into compulsion. This is assessed on the totality of the circumstances, including whether the states' receipt of such funds makes up a substantial amount of their budget,

and whether removal of such funds would impair the states' ability to function. This applies to conditions imposed on both states and municipalities.

Here, the Housing Provision provides federal funds to private developers for new low-income housing projects and requires municipalities to administer the federal grant program. Municipalities that do not administer the program can be charged monetary penalties by the federal government.

This provision requires municipalities to act in a certain way or otherwise receive monetary penalties. The payment of grants to low-income housing developers is a permissible use of the federal spending authority, but the fact that the Act requires municipalities to either comply with the enforcement of such program, or otherwise pay penalties, is not permissible. This likely crossed the line into compulsion. Though it is not a direct condition on receipt of federal funds, because the municipality is not even the entity receiving the federal funds, it requires municipal officers to take substantial action to administer the grant program. This is likely commandeering.

Therefore, by forcing municipalities to enforce a federal grant program without providing some funds to the municipality for compliance, but rather fining municipalities that do not comply, the Housing Provision constitutes commandeering in violation of the Tenth Amendment.

# Question 5

# QUESTION

A public high school in City, State A, has a rule that prohibits students from going to the gas station across the street from the school during school hours because the police have identified that gas station as the site of frequent drug dealing. The school includes the rule in the student handbook that the school provides to all students and their parents at the beginning of each school year. The school's principal also orally informs all students of the rule.

On October 10, at 2:30 p.m., during the last class of the day, the school principal looked out a window of the school building and observed a student walking from the school toward the gas station across the street. Once at the gas station, the student walked close to a car, talked to the driver through the open driver's-side window, and handed something to the driver. The principal could not see whether the student took anything from the driver, but after the car drove away, the principal saw the student put his hands in the front pockets of the jacket he was wearing.

The student returned to the school. About 10 minutes later, the principal ordered the student into the principal's office. When the student arrived, the principal reached into the front pockets of the student's jacket, which he was still wearing, and removed three $20 bills and a small, clear plastic bag containing two white pills. As set forth in the student handbook, possession of any kind of medication in school is prohibited unless permission has been given by the school. The student did not have the school's permission to possess any medication. The principal informed the student that the money would be returned to him if it was not connected with a crime. The principal told the student to return to class.

The principal decided to search the student's assigned locker. The school's locker policy provides that lockers are the property of Local Public School District (LPSD), that an assigned locker may be searched at any time, and that the school administration has a master key to all lockers. This policy is written in the student handbook. In addition, on the outside of every locker is a sticker stating, "This locker is the property of LPSD and may be subject to search." The principal unlocked the student's assigned locker with the master key. On the locker's top shelf was a clear plastic bottle containing white pills that appeared to be identical to the pills found in the student's jacket pocket. There was also a small, clear plastic bag containing a green, leafy material that looked and smelled like marijuana, possession of which is a crime in State A. The principal confiscated both the bottle of pills and the plastic bag of leafy material.

The principal phoned City police. An officer arrived at the school and took into custody the items seized by the principal from the student and the locker. Chemical testing of these items determined that the white pills were methamphetamine and the leafy material was marijuana.

That evening, City police obtained a valid warrant to arrest the student for possession of controlled substances in violation of State A law.

The next day, two City police officers arrived at the school during the school day and arrested the student, who was wearing his backpack. The officers searched the student and his backpack, from which an officer removed the student's unlocked cell phone. One of the officers looked through the cell

phone's text messages and found a series of messages that set meeting times and places and listed "number of units" and "cost." A message from 10:00 a.m. on October 10 referred to a meeting in the gas station parking lot at 2:35 p.m. and mentioned a "cost" of $60.

State A charged the student with possession of controlled substances.

1. Did the principal's search of the student's jacket pockets violate the student's rights under the Fourth Amendment? Explain.
2. Did the principal's search of the student's locker violate the student's rights under the Fourth Amendment? Explain.
3. Did the officer's search of the student's text messages violate the student's rights under the Fourth Amendment? Explain.

# ANSWER

**1. Whether the principal's search of the student's pockets violated the 4th Amendment**

The issue is whether the principal's search of the student's pockets violated the student's 4th Amendment rights. The 4th Amendment applies to acts by the government, including school officials in certain cases. The 4th Amendment protects against unreasonable searches and seizures. It protects persons, houses, papers, and effects. A search occurs when the government either: 1) invades a constitutionally protected area (persons, houses, papers, or effects), or 2) violates the person's subjective expectation of privacy that society is prepared to accept as reasonable. Schools and school officials are subject to slightly different requirements than a traditional setting, because students at elementary and high schools are not subject to such a high level of privacy as a non-student when they are on school property.

However, if a school official conducts a search of a student, it must be relevant and proportional to the needs of the investigation and must not unnecessarily or severely violate that student's reasonable expectation of privacy. Thus, school officials are permitted to engage in actions that would likely violate a reasonable expectation of privacy outside of the school setting, but in the interest of protecting the safety of students at the school, officials may be permitted to exceed normal bounds of a search.

Here, the principal watched the student complete what appeared to be a drug deal at a gas station across the street from the school. This behavior was in violation of the school rule that prohibited students from visiting that gas station during school hours, since the gas station had been identified by police as a site for frequent drug dealing. The students knew of this rule, since it was in the school handbook, and the principal had verbally notified students of this rule.

After the principal witnessed the student violate this rule and act in a way consistent with having participated in a drug deal, he called the student to his office. However, the principal then reached into the student's jacket pocket - which he was wearing - and pulled out a bag of pills and three $20 bills. This act constituted a search by the principal. The principal, acting on behalf of the public school, reached into a pocket of the jacket the student was currently wearing. This act was not disproportionate to the situation at hand - the principal could have asked the student to remove the jacket first, or asked the student to empty the pockets, but reaching into the high school student's pocket was not as invasive as other searches of younger students that have been held improper. Thus, the principal's search of the student's jacket he was wearing did not constitute a violation of the student's 4th Amendment rights.

**2. Whether the principal's search of the student's locker violated the 4th Amendment**

The issue is whether the principal's search of the student's locker violated the student's 4th Amendment rights. The 4th Amendment protects against unreasonable searches and seizures, and it applies to persons, houses, papers, and effects. A search occurs when the government either: 1) invades a constitutionally protected area, or 2) invades such that it violates a person's subjective expectation of privacy that society is prepared to accept as reasonable. Generally, the 4th Amendment only applies to government actors.

If a private actor conducts a "search," it is not subject to any 4th Amendment protections. However, although public employees such as teachers at a public school are not police, they can still be subject to the 4th Amendment when they conduct special needs/administrative searches. A special needs/administrative search is a search by non-police for an important purpose, such as at a border checkpoint, to conduct a food safety inspection, or to search students' belongings at a public school. When a special needs search occurs at a school, the public actor need only demonstrate that there was an important special needs purpose behind the search. A student at a public school has no reasonable expectation of privacy in the contents of their locker or their desk, and thus, an intrusion into these areas does not violate the 4th Amendment.

Here, the principal, an employee of a public high school, searched the student's locker. The school's locker policy states that the lockers are the property of the Local Public School District and can be searched at any time; further, this policy is in the student handbook. Each locker has a sticker on it stating that the locker is the property of the public school and is subject to search. The student did not have a reasonable expectation of privacy of his locker at school, because of these warnings, and because it is public school property. When the principal opened the locker and found a clear plastic bottle containing white pills and a small bag containing what looked to be marijuana, he did not violate the 4th Amendment because he was conducting a special needs search. The purpose was to prevent and catch drug crimes that were occurring near school property and during school hours, so this is an adequate justification to allow the special needs search exception to the warrant requirement to apply.

Further, the principal had reasonable grounds to conduct the search based on his earlier observations and the items he removed from the student's jacket.

Thus, the principal did not violate the student's 4th Amendment rights when he searched the student's locker.

**3. Whether the officer's search of the student's phone violated the 4th Amendment**

The issue is whether the officer's search of the student's phone violated the student's 4th Amendment rights. The 4th Amendment protects against unreasonable searches and seizures. An unreasonable search or seizure is one that takes place without a warrant. However, there are many exceptions to the 4th Amendment warrant requirement, including a search incident to a lawful arrest. A lawful arrest is an arrest supported by probable cause or a warrant. When a police officer lawfully arrests a person, the officer is permitted to search the person, including in their pockets and any containers they have on their person, as well as anything within the wingspan of the person. The main purpose of a search incident to lawful arrest is for officer safety and to prevent destruction of evidence. Anything an officer obtains during a search incident to lawful arrest is admissible evidence.

Cell phones may be lawfully taken during a search incident to arrest, but an officer is not permitted to search an arrestee's cell phone to look for incriminating information - the officer is only permitted to examine the cell phone to make sure it does not contain any weapons such as a razor blade. Searching a person's phone is akin to having a key to unlocking all the documents in their house - which far exceeds the scope and justification for a search incident to lawful arrest.

Here, the officers lawfully arrested the student because they had probable cause and an arrest warrant. However, they did not have a search warrant, but the search incident to lawful arrest exception to the search warrant requirement applies. Upon arrest, the officers searched both the student and his backpack and located his cell phone in his backpack. The officers were permitted to search the backpack because it was a container on the student at the time of his arrest. However, the officers were not permitted to go into the cell phone and look through it for incriminating evidence, even if it was unlocked. The officers found text messages in the phone discussing meeting times, number of units, and cost, including a meeting at the time and place where the principal saw the student going to the gas station during school hours.

The officers' search through the student's phone to find text messages exceeded the scope of their otherwise lawful search incident to lawful arrest. Thus, the student's 4th Amendment rights were violated when the officers looked through his cell phone to find incriminating evidence.

# Question 6

# QUESTION

After a homeowner's curbside mailbox was damaged, the homeowner phoned Quick Mailboxes, a small corporation that installs and repairs mailboxes. The homeowner told the Quick Mailboxes receptionist, "I don't care how you fix it; I just want it done by the end of the week." The receptionist said that the company would charge $220 for the repair, and the homeowner agreed to hire Quick Mailboxes to perform the job.

Quick Mailboxes has 10 local employees. It conducts background checks on all its employees, verifies that they have appropriate driver's licenses, and trains them as needed. After receiving the homeowner's call, Quick Mailboxes promptly sent Jane, one of its part-time employees, from its main office to the homeowner's property to perform the repair. Jane works 20 hours each week for Quick Mailboxes. She drives to work sites in a small, old pickup truck owned by Quick Mailboxes.

When Jane arrived at the homeowner's address, she stopped the pickup truck along the curb on the hilly street so that she could survey the mailbox's damage from her window. As she was about to exit the truck, she answered a personal call on her cell phone. The call lasted about three minutes. Distracted by the call, Jane left the truck without shifting it into "park" and did not engage the parking brake before she walked to the homeowner's front door to introduce herself and explain the work she planned to perform.

While Jane and the homeowner were talking at the front door, the Quick Mailboxes truck began rolling down the street. The homeowner saw it and stared in surprise but said nothing. Seconds later, the truck rolled partly off the pavement into a street sign. The post holding the street sign collapsed, sending the sign crashing onto a vintage luxury car worth $430,000 that a neighbor had parked on the public street.

The neighbor had the car repaired. Because of the special parts needed and the difficulty of finding them, the repairs cost $55,000. The neighbor also suffered serious emotional harm, requiring medical attention, because he had happened to look out his living room window just as the sign fell and damaged his car, which had significant sentimental value to him.

1. Is Jane directly liable to the neighbor in a negligence action? Explain.
2. Is Quick Mailboxes liable to the neighbor either directly or vicariously? Explain.
3. Is the homeowner liable to the neighbor because the homeowner hired Quick Mailboxes? Explain.
4. (a) Assuming that any of the parties is liable, can the neighbor recover the cost to repair the car even though the repairs were unusually expensive? Explain.

   (b) Assuming that any of the parties is liable, can the neighbor recover damages for emotional harm? Explain.

# ANSWER

**1. The issue is whether Jane could be held directly liable for her negligence.**

Under agency law, an agent may be held vicariously or directly liable for their torts. Negligence, a tort, requires duty, breach, causation (actual and proximate), and damages. The duty is ordinarily that of a reasonably prudent person. A breach would involve acting outside the duty owed. The breach must be the actual and proximate cause of the injury. The damage is foreseeable and no superseding cause cuts off the causal chain. Lastly, there must be physical damages. Under vicarious liability, an agent/employee of a company may be held liable in addition to their employer for the torts. Unlike a contract, a tortfeasor does not escape liability by having a principal.

Here, Jane was negligent. She owed the duty of a reasonably prudent person, and was distracted on a personal call when she got out of her car and did not shift it into park. As a result, her van drove down the road into a sign, which then fell over on the car. This both was the actual cause of the incident, as well as a foreseeable cause of letting her car spin out of control. Finally, the car was extremely damaged by the sign.

As a result, Jane would be held liable for her tort even if Quick Mailboxes is also liable for the tort. Therefore, she could be directly liable to the neighbor.

**2. The issue is whether Quick Mailboxes could be held directly or vicariously liable for the torts of Jane.**

Vicarious liability allows an employer to be held vicariously liable for the torts of employees, while the employee is acting within the scope of their employment. The scope of the employment will not be exceeded by a detour, a small foreseeable action taken during performance, while it may be exceeded by a frolic, a substantial deviation. Absent a showing of a frolic, an employee acting within the scope of their employment creates a vicarious liability situation for the employer. Additionally, nondelegable duties are always given to the employer, such as inherently dangerous acts, and may also create a binding duty. Finally, an employer may be held liable directly for negligent hiring, supervision, or training of their employee.

Here, Jane, an employee of Quick Mailboxes likely detoured from her expected course by taking a phone call, and during the phone call forgetting to properly park the car. There is no indication of a nondelegable duty, and her simple negligence in forgetting to shift the car into park while she was working as an employee was the cause of the accident. A quick call is outside the scope of her employment as it was a personal call, but this was a small detour that still allowed her to operate the vehicle normally if she applied proper care. As a result, her employer would be held vicariously liable for the employee's negligence. The neighbor would only be able to recover against one or both in part, but he may not receive double recovery.

Finally, Quick Mailboxes conducts background checks, verifies licenses, and conducts training as needed. Nothing indicates they were directly negligent. Therefore, they can be held vicariously liable for Jane's actions, but not directly liable.

**3. The issue is whether the homeowner is liable to the neighbor because they hired Quick Mailboxes.**

An employer generally may be held liable for employees' actions, but the person who hires an independent contractor is less likely to be held vicariously liable. A person is an independent contractor when the principal hires the agent to handle a specific task and exerts little to no power or control over the agent, who operates in their own manner, and simply performs a task for the party. Such actions do not bind the principal, unless they were nondelegable duties such as extremely dangerous activities. Additionally, a bystander owes no duty to intervene unless they caused the incident or owe a special relationship.

Here, the homeowner hired a company to fix her mailbox. She did not care how it was fixed, she just wanted it fixed by the end of the week. She hired the company and its employees as independent contractors to do a specific job. She gave the company, and Jane, through her discussion, authority to get it fixed but nothing else, and to do so on their own terms by a certain deadline. She did not represent to anyone that Jane or Quick Mailboxes were acting on her behalf. As a result of Jane's negligence in a duty which was not non-delegable, as it was simply parking the truck- not something inherently dangerous, she did not create a relationship by which she could be held liable. Jane, as an independent contractor, created the accident near the homeowner's house. Additionally, while she had agreed to hire Quick Mailboxes, Jane had just arrived and was going to talk with her about the scope and was on a personal phone call. The homeowner had no power over Jane at the time she took the call, and her actions did not reflect or represent the homeowner's actions or control in any way.

Subsequent to Jane's negligence, homeowner saw the truck rolling, but as a bystander who did not cause the accident and did not have any special relationship, had no ability to stop what was unfolding in front of her. Therefore, she will not be liable.

**4a. The issue is whether the car parts can be recovered despite their rarity under the eggshell plaintiff rule.**

Under the eggshell plaintiff rule, special needs or concerns regarding a plaintiff are recoverable as they are found by the defendant. This includes if the plaintiff is prone to special types of injuries, or if the defendant owns particular exotic or rare property which the defendant destroys through their torts. The goal of compensatory damages is to make the plaintiff whole again after the defendant's torts.

Here, the plaintiff owned an expensive car, and expensive cars have expensive parts so the damages were higher in cost. However, the defendant has to find their plaintiffs as they are, and the goal of expectation damages is to restore the plaintiff to being whole. As a result, the defendant who is on the hook would owe the plaintiff for his damages, $55,000 to repair the car. Therefore, he can recover his full injury despite the high price.

**4b. The issue is if any party is liable, can the neighbor recover emotional harm**

Emotional harm can be recovered in addition to physical damages in certain situations. If there was extreme and outrageous contact that caused the emotional harm then Intentional Infliction of Emotional Distress (IIED) may apply. If the harm was done as a result of negligence, and emotional damages resulted, the plaintiff can recover for Negligent Infliction of

Emotional Distress (NIED). NIED may be recovered in three situations: (1) zone of danger requires the person to have been in the line of danger from the damage; (2) special relationship requires an injury to someone that the person is related to, and can be seen at the time by the plaintiff; and/or (3) special circumstances, such as a doctor giving a wrong death declaration or a mortuary mishandling a body.

Here, Jane did not act intentionally, so IIED is not reasonable. However, as discussed above she acted negligently. However, the homeowner was not related to the car despite seeing it fall on his car.  He also was not likely in the zone of danger as his cause is related to seeing it get hurt and it had high value to him. Finally, there is no other special circumstance that would give rise to recovery. Therefore, he would not be likely to recover emotional harm.

# MPT 1

## *LOWE V. JOST (JULY 2025, MPT-1)*

The subject of this performance test is a medical malpractice lawsuit arising from a hip-replacement operation performed on the plaintiff by the defendant, Dr. Emil Jost, an orthopedic surgeon. The examinee's law firm represents Dr. Jost. Each party has filed a motion to exclude the testimony of the opposing party's expert witness. The examinee's task is to draft an argument persuading the court to admit the testimony of the defense's expert. In addition, the examinee should make the argument that the plaintiff's expert is not qualified, and even if he is qualified as an expert, his testimony should be excluded. Finally, the examinee should argue that, even if the court rules that the plaintiff's expert is qualified, summary judgment in favor of Dr. Jost is appropriate because the plaintiff has failed to offer any admissible evidence on elements of her malpractice claim. The File contains the task memorandum; excerpts from the complaint; an affidavit from one of the plaintiff's neighbors; an affidavit from the defendant, Dr. Emil Jost; and excerpts from the motion hearing testimony. The Library contains Franklin Rule of Evidence 702 (expert witness testimony) and Franklin Rule of Civil Procedure 56 (standard for summary judgment), as well as two appellate cases, *Jacobs v. Becker* (Fr. Ct. App. 2020) (setting forth the standard of care in medical malpractice cases), and *Smith v. McGann* (Fr. Ct. App. 2004) (discussing the standard for admitting expert testimony).

# ANSWER

**Argument**

**I. The Court should qualify Dr. Shulman as an expert and admit her opinion testimony.**

Pursuant to FRE 702, a witness must possess "scientific, technical, or specialized knowledge on all topics that form the basis of the witness's opinion testimony." Franklin Code 233 demands that qualifications and reliability are to be analyzed as separate and independent prongs of the *Daubert* inquiry. Whether a witness's testimony should be classified and admitted turns on whether the witness is "qualified" as an expert and whether their testimony is "reliable." *Smith v. McGann*. A witness is "qualified" as an expert when they are the type of person "who should be testifying on the matter at hand." *Id.* A witness's testimony is "reliable" if the "opinion is based on scientifically valid methodology." *Id.*

Here, Dr Shulman is a board-certified orthopedic surgeon. Dr. Shulman spent ten years working as an ortho-surgeon in a private practice in Olympia before transitioning to a teaching position in Olympia. In her current capacity, she teaches student knee and hip replacements. Given Dr. Shulman's significant experience in performing hip replacements during residency and private practice, she clearly has technical and specialized knowledge regarding hip replacements and post-operative recovery protocols. Furthermore, not only does she have extensive technical and specialized knowledge on this procedure, but the fact that she now teaches medical students how to perform these procedures can lead one to reasonably infer that her knowledge and expertise regarding these procedures is medically sufficient. As such, these facts support a finding that Dr. Shulman should be "qualified" as an expert as she is exactly the type of person, an ortho-surgeon, who should be testifying on the matters at hand - hip replacement.

Additionally, Dr. Shulman's testimony is reliable as her opinion is based on scientifically valid methodology. Similar to the case in *Smith v. McGann*, our expert witness's testimony was also based on years of experience in orthopedics, articles read, and conferences attended. Although the Plaintiff here may argue that these factors are not immortalized in FRE 702, the court in *Smith* held that those factors are mere "examples" and the courts must "utilize any other factors" deemed appropriate. Given Dr. Shulman's significant experience performing hip replacement surgeries, the fact that she now teaches how to perform a hip replacement, her knowledge gained from the most up to date and reliable sources of medical information, and her experience attending and presenting at medical conferences discussing proper procedures for joint replacements are extremely persuasive in establishing that Dr. Shulman is a qualified expert witness whose testimony is reliable.

The plaintiff is likely to argue that Dr. Shulman's testimony is not reliable as she has failed to make a thorough comparison between the population and availability of medical care in Olympia and Franklin. They would likely support this argument using the court's decision in *Smith*, which held that an expert witness must demonstrate "familiarity with the standard of care where the injury occurred." Although we contend that Dr. Shulman does not practice in Franklin currently, she completed residency in Franklin. Nevertheless, the

court in *Smith* held that it was not necessary for the witness to testify in the same location so long as they can show a familiarity with the standard of care where the injury occurred. As such, her use of up-to-date medical education journals and her participation in medical conferences as attendee and presenter are sufficient to show that she has kept up with medical literature "in the area" and that the literature is relevant and high-quality material. As such, we hold that the fact Dr. Shulman does not practice in the same location is not dispositive of her qualification as an expert witness and that the other factors, as discussed in Smith and above, are sufficient to show that she is qualified and her testimony is reliable.

In conclusion, we urge the Court to find that Dr. Shulman should qualify as an expert and that her testimony should be admitted.

**II. The Court should not find Dr. Ajax to be a qualified expert, but if he is qualified, his testimony should be excluded.**

When the witness is a physician, the physician is not required to practice in the specialty in question, but they must demonstrate that they are "sufficiently familiar with the standards" in that area by the "knowledge, skill, experience, training, or education." Here, Dr. Ajax is a board-certified orthopedic surgeon who currently has a practice in Franklin. As stated above. A witness is "qualified" as an expert when they are the type of person "who should be testifying on the matter at hand." *Smith v. McGann*. Here, although Dr. Ajax is a board-certified orthopedic surgeon practicing in Franklin, his experience in hip replacements specifically is insufficient. Dr. Ajax divides his time practicing joint replacements between fracture, knee replacements, and hip replacements. Since his residency he has only completed approximately 50 hip replacements and only performed about 20 during his residency. These numbers, when compared to the experience seen in a witness such as Dr. Shulman above, are a clear indicator that Dr. Ajax is an orthopedic surgeon but is lacking in the technical and specialized knowledge gained through performing these procedures.

Nevertheless, should the court find that Dr. Ajax is qualified; however, the issue of the reliability of his testimony must be addressed. As stated above, Dr. Ajax's lack of experience in performing this procedure calls into question his ability to base his opinion on scientifically valid methodology. There is no evidence to suggest that Dr. Ajax has attempted to supplement his minor experience in performing hip replacements through attendance at conferences or through supplemental education such as following medical journals. Instead, his testimony is only that Dr. Jost *could* have done an additional x-ray and that *could* have shown some form of error. As is *Ridley*, the court should consider whether experts within a field would rely on the same evidence to reach the type of opinion being offered. Furthermore, the court in *Smith* stated that speculation about what may occur had there been different facts can "never" provide "sufficiently reliable basis for an expert opinion. When that opinion is "so fundamentally unsupported that it can offer no assistance to the jury, it must be excluded." *Park*. Dr. Ajax's testimony is comprised solely of speculation about what could have happened had the facts been different. Thus, given that no other evidence supporting the reliability of his testimony has been offered, it is consistent with the court's decision *Smith* to find that even if Dr. Ajax can qualify as an expert witness, his testimony is not reliable as their testimony is speculative and without reliable basis.

In conclusion, we urge the Court to find that Dr. Ajax is not a qualified expert

witness, but even if it determines that he is, his testimony should be excluded as it is not reliable.

**III. Should the Court qualify Dr. Ajax as an expert, the Court should grant our motion for summary judgment because the plaintiff has failed to offer any admissible evidence on the elements of her malpractice claim.**

Pursuant to FRE 56, summary judgment is appropriate where a party fails to make a "showing sufficient to establish the existence of an element essential to that party's case." In that case, there is no "genuine issue as to any material fact." A "material fact" is one that is "essential to the establishment of an element of the case which is determinative to the outcome of the case." *Id.* The facts should be viewed in a light favorable to the nonmoving party. *Id.* In a case of negligence, the plaintiff must establish: (1) the existence of a duty requiring the defendant to conform to a specific standard of care, (2) the defendant failed to conform to that standard of care, and (3) the breach of the standard of care caused harm to the plaintiff. *Jacobs.* In a medical malpractice case involving a physician, the standard of care is "that degree of care, knowledge, and skill ordinarily possessed and exercised in similar situations by the average member of the profession practicing in the field." *Id.* Furthermore, in a medical malpractice case, expert testimony is required as only the "expert testimony can demonstrate how the required standard of care was breached" and how that breached caused the plaintiff's injuries.

Here, the motion for summary judgment should be granted because the plaintiff is unable to establish the defendant breached the standard of care through expert testimony. Whether Dr. Jost breached the standard of care is a material fact as it is necessary to prove this element for a successful negligence cause of action. Additionally, whether that breach *caused* the plaintiff's injury is also material as it is necessary to prove for a successful negligence cause of action. As explained above, even if Dr. Ajax was qualified as an expert, that testimony is unlikely to satisfy the "reliability" standard for establishing the standard of care or causation applicable in this case. As previously mentioned, Dr. Ajax is unable to show sufficient scientifically valid methodology to support that Dr. Jost acted differently from the standard of care. However, the plaintiff is likely to argue that in *Smith*, the court found that the expert was properly qualified as they specialized in the same specialty as the defendant even though the witness did not reside in the same area. While we contend that Dr. Ajax's ability to testify to the standard of care may be met given that he practices in the same specialty in the same location, that testimony does not also establish causation. As in Jacobs, a party's failure to provide expert testimony on the causation "justifies" an adverse ruling on summary judgment. In this case, Dr. Ajax's *only* offered testimony regarding causation was entirely speculative. The plaintiff has offered no testimony showing that the defendant's breach of the standard of care *caused* the plaintiff's injuries. As such, the Court is proper, as it was in *Jacobs*, in finding that the plaintiff's failure to offer expert testimony to show how the breach caused the injury to the plaintiff justifies an adverse ruling on summary judgment. Therefore, the Court should grant the motion for summary judgment because the plaintiff has failed to establish causation through expert witness testimony, a material element for a negligence cause of action.

In conclusion, we urge the Court to grant our motion for summary judgment as the plaintiff has failed to offer expert testimony showing causation between any breach of the defendant and the plaintiff's injuries.


THE SUPREME COURT OF THE STATE OF OHIO

# MPT 2

## *IN RE GOURMET PRO (JULY 2025, MPT-2)*

This performance test requires the examinee to assess three documents and determine whether all or parts of the documents are protected by the attorney-client privilege. The client, Gourmet Professional Grilling Co., is a manufacturer of gas grills and accessories. Gourmet Pro has received an administrative subpoena from the Consumer Product Safety Commission (CPSC) seeking records related to the design, safety, and manufacture of certain of Gourmet Pro's products. The examinee's task is to prepare a memorandum analyzing three representative documents that are responsive to the subpoena: an email from the general counsel to the chief executive officer, the executive summary of a report prepared by an outside law firm, and an email to the general counsel from the company's chief auditor. The documents contain a mix of legal and business advice; in the memorandum, the examinee should be specific as to paragraphs or even individual sentences that are covered by the privilege and therefore not subject to disclosure. The File includes the task memorandum, a file memorandum providing background on the CPSC investigation, and the three documents to be evaluated. The Library consists of one appellate case, *Franklin Dep't of Labor v. ValueMart* (Fr. Sup. Ct. 2019) (explaining the legal standard for determining whether the predominant purpose of a document is legal or business advice), and the order issued by a Franklin trial court regarding discovery motions in *Infusion Tech. Inc. v. Spinex Therapies LLC.*

# ANSWER

**Memorandum**

**To:** Anita Hernandez

**From:** Examinee

**Re:** Gourmet Pro response to CPSC

**Date:** July 29, 2025

This memorandum addresses how the attorney-client privilege may apply to the information of our client Gourmet Professional Grilling Co. (Gourmet Pro). Specifically, an analysis of the attorney-client privilege is provided for three documents that are responsive to a subpoena issued by the Consumer Product Safety Commission (CPSC).

Each analysis will describe whether some or all of it is protected from disclosure by attorney client privilege. Moreover, a description of the legal standard to be applied across these three documents is provided in the immediate section below.

**Legal Standard:**

State law governs the application of the attorney-client privilege. *Infusion Technologies Inc. v. Spinex Therapies LLC* (2021). Under Franklin law, the attorney-client privilege applies to "communications made between a client and their professional legal adviser, in confidence, for the purpose of seeking, obtaining, or providing legal assistance to the client." *Franklin Dep't of Labor v. ValueMart* (2019) (quoting *Franklin Mut. Ins. Co. v. DJS Inc.* (1982)). Such a privilege usually extends to communications between the company's lawyers and its board of directors, executives, and managerial employees who seek legal advice on behalf of the company. *ValueMart.*

Furthermore, the threshold inquiry in a privilege analysis is to determine whether the contested document embodies a communication in which legal advice is sought or rendered. *Id.* However, it is critical to stress that "[a] document is not cloaked with privilege merely because it bears the label 'privileged' or 'confidential.' *Moore v. Central Holdings, Inc.* (2009). Additionally, nonlegal work does not become cloaked with the privilege just because the communication is with a licensed lawyer. *ValueMart* (citing *Peterson v. Xtech, Inc.* (2007) in which accounting work performed by a lawyer and financial audits were not protected by the attorney-client privilege). Because the privilege is a barrier to disclosure and tends to suppress relevant facts, the privilege is strictly construed. *ValueMart.* Yet, the privilege does extend to a lawyer's advice interpreting regulations or assessing legal liabilities arising from, for example, a tax audit. *Franklin Dep't of Revenue v. Hewitt & Ross LLP* (2017).

Of course, as suggested by the case law above, a primary concern when considering whether to apply the privilege is whether it primarily provides: 1) legal advice, or 2) business information and advice. *ValueMart.* When a report contains both business and legal advice, the protection of the attorney-client privilege "applies to the entire document only if the predominant purpose of the attorney-client consultation is to seek legal advice or assistance. *ValueMart (*quoting *Federal Ry. v. Rotini* (1998)). If the predominant purpose is business advice, the attorney-client privilege will still protect any portions of

the document that contain legal advice. *See Franklin Machine Co v. Innovative Textiles LLC* (2003). Moreover, when a document's predominant purpose is for business, the portions that are protected by privilege must be carefully identified, and if such portions are easily severable, they should be withheld from disclosure to preserve the protection of the privilege. *ValueMart*. Thus, the application of the attorney-client privilege to documents is not an "all-or-nothing" approach. *Infusion Technologies*. Care should always be given to ensure that legal advice is protected by the privilege even when it is embedded in business advice. *See id*.

Moreover, the predominant purpose test considers five factors, requiring the court to consider the "totality of the circumstances" surrounding each document. *See In re Grand Jury* (2016). These factors include: 1) the purpose of the communication; 2) the content of the communication; 3) the context of the communication; 4) the recipients of the communication; and 5) whether legal advice permeates the document or whether any privileged matters can be easily separated and removed from any disclosure. *See* J. Proskauer, *Privilege Law Applied to Factual Investigations* (2018).

Therefore, using this law, an analysis of the three documents requested by the CPSC subpoena is provided below:

**Document 1: Email from general counsel to CEO of Gourmet Pro**

First, it must be determined what the primary purpose of this email serves.

As a preliminary matter, the fact that the email derives from a licensed lawyer, Trisha Washington, says nothing about its privileged status.

Under the first factor, the stated purpose of the email, at least according to the "Re:" line is to discuss/provide information about the Main Street class-action litigation. Additionally, Trisha states in the opening paragraph that the email will discuss the implications of the Main Street litigation. This purpose/heading is starkly different from the communication in *ValueMart* that primarily had the purpose to "gather information about ValueMart's facilities" and offer business recommendations to upper management to facilitate "provision of appropriate fire exists." Instead, the purpose is more in-line with the report prepared by outside counsel in *Booker* that aimed to assist the company in complying with state tax regulations. Here, Trisha Washington is ultimately trying to help insulate Gourmet Pro from legal liability, an issue directly related to providing legal advice. That is, the tenor of this email is in line with *Franklin Dep't of Revenue v. Hewitt & Ross,* in which a lawyer was assessing legal liabilities under a tax audit. This factor weighs in favor of designating the email as one having a primary legal purpose.

Under the second factor, the content of the communication, one can see that the content reflects significant legal advice. Phrases like, "Legal considerations also suggest that we redouble our efforts to ensure the safety of our products" and "To help insulate us from legal liability" are all evidence of this. Thus, this factor also weighs in favor of designating the email as one having a primary legal purpose.

Under the third factor, context, it helps to compare the facts with *ValueMart*. The Middleton Report, a key document in *ValueMart* was written when no litigation was yet pending. Here, the facts differ slightly. While there is no actual litigation currently pending against Gourmet Pro, a class-action lawsuit has been filed against a competing company that is in the same line

of business as Gourmet Pro. Thus, this email was prepared in the context of litigation, albeit not Gourmet Pro's litigation, rather than being entirely removed from the litigation context like in *ValueMart*. Therefore, this factor also weighs in favor of designating the email as one having a primary legal purpose.

Under the fourth factor, recipients, the email was sent to Maria Johnson, the CEO of Gourmet Pro. As *ValueMart* stated, privilege usually extends to communications between the company's lawyers and its board of directors, executives, and managerial employees who seek legal advice on behalf of the company. Thus, because the content of the email regarded arguably strictly legal advice (unlike the Middleton Report in *ValueMart* that dealt extensively with business/safety features of a locale), and was directed to an executive of Gourmet Pro, the CEO, this factor also likely weighs in favor of designating the email as one having a primary legal purpose.

Finally, under the fifth factor, whether legal advice permeates the document, one could argue that certain portions of the email lack any particular reference to Gourmet Pro's legal plans of action. For instance, the second paragraph could arguably be removed without revealing any legal advice particular to Gourmet Pro, however, the hint of plan still is present in the final sentence: "You can expect that the media in Franklin and elsewhere will be reporting on the dangers of the Main Street defects and interviewing customers. We should ask our marketing department to track those media reports." Moreover, every additional paragraph contains a form of legal advice regarding a plan of action Gourmet Pro should take based on Main Street's litigation. Therefore, it seems as though legal advice permeates practically the entire email, thusly weighing in favor of designating the email as one having a primary legal purpose.

Therefore, because each factor weighs in favor of designating the email from Trisha Washington as one of primarily legal advice, the entire email, under the totality of the circumstances, should be deemed to be privileged.

**Document 2: Executive summary of report from outside law firm**

Once again, as a preliminary matter, the fact that this communication derived from licensed attorneys, WatsonSmith, and the fact that it says it is a summary of a Privileged and Confidential Report do not yield any significance in determining whether the document is in fact privileged under *Moore v. Central Holdings, Inc.*

Regarding whether the summary is primarily for legal advice or business:

Under the first factor, the stated purpose of the summary, such a purpose seems to stem from the second paragraph that states: "Our main goal is to learn the company's processes and practices and develop business recommendations to make the company even better when it comes to dealing with safety concerns." (The letter continues to state that the summary is privileged and confidential, but once again, that is not relevant). In this statement alone, one can see that the stated purpose is to offer *business* recommendations, not to offer legal advice. Thus, this first factor weighs in favor of deeming the summary as one NOT rendered for legal advice.

Under the second factor, the content of the communication, the latter portion of the summary is entirely dedicated to *business* recommendations. For instance, the third paragraph states that "the company should maintain

a hotline, maintained by a third party, which employees could use to anonymously raise concerns or ask questions about safety or business behavior." Such a recommendation is reminiscent of the Middleton Report that was focused on improving the safety of ValueMart's premises. The only semblance of anything legal occurs in the fourth paragraph under the Overview section, which does not provide anything that would not be publicly available. The line that is most suspect, stating: "the company has not been found liable in any lawsuit that has gone to trial, and the company's public financial reports confirm that payments for legal settlements have not been substantial," could be seen as confidential. However, if it were considered legal advice/privileged, it could easily be detracted and would in no way render the entire summary privileged. Thus, for the most part, this factor weighs in favor of designating this summary as having a non-legal advice purpose.

Under the third factor, context, just like the Middleton Report, this summary was prepared outside of any threat of litigation. In the opening paragraph, the summary states, "While our law firm has not been hired in connection with any pending litigation or government investigation, we are always mindful that in the heavily regulated area of consumer safety, the risk of liability looms large." While the risk of liability is present, the report is largely still devoid of any legal plan of action akin to what Trisha Washington offered in her email to the CEO. Once again, just like the plan to make ValueMart safer through its safety regulations, Gourmet Pro too just wants to make its product safer and is seeking *business* advice on how to do so. Thus, this factor also weighs in favor of designating the summary as having a non-legal advice purpose.

Under the fourth factor, recipients, the summary was prepared for the Management and Board of Directors of Gourmet Pro. While such management *could* be a protected group under privilege, the actual content of the communication, unlike the email from Trisha Washington, does not pertain to legal advice. Therefore, this factor also weighs in favor of designating the summary as having a non-legal purpose.

Under the fifth factor, legal permeation, the summary contains very little legal advice/reference to legal information, and, as stated, the small info found in paragraph 4 stating that "The company has not been found liable in any lawsuit that has gone to trial, and the company's public financial reports confirm that payments for legal settlements have not been substantial," under the Overview section could be redacted/removed if needed, and would not render the entire document privileged per *Infusion Technologies'* directions (when the *Infusion* court pointed out Item 77/43 noting how such legal info could be withheld but the remaining portions of the information should be discoverable).

Therefore, because the majority if not arguably all of the summary pertains to business recommendations as to how Gourmet Pro could make its grills safer, the summary should not be subject to the attorney-client privilege, and in the case that certain info in paragraph 4 is considered legal advice/information, such info could easily be severable/be redacted while still making the entire report available.

**Document 3: Email from Gourmet Pro's chief auditor to general counsel:**

Once again, it must be determined what the primary purpose of the email is.

Under the first factor, stated purpose, the "re line" of the email states

that Lionel Alexander would like to discuss the Audit results, presumably an accounting audit. Such a purpose is largely removed from the legal field; Alexander even states under Issue 1 that he knows that Trisha is not an accountant and that Alexander is. Moreover, such a stated purpose is reminiscent of *Peterson v. Xtech* in which a lawyer performed a financial audit that was not under the attorney-client privilege. In other words, the stated purpose already proves that the email is far removed from the legal arena.

Under the second factor, content, the email contains two issues, neither of which bear heavily on legal information/litigation plans. Issue One is Alexander merely requesting Washington's *financial* rather than legal advice (once again invoking the precedent of *Peterson v. Xtech*), requesting that Trisha offer her opinion as to whether a narrative or a mixture of charts would work better in the presentation of the company's annual report. That is, Trisha is only lending her help for a completely business-related purpose. Issue 2 might arguably be a little more geared towards legal advice, but not quite so. It would seem that Alexander and the auditing team would like to attack head-on the problems that products manufactured in a facility outside of Olympic City are presenting. Trisha, even though she is an attorney, is merely being requested for her help to track down employees who could aid Alexander in accomplishing that head-on attack. Therefore, this factor weighs in favor of deeming the email as non-privileged.

One might argue that the Issue Two paragraph does pertain to some legal information (though that would be a very weak argument). If that even where the case, that portion of the email could still be omitted, rendering the rest of the email available for discovery.

Under the third factor, context, there does not seem to be any indication that this email was drafted in the context of any litigation. In fact, it seems even farther removed from the two previous documents that dealt subtly with the *Main Streem* litigation. Here, *Main Streem* is never mentioned nor is any specific litigation instance. Thus, this factor also weighs in favor of deeming the email as nonprivileged.

Under the fourth factor, recipient, Trisha Washington, an attorney for Gourmet Pro is the recipient. However, once again, that means little, particularly when the content of the document arguably does not pertain to legal advice. Therefore, this factor weighs in favor of deeming the email as nonprivileged.

Finally, under the fifth factor, permeation, the email contains little to no legal information/advice and would not impose any complications in the severability of the document.

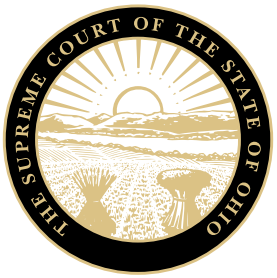
Consequently, since all these factors weigh in favor of deeming the email from Lionel Alexander as non-privileged, the email should be subjected to discovery.

Conclusion:

Therefore, the first document arguably should be privileged while the latter two, subject to possibly two small statements in each, should not be privileged.

*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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