MPT 1 – SAMPLE ANSWER 1

To: Gale Fisher, Senior Partner

FROM: Examinee

RE: State of Franklin Department of Children and Families v. Little Tots Child Care Center

DATE: February 26, 2019

STATEMENT OF THE CASE:

Ashley Baker is the Owner of Little Tots Child Care Center. Franklin Department of Children and Families threatened to revoke her license to operate the child car center due to accusations of appliance issues. Ms. Baker filed a complaint and a motion seeking preliminary injunction to prevent the revocation of her license to operate her child care center. We represent Ms. Baker in this matter. She has requested that we prevent the Franklin Department of Children and Families from revoking her license.

STATEMENT OF THE FACTS:

Around June 2018, Ashley Baker operated the Little Tots Child Care Center. Little Tots is the only child care center in the neighborhood that serves low-income families. Her child care facility is open for extended hours, which is beneficial for parents who must work early and late throughout the work week. Ms. Baker received a grant that allows her to

charge reduced fees to parents whose income falls below a certain level and it allows her to hire more staff and expand the number of children that Little Tots serve.

On July 16, 2018, Ms. Baker received her first Notice of Deficiency, stating that she violated (1) enrollment procedures, (2) staff qualification, and (3) Staffing standards pursuant to the Franklin Admin. Code. It was alleged that there were 37 incomplete enrollment forms, a lack of background checks for four employees, and an improper ratio for her 2-year-old (9:1) and 3-year-old rooms (11:1). Ms. Baker promised to take care of the noncompliance issue. On October 19, 2018, Ms. Baker received a second Notice of Deficiency, stating that she violated (1) enrollment procedures, (2) staff qualification, and (3) staffing standards pursuant to the Franklin Admin. Code. It was alleged that there were 16 incomplete enrollment forms, a lack of background checks for 3 employees (one being a new employee), and an improper ratio for her 2-year-old room (9:1). Ms. Baker satisfied most of her promises since the last notice. On January 23, 2019, Ms. Baker received her third Notice of Deficiency, stating that she violated (1) enrollment procedures, (2) staff qualification, (3) Staffing, and (4) Meals and nutrition standards pursuant to the Franklin Admin. Code. It was alleged that there were 5 incomplete enrollment forms, a lack of background checks for two employees, an improper ratio for her 2-year-old room (9:1), and a lack of supervision of the food area because Child "A" had an allergy to dairy products. As of February 22, 2019, Ms. Baker received a Notice of License Revocation from the Dept. of Children and Families stating that on March 5, 2019, her license would be revoked for accusations of noncompliance with critical standards pursuant to Franklin Civil Code 35.1.

ARGUMENT:

I. Preliminary Injunction Standard

Preliminary Injunctive relief may be granted in appropriate cases to preserve the status quo pending a decision on the merits. Lang v. Lone Pine School District. A party seeking a preliminary injunction must meet this four-factor test: (1) that the moving party is likely to succeed on the merits, (2) that the moving party will suffer irreparable harm if the injunction is not granted, (3) that the benefits of granting the injunction outweigh the possible hardships to the party opposing the injunction, and (4) that the issuance of preliminary injunction serves the public interest. id.

THERE IS A HIGH LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE MS. BAKER'S CHANCES OF SUCCEED ON HER CLAIM TO HER LICENSE IS MORE THAN A MERE PROBABILITY.

As to the likely hood of success on the merits, the moving party need not meet the standard of proof required at trial on the merits but must raise a fair question regarding the existence of the claimed right and the relief she will be entitled to if successful at trial on the complaint for permanent relief. Smith v. Pratt, Franklin Court of Appeals (2001). A party seeking preliminary relief need only demonstrate that his chances to succeed on at least one of his claims are better than negligible. id. If the movant shows that his chance of succeeding on his claim for relief is better than a mere possibility, the court should grant the motion for preliminary relief. id.

In Lang, Blake and Olivia Lang, parents of Michael (seven year old child), sued the Lone Pine School District for violating Michaels rights as a child with disabilities and sought preliminary and permanent injunctive relief. Lang v. Lone Pine School District, Franklin Court of Appeal (2016). The motion was for the District to allow Michael to attend school with a service animal. The motion was granted. The District filed an interlocutory appeal arguing that the court erred in granting the motion. The case was appealed to the Franklin Court of Appeals for review. Under the first element of granting a preliminary injunction

(likelihood of success) the trial court found that there was no dispute that Michael is a child with a disability and requires an accommodation. The court saw that the Langs have established that the service animal may well be the sort of accommodation needed, hence the Langs have shown a fair question regarding the rights of their son and the likelihood of receiving a remedy. id. Here, Ms. Baker argues that she is entitled to her license because she has shown her attempts to comply with the the Franklin Admin. Codes. Therefore, there is a liklihood that she would receive a remedy if the motion is granted.

MS. BAKER WOULD SUFFER FROM IRREPARABLE HARM BECAUSE DAMAGES WOULD NOT ADEQUATELY COMPENSATE HER FOR THE LOSS OF HER CHILD CARE CENTER.

An alleged harm or injury is irreparable when the injured party cannot be adequately compensated by damages or when damages cannot be measured by any certain pecuniary standard. In Lang, the alleged harm is the harm to Michael of continuing to attend school without the accommodation that may be most helpful to him. Lang v. Lone Pine School District. Here, Ms. Baker's loss of her child care center would not be sufficiently compensated by damages because she cannot measure the proper amount of damages. Her passion for the children and her center far exceeds any compensation that could be offered.

MS. BAKER WOULD SUFFER GREATER INJURY IF THE INJUNCTION WAS REFUSED BECAUSE SHE, ALONG WITH THE PARENTS, WOULD NOT HAVE A CHILD CARE CENTER THAT IS AFFORDABLE FOR THE CHILDREN.

The court must weigh the benefits of granting the injunction against the possible hardships to the party opposing the injunction. Lang v. Lone Pine School District. The court must determine whether greater injury would result from refusing to grant the relief sought than

from granting it. Here, Ms. Baker would suffer tremendous injury if her license was revoked and the parents in the neighborhood would as well. Jacob Robbins, a parent of a child who attends Ms. Baker's child care center is one of a dozen parents who would suffer from the closing of the center. His kids love it at her facility and have grown to become better more outgrowing children. He stated that if Ms. Baker's license is revoked, his wife would have to quit her job and care for the kids; this would place this family in an economic hardship which is against the Franklin Child Care Center Act. The Franklin Child Care Center Act states that: "There is a need for affordable and safe child care centers for low-income parents in underserved and economically depressed communities. By providing affordable and safe child care centers, the State of Franklin encourages employment of parents who, without these child care centers, could not be employed." Not granting this motion would cause Ms. Baker to suffer greater injury and the parents would too because there are no other affordable child centers in the area. If Ms. Baker's license was revoked, the domino effect of the center being closed would place an undue hardship on her and the parents who support her.

THIS INJUNCTION SHOULD BE GRANTED BECAUSE THERE IS A PUBLIC INTEREST WHERE THE PARENTS IN THE COMMUNITY AND THE CHILDREN WOULD BENEFIT FROM.

A court must consider whether issuance of the preliminary injunction serves the public interest. As stated above, the public interest is an affordable child care facility remaining open. Not only is Ms. Baker's child center affordable, but it is a clear benefit to the children in the neighborhood. The children are safe and smarter and there are no reported incidents that occurred in her child care center.

II. Compliance with the Codes

MS. BAKER'S LICENSE SHOULD NOT BE REVOKED BECAUSE SHE COMPLIED TO EACH CODE AND USED A GOOD FAITH EFFORT TO ENSURE THAT SHE WAS IN COMPLIANCE.

Enrollment Forms

Pursuant to Section 3.06 under the Franklin Admin. Code, a written application with the signatures of the enrolling parents shall be on file for each child. Here, Ms. Baker fully complied with this code. Despite her first notice of noncompliance, parents were given enrollment forms. Over time, the number of enrollment forms needed decreased from 37 incomplete forms to 5 incomplete forms. Also, some parents did not return the forms in a timely fashion and unfortunately for our client, she cannot force the return of these forms. She can only make a good faith effort to constantly request the forms from the parents. Therefore, Ms. Baker made good faith effort to not only retain the forms but she reduced the amount of empty forms tremendously. The court should take into consideration that she is in compliance with the code and by the time the injunction is lifted, the 5 incomplete forms should be returned to Ms. Baker.

Staff Qualifications

Pursuant to Section 3.12 under the Franklin Admin. Code, "each child care center shall subject all persons who work with children to criminal background checks and shall require them to authorize the background checks and to submit to fingerprinting. No person who has been convicted of a felony shall be employed at a child care center."

Staffing Ratio

Pursuant to Section 3.13 under the Franklin Admin. Code, Ms. Baker is in compliance

with this code. Since receiving the first notice, Ms. Baker has reduced the number of children to employees within a reasonable time. She no longer has a ration issue with her 3-year old classroom. The reason for the additional student in her 2-year-old classroom is because one of the students were leaving.

Meals and Nutrition

Pursuant to Section 3.37 under the Franklin Admin. Code, A child requiring a special diet due to allergic reactions shall be provided with meals and snacks according to the written instructions of the child's parents of legal guardian. There is nothing to show that Ms. Baker violated this rule because Child "A" was provided with everything he/she needed regarding meals and snacks. Although allergic to Milk, Child "A" was never exposed to the milk while in the custody of Ms. Baker. Therefore, she did not violate this code.

III. Conclusion

Therefore, the motion for preliminary injunction should be granted because Ms. Baker would likely would likely succeed on her merits, she would suffer irreparable harm, greater injury would result from refusing to grant the injunction, and the injunction would serve a public interest. Ms. Baker has made good-faith attempts to comply each requirement and numerous parents of the neighborhood support her and the child care center. Not only is the case law of this jurisdiction, but a court would likely rule in favor of Ms. Baker because of the persuasive case law cited within. If her license wold be revoked, the child care center would close and the effect on the surrounding neighborhood would suffer because the nearest center is 15 miles away. This is neither fair to our client nor the parents in the area. As such, the court should rule in favor of granting our motion for preliminary injunction.

MPT 1 – SAMPLE ANSWER 2

STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES,

Plaintiff, v. LITTLE TOTS CHILD CARE CENTER,

Defendant.

Defendant's Brief in support of Motion for Preliminary Injunction

Statement of the Case: [omitted]

Statement of the Facts: [omitted]

Argument:

The issue here is whether or not to allow Little Tots to continue to operate the child care center, although there are some issues regarding compliance with the standards of the Franklin Administrative Code regarding child care centers. Franklin courts allow preliminary injunctive relief in appropriate cases in order to preserve the status quo pending a decision on the merits. In order to be granted a preliminary injunction, the seeking party must meet a four factor test: (1) that the moving party is likely to succeed on the merits, (2) that the moving party will suffer irreparable harm if the injunction is not granted, (3) that the benefits of granting the injunction outweigh the possible hardships to the party opposing the injunction, and (4) that the issuance of a preliminary injunction serves the public interest. Here, we argue that Little Tots Child Care Center meets all of the requirements and therefore, preliminary injunctive relief is appropriate and should be granted in this matter.

Likelihood of Success on the Merits

First, as to the likelihood of success on the merits, the moving party need not meet the standard of proof required at trial on the merits but must raise a fair question regarding the existence of the claimed right and the relief he will be entitled to if successful at trial on the complaint for permanent relief. A party seeking preliminary relief need only demonstrate that his chances to succeed on at least one of his claims are better than negligible. Smith

v. Pratt (Fr. Ct. App. 2001). This standard requires only a showing that the movant's success on the claim for relief is better than a mere possibility.

Here, there is no dispute that Little Tots failed to keep their center up to the standards of the Franklin Child Care Act. The dispute, however, lies in determining whether or not Little Tots has taken substantial steps to remedy the noncompliance and whether they will be able to bring the center up to standards. Little Tots has submitted evidence showing that at each inspection, substantial efforts were made to bring the Center up to standard, there were only issues on account of technicalities of newly enrolled students and one statement of a busy teacher. The evidence presented by Little Tots and their efforts to comply with the Code are issues to be determined on the merits of the case. Hence, Little Tots Child Care Center and the owner, Ms. Baker, have shown a fair question regarding the rights of the center to remain open and the likelihood of receiving a remedy at trial.

Irreparable Harm

An alleged harm or injury is irreparable when the injured party cannot be adequately compensated by damages or when damages cannot be measured by any certain pecuniary standard. In other words, if the moving party, the Little Tots, can be compensated through damages for the wrong suffered, they would not have suffered an irreparable injury. The alleged harm here is the harm to Little Tots of not being able to continue to operate the child care center in a community that is underserved and where the need for the center is great. There is also the harm to the Center Operator, Ms. Ashley Baker of great financial hardship by way of losing the center's grant, default on business loans, and the great likelihood that the center would not be able to be reopened even after she was able to get the license reinstated. While the trial court could award damages to Ms. Baker after a trial on the merits to recover any pecuniary damages that she faced such as the loss of the grant, the business loan, and loss of income, there is no amount of

monetary damages could substitute for providing the community and the children the care that they so desperately need. Lang v. Lone Pine School District (Fr. Ct. App. 2016).

Balance of Benefits and Hardships

The court must weigh the benefits of granting the injunction against the possible hardships to the party opposing the injunction. Put another way, the court must determine whether greater injury would result from refusing to grant the relief sought than from granting it. There is a great likelihood that the Department will argue that by continuing to run a child care center that is not compliant with the Franklin Administrative Code, Chapter 34, there would be actual or potential harm to children.

We agree that the safety and care of the children is of the utmost importance in this matter, and that it is true that the standards were put in place to secure the best interests and safety of the children. However, the Department's Code currently provides that "if the operator of a child care center is in noncompliance with those standards deemed critical, the Director may, after notice, impose penalties including but not limited to a civil fine of at least $500 but not more than $10,000..." Franklin Child Care Center Act §3(f). Therefore, the Department currently allows for provisions that do not necessitate the revocation of the license of the operator. To permit the Little Tots Child Care Center to continue to operate during the interim until trial on the merits, the harm to the Department would not match the harm done to the children and families if the children are faced with no where to go. Although an incident involving a child being picked up by the wrong person, a child ingesting the wrong foods outside of their dietary restrictions, and having teachers with criminal backgrounds could cause substantial harm to the Department and to the children, in this instance the likelihood of that happening has diminished greatly since the first inspection. In fact, the likelihood of harm done to the children has decreased in each inspection. In weighing the harms cited by the District against those of Little Tot's, as well

as the community's loss of a child care center that meets the needs of the underserved, it is evident that the loss of care of the children and the service that is provided to this community is by and large a greater benefit than the lack of 5 completed forms, a child with a milk allergy who has not had any incidents, and one background check could bring harm. While we do agree that the standards need to be met, we also acknowledge that Ms. Baker has been working diligently to correct those noncompliant areas and has shown substantial progress in bringing the center up to code. The hardship in revoking the license of the Center, and therefore closing it to the community in which it sits and serves, would greatly outweigh the benefit in revoking the Center's license due to a few small noncompliant factors. In sum, the weighed hardships to benefits tip in favor of Little Tots and the families of this community.

Public Interest

Fourth, the court must consider whether issuance of the preliminary injunction serves the public interest.

Franklin Child Care Center Act §1 provides:

(a) It is the policy of the State of Franklin to ensure the safety and well-being of preschool age children of the State of Franklin through the establishment of minimum standards for child care centers.

(b) There is a need for affordable and safe child care centers for the care of preschool age children whose parents are employed.

(c) There is a need for affordable and safe child care centers for low-income parents in underserved and economically depressed communities.

(d) By providing affordable and sage child care centers, the State of Franklin encourages employment of parents who, without these child care centers, could not be employed.

This criterion cuts both ways on the facts of this case. On the one hand, the Department correctly notes that its need to regulate the standards applied to child care centers because of the actual or potential harm to children serves the public interest. On the other hand, Little Tots also contends that the injunction will serve the statutory purposes of the laws protecting children and families by providing a safe, nurturing environment and providing a service to underserved and low-income families that can not be replaced. Additionally, the absence of such a program in this community will cause a domino effect in households where working parents are not able to attend work due to the lack of childcare. Many parents, including those that will testify in court proceedings, attest to the fact that they feel safe leaving their children in the care of Little Tots Child Care Center and that the Center provides a service, where the loss of thatservice would cause a detrimental effect on the community.

The Center also provides services to the State University Early Learning Center, as students observe the innovative program. This allows for the opportunity to create more centers that are subsidized and that will service those under served families in need of care for their children so that they can secure job, promote the economy, and properly care for their children. The trial court did not err in concluding that issuance of the injunction served the public interest.

In conclusion, the court should grant Little Tots Child Care Center a preliminary injunction effective until trial on the merits.

MPT 1 – SAMPLE ANSWER 3

A. The Court Should Issue a Preliminary Injunction to prevent the Franklin Department of Children and Families (FDCF) from revoking Ms. Baker's License to operate Little Tots

until a hearing on the merits because the balance of the facts favor maintaining the status quo.

Courts have noted that "[p]reliminary injunctive relief is an extraordinary remedy and is disfavored by the courts, but this relief may be granted in appropriate cases to preserve the status quo pending a decision on the merits." *Lang v. Lone Pine School*. In determining whether a preliminary injunction will be issued, the Court will apply a four factor test: (1) the moving party is likely to succeed on the merits, (2) the moving party will suffer irreparable harm if the injunction is not granted, (3) the benefits of granting the injunction outweigh the possible hardships to the party opposing the injunction, and (4) the issuance of a preliminary injunction serves the public interest. *Id.*

(1) Ms. Baker is likely to succeed on the merits because Ms. Baker can show revocation of her license would be improper.

The moving party need not meet the standard of proof required at trial on the merits but must raise a fair question regarding the existence of the claimed right and the relief he will be entitled to if successful at trial on the complaint for permanent relief. *Lang v. Lone Pine School*. A party seeking preliminary relief need only demonstrate that his chances to succeed on at least one of his claims are better than negligible. *Smith v. Pratt*. If the movant shows that his chance of succeeding on his claim for relief is better than a mere possibility, the court should grant the motion for preliminary relief. *Lang v. Lone Pine School*.

In *Lang v. Lone Pine School*, parents of Michael Lang, a child with a disability that requires an accommodation, moved for a preliminary injunction. The issue to be tried on the merits was the type of accommodation needed for Michael and whether a service animal is a proper or necessary accommodation. The Langs presented evidence that established the service animal may well be the sort of accommodation needed, and the

Court concluded that the Langs showed a fair question regarding the rights of their son and the likelihood of receiving a remedy at trial.

The question to be heard on the merits is whether the deficiencies of Ms. Baker were sufficient to warrant revoking her license. Here, Ms. Baker is having her license for Little Tots revoked by the FDCF under the Franklin Child Care Center Act (FCCA), Fr. Civil Code section 35.1 *et seq*. Ms. Baker was found to be in violation of several sections of the Code. Specifically, Ms. Baker was found to be in violation of the Enrollment Procedures, Staff Qualifications, Staffing, and Meals and Nutrition. *See Notice of Deficiencies*. Ms. Baker had her licensed revoked without an administrative hearing. *See id.* Accordingly, Ms. Baker has not had an opportunity to have her arguments heard on the merits. Further, Ms. Baker has been improving the operation of little tots with each deficiency and will likely be in full compliance in a couple weeks. Therefore, Ms. Baker is likely to succeed on the merits because Ms. baker can show a chance of succeeding on her claim because she substantially complies with the FCCA.

The FDCF may assert that Ms. Baker is unlikely to succeed on the merits because she was repeatedly found in violation of the critical standards. However, her deficiencies regarding the staffing were short by 1 child in each instance, which equates to approximately a 10% deficiency. Further, Ms. Baker has improved upon the enrollment procedures (by receiving enrollment forms from parents) and staff qualifications (by proceeding with background checks for all employees except for an old employee who is a hold over from the previous owner and a newly hired employee) through each deficiency. Additionally, the meals and nutrition violation asserted by the FDCF does not appear to violate the FCCA. The FCCA merely requires that a child requiring a special diet due to medical reasons shall be provided with meals and snacks according to the written instructions of the child's parents or legal guardians. *FCCA*, section 3.37. Here, the child was provided additional accommodations for their milk allergy, the child was 5 years old

and knew not to drink milk, and nothing in the statute says the child must have supervision while consuming food. Thus, Ms. Baker substantially meets all of the standards contrary to the assertions of the FDCF. Further, even if Ms. Baker is in violation of the FCCA, the FDCF should at most impose a fine rather than revoking her license.

(2) Ms. Baker will suffer irreparable harm if the injection is not granted because she will lose her only source of income, will lose a government grant, and will be unable to repay her business loans.

An alleged harm or injury is irreparable when the injured party cannot be adequately compensated by damages or when damages cannot be measured by any certain pecuniary standard. *Lang v. Lone Pine School*. The harm in *Lang* was Michael of continuing to attend school without an accommodation that may be most helpful to him. While the court could provide monetary remedies, no amount of monetary damages could substitute for providing Michael the education he needs.

Here, Ms. Baker will suffer irreparable harm because she will be without any income, will lose a government grant, and will have to find a way to repay her business loans. While these can be labeled as mostly monetary damages, the amount of time between the revocation of Ms. Baker's license and the final hearing of a court on the merits would cause Ms. Baker to become delinquent on her business loans, which may cause her to go into bankruptcy before the hearing on the merits. Accordingly, Ms. Baker will suffer irreparable harm if the child care center is closed.

(3) The benefits of granting the injunction for Ms. Baker outweigh the possible hardships to the FDCF opposing the injunction.

The court must determine whether greater injury would result from refusing to grant relief sought than from granting it. *Lang v. Lone Pine School*. In *Lang*, the court stated that the

court must determine whether greater injury would result from refusing to grant the relief sought than from granting it. In *Lang*, the court found that hardship favored the Langs even though the school district would be faced with hardship in accommodation Michael because the impact to Michael would be significantly greater.

Here, the hardship to Ms. Baker is great. As stated above, Ms. Baker would lose her sole source of income, she would lose her government grant, and she would be unable to repay her business loans. Thus, much like the Langs, the hardship to Ms. Baker is quite significant. In contrast, the FDCF would not suffer great loss. While there would be some minor hardship in having to continue monitoring the day care center, this would be in the normal routine of the FDCF. Thus, the hardship to FDCF is quite minimal in comparison to Ms. Baker. Accordingly, the benefits in granting the junction far outweigh the possible hardships to the FDCF.

(4) The issuance of a preliminary injunction serves the public interest because Little Tots provides assistance to low income Parents.

The Court must consider whether issuance of the preliminary injunction serves the public interest. *Lang v. Lone Pine School*.

In Lang, the court noted that the public policy cuts two ways, much like in this case. Specifically, the court in Lang found that the school district needs to conserve resources and ensure the well being of the children of the district. On the other hand, the court found that the Langs were correct that the injunction would serve the statutory purpose of the laws protecting disabled children.

Here, much link in *Lang*, a preliminary injunction would serve the statutory purpose of the FCCA. The legislative purpose of the Franklin Child Care Center Act is to ensure the safety and well being of children while providing safe and affordable child care to low income parents that, without these child care centers, could not be employed. *See FCCA*,

section 1. Further, the parents of Little Tots indicate that Little Tots is affordable and allows parents to work. Specifically, Jacob Robbins asserts that if Little Tots closes his wife will have to quit her job to take care of the kids because Little Tots is the only low-income child care center within 15 miles of their home. Further, the State University is sending students to observe the program in Little Tots so the state education of students will be impacted if the preliminary injunction is not issued. Accordingly, much like in *Lang*, issuing a preliminary injunction would support the statutory purpose of the FCCA, while also provide assistance to the public interest at large.

The FDCF may argue that denying the preliminary injunction would support the statutory purpose of protecting the children. However, the FDCF can continue to monitoring little

tots while the case proceeds so that the main purpose of protecting children under the FCCA is met. Thus, contrary to the FDCF's possible assertion, both purposes of the FCCA would be met by granting the preliminary injunction instead of denying it.

Conclusion

Accordingly, for at least the above reasons, Ms. Baker has shown that she is likely to succeed on the merits, that she will suffer irreparable harm, the benefits in granting the injunction outweigh the hardships, and the public interest supports issuing preliminary injunction. Therefore, Ms. Baker respectfully requests that the court grant her preliminary injunction.

MPT 2 – SAMPLE ANSWER 1

<u>Memorandum</u>

TO: Susan Daniels

FROM: Examinee

DATE: February 26, 2019

RE: Andrew Remick matter

This memorandum analyzes and evaluates whether our client, Andrew Remick, has a viable negligence claim against Larry Dunbar. Because all of the elements of negligence are likely established, Remick will likely be able to prevail on a negligence claim against Dunbar.

I. Duty

First, Remick must show that Dunbar owed Remick a duty, which is a legal obligation requiring the actor to conform to a certain standard of care. Weiss. An affirmative duty to act only exists if it is created by statute, contract, relationship, status, property interest, or some other special circumstance. Boxer. While the common law imposes no duty to act, where an act is voluntarily undertaken, the actor assumes the duty to use reasonable care. Boxer.

A. Restatement Section 42

An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if (a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or (b) the person to whom the services are rendered relies on the actor's exercising reasonable care in the undertaking. Section 42 Restatement. Reasonable care can be breached by either an act of commission (misfeasance) or by an act of omission (nonfeasance). Section 42 Restatement comment c. An "undertaking" requires an actor to voluntarily

rendering a service on behalf of another, where the actor knows that the undertaking serves to reduce the risk of harm to another, or of circumstances that would lead a reasonable person to the same conclusion. Section 42 Restatement comment g. Furthermore, Section 42 envisions the assistance of a private person to a person in need of aid. Weiss.

Here, Dunbar had a duty of reasonable care to Remick because he undertook to render services and knew or should have known that his assistance would reduce the risk of physical harm to Remick. Under Section 42(a), it is unclear whether Dunbar's failure to intervene as he did would have increased or decreased Remick's harm. Dunlap did not move Remick's car or put out any emergency lights. Remick Transcript. Instead, by pulling over to the shoulder, he closed of another means of moving the car from the road. However, under Section 42(b), Remick likely relied on Dunlap exercising reasonable care. Dunlap purported to be a mechanic, and was looking in the hood of the car. Dunlap who did not have much knowledge in these issues, likely relied on this expertise.

Therefore, under Restatement Section 42, Dunbar likely had a duty to Remick to exercise reasonable care.

B. Restatement Section 44

Even if an actor has no duty to do so, but takes charge of another who reasonably appears to be "imperiled" or "helpless or unable to protect himself or herself," the actor has a duty of care to exercise reasonable care while the other is within the actor's charge. Restatement Section 44. This duty is limited in scope and duration to the peril to which the other is exposed and requires that the actor voluntarily undertake a rescue and actually take charge of the other. Restatement Section 44 comment c. Furthermore, this rule is applicable whenever a rescuer takes charge of another who is imperiled and incapable of taking adequate care. Section 44 Restatement comment g. It is also applicable to one

who is rendered helpless by his or her conduct, the tortious or innocent conduct of others, or by a force of nature. Id. The rule requires that the rescuer "take charge" of the helpless individual with the intent of providing assistance in confronting the then-existing peril. Id. The major difference between Sections 42 and 44 is that Section 44 requires an individual to be an imperiled, helpless position. Thomas (finding that where an actor, without any duty to act, voluntarily takes charge of an intoxicated person who is attempting to drive, changes the other person's position for the worse). For example, in Weiss the court found that Section 44 could apply to a homeowner that hosted an individual that fell and hit her head, went home, and where the homeowner did not tell the husband that the injury was suffered. Weiss. The determination of whether an individual is "imperiled" or "helpless" is made in the context of each case. Thomas. The mere fact that a car is being repaired, or that an individual is distraught, do not render an individual helpless. Boxer. For example, where an ill passenger is attacked after being left in an unlocked, running vehicle at night, the driver can be held liable. Sargent. But an individual does not "take charge of" an individual just by driving him where both individuals decide to participate in the decision-making process. Boxer.

Here, Remick will also likely be able to show that Dunbar had a duty. Like Thomas, Remick was likely placed in a worse position by Dunbar's help. Remick was likely "imperiled" or "helpless" according to the statute because of his swollen ankle where he could not really move. He twisted his ankle by trying to move his car, which likely satisfies the statute because comment g states that it applies to one who is rendered helpless by his own conduct. Because Remick was likely imperiled and helpless, Dunlap likely had a duty to take charge of Remick and provide assistance. While Remick was not helpless just because his car was being repaired (like Boxer), the addition of his aggravating injury likely does count. This case is more like Sargent, because being ill like the plaintiff there is similar to Remick being injured here.

Therefore, a court would likely determine that Dunbar has a duty under Section 44.

II. Breach

Remick must also show breach of duty, or that the conduct was unreasonable in light of foreseeable risks of harm. Weiss.

Here, a court would likely find that Dunlap breached the duty to Remick. Dunlap had a duty to act reasonably under the circumstances. He held himself out to be a mechanic, and Remick likely relied on this expertise. Although Dunlap was no longer technically a mechanic, there is no evidence that Remick knew that, or that the standards of mechanics have changed. There were three possible alternatives here whereby Dunlap could have made the situation safer: he could have (i) moved the stalled car, (ii) set out emergency flares, or (iii) turned on the hazard lights on his truck. He did none of these, even though Remick specifically suggested emergency flares and pushing the car to the side of the road. This was all exacerbated by the fact that it was become dark (at dusk), that the car stalled just beyond a turn, and that it was rural and only a two-lane highway. Additionally, while Remick attempted to move his car or turn on the hazard lights himself, the car would not start and Remick became injured. Dunlap's nonfeasance (which qualifies under the statute) of not doing any of the things he could have done to act reasonably was likely a breach of his duty.

Therefore, a court would likely determine that Dunlap breached his duty of care.

III. Causation

Remick must also show causation. Weiss. To demonstrate causation, a plaintiff must show a "reasonably close causal connection between the actor's conduct and the resulting harm. Id. In Weiss, the court found that a defendant could be liable even though an

individual fell and hit her head, fell asleep, woke up, walked home, and went to sleep at home again. Weiss. And in Thomas, the court found that the defendant could be liable even though the golf course was the party that served the driver alcohol. Thomas.

Here, Dunbar, who claimed to be a mechanic offered to help Remick. Interview Transcript. Because it was getting dark, Remick told Dunbar he was worried about the fact that it was getting dark and that his care was still parked on the road. Id. Remick, due to his pain and swelling, was unable to do this himself. Dunbar told Remick not to worry about moving the car, and also not to worry about emergency flares. Id. Therefore, there were no warning signs that Dunbar could have rectified, and Gibson did not see the unlit car and collided with the car despite going under the speed limit. See Gibson's Statement to Police.

Therefore, because Dunbar had a duty to Remick and breached that duty (see supra), and the collision happened as a result of Dunbar's nonfeasance, a court would likely consider that Dunbar's nonfeasance caused the collision.

IV. Damages

Finally, Remick must demonstrate damages. Weiss. In order to demonstrate damages, a plaintiff must include at least one of the following: lost wages, pain and suffering, medical expenses, or property loss or damage. Fisher.

Here, the impact of the collision dislocated Remick's shoulder, broke his arm, and give him a minor concussion. Interview Transcript. An orthopedist thinks that he will probably need surgery to repair the damage to his shoulder, and his broken arm will need to heal for at least another three to four weeks. Id. This will also include physical therapy for several months to regain full function in his left arm and shoulder. This all demonstrates medical expenses. See Fisher. Additionally, Remick owns a small landscaping

business, and without the use of his shoulder and arm, he likely will be unable to work. This demonstrates the potential for lost wages. See Fisher. He also estimates it will cost him at least $4,500 to repair the damage to his car, which constitutes "property loss." See Fisher.

Therefore, Remick has likely demonstrated damages.

MPT 2 – SAMPLE ANSWER 2

To: Susan Daniels

From: Examinee

Date: February 26, 2019

Re: Andrew Remick Matter

You asked me to review whether our client, Andrew Remick, has a valid negligence claim against Larry Dunbar. As discussed below, Mr. Remick does have a valid negligence claim based on the "Good Samaritan" doctrine set forth in Sections 42 and 44 of the Restatement of Torts (the "Restatement"), which has been adopted by the Franklin courts.

In Franklin, in order to establish a claim for negligence the plaintiff must prove four elements: 1) duty - a legal obligation requiring the actor to conform to a certain standard of conduct; 2) breach of that duty - unreasonable conduct in light of foreseeable risks of harm; 3) causation - a reasonably close causal connection between the actor's conduct and the resulting harm; and 4) damages - including at least one of lost wages, pain and suffering, medical expenses or property loss or damage (*Fisher v. Brown*). In order for our claim against Mr. Dunbar to survive any motion for directed verdict that he may file, we must show that Mr. Remick's complaint properly states a cause of action when viewing the evidence and all reasonable inferences therefrom in the light most favorable to the

party against whom the verdict is directed (*Ellis v. Dowd*).

Below, I will discuss each of the elements of Mr. Remick's negligence claim in turn.

<u>Duty</u>

Dunbar by volunteering to assist Remick in fixing his vehicle assumed a duty under both Section 42 and Section 44 of the Restatement to protect Remick against unreasonable harm.

As noted above, a duty is a legal obligation requiring an actor to conform to a certain standard of conduct. A duty must be recognized by law and must obligate a defendant to conform to a particular standard of conduct in order to protect others against unreasonable harm (*Brown*). If there is no duty in a negligence action, the defendant is entitled to a directed verdict (*Ellis v. Dowd*).

Under common law there is no legal duty unless an act is voluntarily undertaken, in which case the actor assumes the duty to use reasonable care (*Ellis*). Sections 42 and 44 of the Restatement (otherwise know as the "Good Samaritan" doctrine) set forth the duty required of an actor when he or she, otherwise without any duty to do so, voluntarily takes charge of a person. Specifically, Section 42 of the Restatement states that an actor who undertakes to render services for another has a duty of reasonable care to the other for the purpose of reducing the risk of harm to another if the failure to exercise reasonable care increases the risk of harm beyond that which existed without the undertaking or the person to whom the services are rendered relies on the actor's exercising reasonable care. Section 42 applies even with respect to the assistance of a private person to a person in need of aid (*Weiss v. McCann*).

Here, Dunbar being a private citizen does not preclude him owing a duty to Remick. In *Weiss*, McCann hosted a party at his home with friends, including Weiss. Later in the

night, Weiss fell and hit her head after drinking and walked herself home the next day.

While McCann witnessed her injury and called her family the next day to check on her, McCann didn't mention the injury until it was too late and Weiss suffered brain damage. The court held that based on the plain language of the Restatement, it could not as a matter of law preclude application of Section 42 to a homeowner such as McCann. This principle should be even more applicable in this case as Dunbar was previously a trained mechanic who should be familiar with car safety principles.

Also in this case, Dunbar undertook to render services for Remick and Remick relied on him using reasonable care to perform those services. In *Thomas v. Baytown Golf Course*, two men played golf together and consumed alcohol after which Thomas appeared intoxicated causing a Baytown employee to take his keys. Parker then informed the employee said he would drive Thomas's car, but Parker later gave the keys to Thomas who crashed into a tree. In *Thomas*, the court found that Parker had a duty under Section 42 to use reasonable care by taking charge of Thomas for reasons of safety. Had Parker not told the employee he would get Thomas home safely, the employee may have taken steps to avoid the accident.

Here, as in *Thomas*, Dunbar took charge of Remick's safety by offering to help, grabbing his toolbox and trying to jump Remick's car. Dunbar also informed Remick he was a mechanic thus causing Remick to rely on his services and take his advice as to certain safety measures such as putting on flashers, setting up flares or moving the car to the shoulder. As in *Thomas*, had Dunbar not volunteered his expertise in this manner Remick could have taken steps to protect himself as he mentioned in his statement that he had flares in his trunk and had previously been attempting to move the car off the road. Dunbar therefore increased the risk of harm to Remick by discouraging from a place of authority to engage in basic safety measures. Thus, by volunteering to assist Remick and offering

his expert services, Dunbar had a duty to use reasonable care in rendering those services under Section 42 of the Restatement.

Dunbar also had a duty under Section 44 of the Restatement. Section 44 of the Restatement requires that an actor who takes charge of another who reasonably appears imperiled and helpless has a duty to exercise reasonable care while the other is within the actor's charge, which applies when the other person is imperiled and unable to adequately protect himself, including someone who is rendered helpless by his own conduct. A person is deemed to be helpless even through his own voluntary actions (Comment g. to Section 44 of the Restatement). Determination of whether an individual is "imperiled" or "helpless" must be made within the context of each case (*Thomas*). A defendant "takes charge" of another when, through affirmative action, he assumes an obligation or intends to render services for the plaintiff's benefit (*Thomas).*

In *Boxer v. Shaw,* Shaw drove Boxer around town when his car was being repaired for the pair to engage in various social activities. They later had an argument and Shaw pulled over on the highway letting Boxer out, after which time Boxer was hit and killed while later trying to cross the highway. The court found that the mere fact that a car was being repaired did not make Boxer helpless and that Shaw did not take charge of Boxer because there was no indication Shaw directed where the men should go or took any affirmative action intending to "take charge" of boxer.

Here, while Dunbar may argue that like in *Boxer* Remick's car needing repair did not make Remick helpless, Remick can argue that his sprained ankle made it such that he could not repair the car himself or move the car to the side of the road. This is true despite the fact that Remick's injury was caused by his own actions. In addition, Dunbar took charge of Remick by voluntarily rendering his services to jump Remick's car knowing that Remick was injured and could not assist himself. This case is similar to *Sargent v.*

Howard, in which a driver was held liable for injuries sustained by ill passenger who was attacked after being left in an unlocked, running vehicle at night. Remick was similarly helpless in that he could not move his car or jump his battery himself and Dunbar by volunteering his services assumed a duty to Remick to use reasonable care. Therefore, Dunbar will be found to have a duty to use reasonable care in rendering his services to Remick under both Section 42 and 44 of the Restatement.

Breach

As noted above, Dunbar had a duty to use reasonable care to render his services to Remick. A breach of that duty will be found when a party engages in unreasonable conduct in light of the foreseeable risks (*Brown*). Here, the foreseeable risks of leaving Remick's car in the lane of traffic at dusk on the other side of a curve instead of moving it to the shoulder or using some other signaling device such as flashers or flares is that the car will be hit by another motorist. Here, Remick had flares (and communicated this to Dunbar) and both cars had working flashers, therefore it was unreasonable for Dunbar to not take these minor steps to ensure their safety. The facts also show that the motorist that hit Remick was traveling under the speed limit and which proves even further that the risk of getting struck by another vehicle was foreseeable. Therefore, Dunbar will be found to have engaged in unreasonable conduct to avoid foreseeable risks and breached his duty of care.

Causation

In order to show that Dunbar's actions caused Remick's injuries there must be a reasonable close connection between his actions and the harm. Here, as noted above, Dunbar had the ability to engage in several safety measures that could have reduced the risk and by not doing so caused the harm. Dunbar may argue that because the motorist

was not speeding and hit the brakes immediately, putting flashers on or using flares would not have reduced the risk and thus he did not cause the harm. However, he should have at least attempted to move the car to the shoulder, especially after Remick suggested he do so, because of the increased risk of being around a curve at night. Therefore, by not engaging in this conduct there is a close connection between his actions and the accident.

Damages

Finally, Remick must prove he suffered damages, including at least one of lost wages, pain and suffering, medical expenses or property loss or damage. All can be shown here by Remick. By his own statement he suffered a broken arm, needs surgery to repair his shoulder, and has to undergo physical therapy. This is clear evidence that he suffered pain and suffering as a result of the accident. He also indicated that he owns a lawn care business and has not been able to work since the accident. He can thus pecuniary damages from his lost work. Finally, the accident caused $4,500 in damages in addition to the original broken alternator. All of these are provable damages that were caused by Dunbar's negligence and satisfy this element of Remick's claim.

MPT 2 – SAMPLE ANSWER 3

To: Susan Daniels

From: Examinee

Date: February 26, 2019

Re: Andrew Remick matter

Introduction

You have asked me for a memorandum analyzing and evaluating if our client, Andrew Remick, has a viable negligence claim against Larry Dunbar. To establish a viable cause of action in negligence, a plaintiff's complaint must allege the following four elements: (1) duty: a legal obligation requiring the actor to conform to a certain standard of conduct; (2) breach of duty: unreasonable conduct in light of foreseeable risks of harm; (3) causation: a reasonably close causal connection between the actor's conduct and the resulting harm; and (4) damages including at least one of the following: lost wages, pain and suffering, medical expenses, or property loss or damage. *Weiss* (citing *Fisher v. Brown* (Fr. Sup. Ct. 1998)). As set forth below, Remick can likely establish all four elements of a negligence claim against Dunbar.

(1) Duty

The common law "affirmative duty" or "Good Samaritan" doctrine set forth in Sections 42 and 44 of the Restatement (Third) of Torts has been adopted by Franklin Courts. *Weiss v. McCann* (Fr. Ct. App. 2015). You have asked me to analyze each of these sections to determine whether a duty exists under either, neither, or both.

A. Section 42

Under Section 42 of the Restatement, "an actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if: (a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking; or (b) the person to whom services are rendered . . . relies on the actor's exercising reasonable care in the undertaking." This provision "envisions the assistance of a private person . . . to a person in need of aid." *Weiss*. The touchstone,

therefore, of Section 42 is that the actor's actions increased the risk of harm or the victim relied on the actor. The comments to Section 42 provide that the duty is one of reasonable care, and it may be breached either by an act of commission or omission. An undertaking, according to the comments, entails an actor voluntarily rendering a service on behalf of another. The actor's knowledge that the undertaking serves to reduce the risk of harm to the another, or of circumstances that would lead a reasonable person to the same conclusion, is a prerequisite for an undertaking under this section.

The first issue here is whether Dunbar changed Remick's position for the worse. On the one hand, it is hard to see how Remick was in a worse position because of Dunbar's actions or omissions. Had Dunbar never come along, Gibson likely would have encountered Remick in an identical situation--in his car, in the middle of the lane, with no lights on. Remick could argue that he would have lit his flare lights had he been on his own, thereby preventing Gibson from hitting him, which happened primarily because it was dark and she couldn't see Remick's car until it was too late. On the other hand, Remick was alone for over 45 minutes before Dunbar showed up, and thus if he was going to light the flares, he should have done so in that time.

As for the second issue under Section 42, Remick relied on Dunbar to take reasonable care in assisting him. He told Dunbar about lighting th flare lights, and asked him multiple times to move his car to safety on the side of the road. Remick was unable to do these things because of his ankle. Ultimately, because Remick's position was likely not made worse because of Dunbar, there is likely no duty under subsection (a) of Section 42. But because Remick relied on Dunbar's exercising reasonable care in helping him, a duty under Section 42(b) probably exists.

B. <u>Section 44</u>

"The major difference between Section 42 and section 44 is the requirement of Section

44 that the person be in an imperiled, helpless position. *Thomas v. Baytown Golf Course* (Fr Ct App 2016). Specifically, under Section 44 of the Restatement of Torts, "an actor who, despite no duty to do so, takes charge of another who reasonably appears to be imperiled and helpless or unable to protect himself, has a duty to exercise reasonable care while the other is within the actor's charge." The comments further provide that Section 44 is limited to instances in which an actor takes steps to engage in a rescue by taking charge of another who is imperiled and unable to adequately protect himself. The duty is limited in scope and duration to the peril to which the other is exposed and requires that the actor voluntarily undertake a rescue and actually take charge of the other. "The determination of whether an individual is "imperiled" and "helpless" must be made within the context of each case." *Thomas v. Baytown Golf Course* (Fr Ct App 2016).

Here, although a twisted ankle might not render an individual "imperiled" and "helpless" in all situations, the injury rendered Remick unable to move his car out of the road. He also could not turn on his own hazard lights, as they would not work, and he couldn't call anyone for help, because his cell phone couldn't get a signal. He was essentially immobilized in his broken down car in the middle of the road, unable to do anything about it because of his injury and the condition of the car. It is likely that Remick was therefore "imperiled and helpless." In addition, Dunbar clearly "through affirmative action, assumed an obligation or intended to render services" for Remick's benefit. *See Thomas*, *Sargent v. Howard*. Dunbar opened the hood of Remick's car and began working on it. He stated that he would be happy to work on the car, and to provide a jump start, as he had experience from being a car mechanic. Accordingly, Dunbar owed Remick a duty under Section 44 of the Restatement.

(2) <u>Breach</u>

Dunbar may have breached the duty of reasonable care in several ways. A breach

requires unreasonable conduct in light of foreseeable risks of harm. *Weiss*. In this situation, a reasonable person in Dunbar's shoes arguably should have pushed the car to the side of the road (especially because Remick asked him to), where it would have been safe from oncoming cars. This is especially so because it was dark outside and Remick's car was located just beyond a bend in the road. Given these facts, a reasonable person also likely would have lit the emergency and/or turned on his own hazard lights, given that Remick's hazard lights were broken. These were likely breaches of the duty of reasonable care. And the harm that the breaches caused were certainly foreseeable: a car crashed into Remick's car, because the driver could not see Remick's car in the middle of the road in the dark with the short notice because of the bend. Accordingly, Remick can likely establish breach.

(3) <u>Causation</u>

Dunbar's conduct will also likely be found to have caused Remick's injuries. Causation required a reasonably close causal connection between the actor's conduct and the resulting harm. *Weiss*. Conduct includes both commissions and omissions. See Comments to Restatement Section 42, 44. The conduct here was failing to move Remick's car to the side of the road, failing to light the emergency flares, and failing to put on his own hazard lights. These omissions are "causally connected" to Remick's injuries, which were sustained when Gibson crashed into the back of his car, even though she "immediately" breaked when she saw the vehicle. The causal connection is made apparent by the evidence that Gibson was driving *below* the speed limit, yet still crashed into Remick because she couldn't see the car. And she couldn't see in large part because it was dark, and there was a bend. The lack of lights (emergency flares and/or hazards) and position of Remick's car in the middle of the road there is causally--and closely--connected to Remick's injuries, and causation is satisfied.

(4) Damages

Remick easily satisfied the showing for damages. Actionable damages include at least one of the following: lost wages, pain and suffering, medical expenses, or property loss or damage. *Weiss* (citing *Fisher v. Brown* (Fr. Sup. Ct. 1998)). Here, Remick suffered a dislocated shoulder, he broke his arm, and suffered a minor concussion. HE will likely need surgery to repair the damage to his shoulder, and his broken arm will need at least 3 to 4 more weeks to heal. He will also have to undergo physical therapy to regain full function in the left arm and shoulder. These are all items of medical expenses that could be recoverable. He is also likely to suffer lost wages, as he works in landscaping, and will be unable to work in the short term--and potentially in the long term depending on his recovery--because of the injury. Property damage would also be recovarable. Here, the car suffered damages of $4,500.

ESSAY 1 - SAMPLE ANSWER 1

1. The property venues for this suit are Middle County or South County, but not North County. Under Georgia law, venue is proper where a substantial portion of the act or omission giving rise to the claim occurred or where substantial performance of a contract is to occur, where a defendant resides, or if none of those are applicable, in a venue that can properly exercise personal jurisdiction over the defendant. Here, the facts state that the tort involving personal injury inflicted on Philip for which the basis of the complaint is formed occurred in Middle County, and as such, venue is proper in Middle County. Further, South County is where ABC Corporation's registered agent for service is located, thus making South County a proper venue for this suit. For venue, where a corporation's registered agent is located is the proper venue for a suit. Also, if a suit is filed in a county where a company is authorized to transact business and holds an office, the venue is proper. However, if the suit is filed in a county where the company does not have an office,