MPT – SAMPLE ANSWER 1

To: George Bunke

From: Examinee

Re: Janet Klein matter

Date: October 5, 2020

A. Whether the State of Franklin is protected from liability by sovereign immunity

No. The State of Franklin is not protected from liability by sovereign immunity under the Franklin Tort Claims Act. Under the Franklin Tort Claims Act (FTCA) Section 41-6 waiver of government immunity is found where a government employee acting within the scope of duty is negligent giving rise to unsafe, dangerous, or defective conditions on property owned by the state of Franklin. Farrington v. Valley County, Fr. Sup. Ct. (2015).

Here, Mr. Randall Small is an employee of the state and may impute liability to the state of Franklin as a state employee as a result of negligence on the premises or grounds surrounding buildings owned by the state of Franklin under the FTCA. FTCA section 41-6. On the night of the rodeo Mr. Small was the on-site parking supervisor and had the ability to create a safe condition by moving the barriers to allow for multiple exits from the parking lot. See Investigation Email. However, Mr. Small did not allow for the removal of the barricades blocking the Central Avenue exit of the parking lot as Ms. Moore reported in the preliminary investigation. As required under the FTCA section 41-6 a government employee who is negligent within the scope of his employment and gives rise to unsafe, dangerous, or defective conditions on property owned by the state of Franklin may give rise to a waiver of sovereign immunity. FTCA section 41-6.

The state may argue that mere sloppy supervision is not actionable under the FTCA. See Rodriguez v. Town of Cottonwood, Fr. Ct. App. (2018) (noting that lack of supervision is not a dangerous condition where an employee acts within the scope of employment on government property or surrounding grounds). Alternatively, the state may argue that there is no waiver of sovereign immunity where state employee negligence did not create the risk of harm on or around government property. See Arthur v. Custer, Fr. Ct. App. (2008). Waiver is not found where negligence did not result in creating the risk of harm in a public park. Rodriguez, (2018)(citing Arthur v. Custer, Fr. Ct. App (2008)).

However in Mrs. Klein's action, Mr. Small did not merely act with sloppy supervision he actively did not allow for the removal of the barriers that blocked the Central Avenue exit during an event where the parking lot is excessively crowded. Thus, Mrs. Klein may argue that the refusal to unblock the central avenue exit to mitigate the risk of causing an unsafe, dangerous condition within the parking lot at a time where the lot would be at capacity created the risk of an unsafe or dangerous condition.

Therefore, it is arguable that Mr. Small's omission to remove the barricades blocking the Central Avenue exit during the rodeo event, an event that is known to create dangerous conditions, may have given rise to a dangerous and unsafe condition under the FTCA and that sovereign immunity was waived for the purposes of the FTCA.

B. Whether Mrs. Klein met FTCA notice requirements

An agency that causes alleged harm must have actual notice before written notice is not required. Beck v. City of Poplar, Fr. Ct. App (2013)(citing Ferguson v. State of Franklin, Fr. Sup. Ct. (2010)). Here, Mrs. Klein was injured on May 23, 2020 and screamed the state would pay for her damages at Mr. Small the on-site parking supervisor for the rodeo. However, this would be insufficient notice that the state should expect a claim against it under the FTCA section 41-16(b). Section 41-16(b) requires actual notice that the state agency may expect a claim against it and not mere injury, date, time, location. See Beck, Fr. Sup. Ct. (2012). Mrs. Klein was cited in a police report the same day, and the report also

noted that she screamed that the state would pay for her damages. See Police Report. However, this too would likely be considered ample notice under the FTCA.

Furthermore, under the FTCA section 41-16(a) a claim must be noticed in writing within 90 days of the cause of action. Solomon v. State of Franklin, Fr. Ct. App. (2012). Mrs. Klein did not give "official" notice of the claim against the state until 97 days after the incident giving rise to the cause of action. Thus, this would likely not put the state on notice as required under the FTCA.

However, some exceptions apply to the notice requirement under the FTCA. Under FTCA section 41-16(b) an agency is notified where notice reasonably apprises the agency it may be subject to litigation. FTCA 41-16(b). It could be argued that Mrs. Klein's statement in the police report was sufficient, but as mentioned above this alone would likely be insufficient under the FTCA. But the inference from a three car pile up at a crowded event on state property may coupled with that statement in a police report may be sufficient because it would then place the state on notice that the agency should have been reasonably alerted of necessary investigation of the facts surrounding the three car collision on its property to include what Mr. Small (a state employee charged with parking supervision during the event) did or did not do to mitigate the risks of creating a dangerous or unsafe condition during the rodeo event. See FTCA section 41-16(b).

Furthermore, Mrs. Klein cc'd Mr. Small on her official notice and he remembered that Mrs. Klein wanted to sue the state agency on the night of the accident, which should have placed the state agency on alert that a claim was imminent as a result of the accident on the night of May 23, 2020.

Therefore, if it could be successfully argued that the statement in the police report and the inference that a three car pile up should have put the state agency on reasonable alert notice that it should have investigated the facts surrounding the accident at the rodeo, Mrs. Klein may be successful in asserting timely and proper notice under the FTCA.

C. Conclusion

It is assumed that if Mr. Small was negligent and acted within the scope of employment and it is found the state waived immunity under the FTCA that the state is vicariously liable for Mr. Small's negligence. Therefore, if Mrs. Klein can successfully argue that she gave notice within 90 days of the incident and that notice was sufficient to reasonably alert the Risk Management Division of the State of Franklin Mrs. Klein may be successful in recovering her injuries, personal and property damages, as well as lost wages.

MPT – SAMPLE ANSWER 2

Is the State of Franklin protected from liability in this case by sovereign immunity?

The State of Franklin is typically immune from suit under the doctrine of sovereign immunity. However, in certain cases, the state may waive its protection of sovereign immunity and open itself to liability from suit. This is exactly what the State of Franklin has done. In §41-1 of the Franklin Tort Claims Act, the state legislated that it is public policy for Franklin to be liable only while within the limitations of the Tort Claims Act. The act further states, in §41-4 and §41-6, that immunity "is waived when bodily injury, wrongful death, or property damage is caused by the negligence of public employees while acting within the scope of their duties."

In the present case, Janet Klein was involved in a car accident and injured on May 23, 2020, while leaving the Rodeo. The Rodeo was operated on the Franklin State Fairgrounds, which would classify as a state building or public park for purposes of the Tort Claims Act (*see* §41-6). Furthermore, it is stipulated in the library that Randy Small was the Director of Parking Facilities at the state park. The act requires personal or property injury, of which Janet Klein had both. Ms. Klein's car was damaged, as per the official report, and Ms. Klein has provided evidence of physical injuries which have caused her much trouble and

financial consequence. Further, the accident occurred at the state fairground's parking facility, which is a public park for purposes of the Tort Claims Act. Finally, the facts stipulated that Mr. Small was negligent in his operation of the parking facilities because he only allowed one exit to be operational, despite the facility having two exists and much of Mr. Small's staff expressing concern that the second exit remained barricaded.

Under *Rodriguez v. Town of Cottonwood*, the Franklin Court of Appeals held that the language in §41-6 of the Act has been interpreted to refer only to "operation" or "maintenance," and not supervision, of state facilities. It is stated that Mr. Small was negligent in his operation of the parking facility, thus falling within the limitations of the Act. While Mr. Small undoubtedly was negligent in his supervision of the parking facilities on the day of the incident, his negligent supervision alone isn't what waives immunity for the state. Mr. Small's negligent operation of the facilities is what imputes liability to the state. The Library indicates multiple studies, observations, and statements from employees of the parking facility that leaving barricades in place to block the second exit was negligent, and would ultimately lead to an accident. Ms. Klein alleges that had both exists been open, the accident would not have occurred. The allegations of negligence stem from Mr. Small's operational decision (negligence) to utilize only one exit.

A final defense that may be raised by the State of Franklin is that the parking facility, although adjacent to the State Fairgrounds, was not part of the fairgrounds and thus does not qualify as a state building or park under the meaning of §41-6. The court, in *Farrington v. Valley County*, held that a plain reading of the Act "discern[ed] no intent to exclude [...] liability for injuries arising from defective or dangerous conditions on the property surrounding a public building" or park. In *Farrington*, the court was considering the County Housing Authority's responsibility to keep the common areas around public housing safe from roaming dogs. It is certain that the court would find the state-managed parking lot attached to the state fairgrounds to be within the meaning of "state buildings and parks" for the purposes of waiver just as it found common areas of county housing to be within the definition. Further, the court ruled that the Housing Authority's (the state actor in *Farrington*) liability would rest on if it knew, or should have known, of the issue of roaming dogs in the

housing complex. That isn't an issue in the instant case as it was clear that Mr. Small had been warned on multiple occasions of the dangers of allowing only a single exit from the facility and yet refused to open the second exit. Mr. Small's knowledge, as an employee of the state, will be imputed to the state.

The State of Franklin will be liable to Janet Klein under the Franklin Tort Claims Act so long as she met the notice requirement's laid out in said statute.

Did the State of Franklin receive sufficient notice as required by the Franklin Tort Claims Act?

Under the Franklin Tort Claims Act, "[e]very person who claims damages from the State [...] shall present [...] claims against such local governmental body, within 90 calendar days after an occurrence" that would be a claim against the State of Franklin and would require Franklin to waive sovereign immunity of the Tort Claims Act. The written notice must also state "the time, place, and circumstances of the loss or injury."

Under the Act, claims may be addressed to the Risk Management Division if the claim is against the State. Here, Ms. Klein has a claim against the state and she provided written notice to the Risk Management Division of said claim on August 30, 2020 for the injuries she suffered on May 23, 2020. There is a question as to whether or not the Risk Management Division of the state is the appropriate division to be notified. The Act states a number of agencies that may receive notice or provides for notice to "the head administrative head of any other local governmental body for claims against such local governmental body." Thus, if there was a governmental body for "State Parks and Fairgrounds," Ms. Klein should have sent her notice there.

Additionally, the Act requires that written notice must be provided to the required state agency within 90 days, and because Ms. Klein's letter was dated August 30, 2020 (more than 3 months after the occurrence on May 23, 2020), she failed to provide timely notice.

The State of Franklin would thus be immune from suit. However, §41-16(b) of the Act states that any suit which immunity has been waived for shall not be heard unless notice has been given, or unless the governmental entity had actual notice of the occurrence. The question is therefore whether or not the state had actual notice of the occurrence.

In *Beck v. City of Poplar,* the court interpreted the "actual notice" portion of the Act, as seen in §41-16(b). The court held that actual notice "means that 'the *particular agency that caused the alleged harm must have actual notice*.'" The state further held in Beck that a police or other report may serve as actual notice as required by §41-16(b). However, the court clarified that the report itself must indicate that there may be a claim against the governmental entity.

In the instant case, there are a few opportunities when the governmental agency managing the fairgrounds and parking facility may have been put on notice. First, there was a state agent there, Mr. Small, who arrived at the scene just moments after the accident and witnessed Ms. Klein swearing and threatening suit against the state. As an employee of the state, Mr. Small's knowledge will be imputed to the state. Ms. Klein's statements were also rather explicit regarding her intentions to sue, therefore putting Mr. Small (and the state) on notice.

There was also a Traffic Collision Report created on the date of the accident. The collision report itself would not have been enough to impute actual knowledge on behalf of the appropriate governmental entity. However, located within the report, was a recorded statement from Ms. Klein where she stated, "The State will pay for this!" The language "the state will pay" is clearly enough to alert the state that there may be impending litigation. However, it is important that the state still received actual notice within the 90 days, as set out by the Act and the holding in *Beck*. Fortunately for Ms. Klein, Mr. Small's email to Mr. Thomas on September 27 stated that he received the Traffic Collision Report the week after the accident. A week after the accident is within the 90 day timeline, and, as stated above, the report included a notice that the state may be sued. This is different than the accident

report Beck, where the report only stated the date, time, and location without providing any indication that the City would be held liable.

For the above reasons, the State of Franklin did not receive written notice as required under §41-16(a) of the Act, but was put on actual notice (as required under §41-16(b)), in the form of the Traffic Collision Report, within 90 days of the occurrence. Therefore, the State of Franklin will be deemed to have been put on notice of the occurrence and will have waived sovereign immunity under the Tort Claims Act.

MPT – SAMPLE ANSWER 3

MEMORANDUM

October 5, 2020

To: **George Bunke**

From: **Examinee**

Re: **Janet Klein Matter**

Issue 1: Is the State of Franklin protected from liability in this case by sovereign immunity?

No, the State of Franklin is not protected from liability in this case by sovereign immunity. The Courts will likely waive immunity in this case in favor of Ms. Janet Klein.

The issue here is whether the State of Franklin would be vicariously liable for their employee's, Mr. Small's, negligent supervision and operation of the fairground parking lot

(Lot B specifically) on the night of May 23, 2020 during the Hopps Rodeo at the annual State Fair. Ms. Klein is arguing that because Mr. Small was negligent in operating, maintaining, and supervising the parking lot B that his negligence caused the parking lot B to be unsafe and resulted in Ms. Klein's three-car vehicle accident.

First, we need to examine the law in the jurisdiction that is applicable here. The Franklin Tort Claims Act (hereinafter "Act") applies here, specifically Sections 41-1, 41-4, 41-6, and 41-16. As to this first issue, we will cover Sections 41-1, 41-4, and 41-6. Section 41-16 will be covered in Issue 2 below. Section 41-4 states the Legislative public policy of Franklin that they have this Act is to protect the state and local governmental entities and public employees from being liable within the limitations of this Act. The Act goes on to say that any state and local governmental entity and any public employee acting within the scope of employment are granted immunity from liability for any tort except those waived in Sections 41-5 through 41-15. This is where Section 41-6 comes in to our facts. Section 41-6 states that the immunity granted in the Act is waived when "bodily injury, wrongful death, or property damage is caused by the negligence of public employees while acting within the scope of their duties in the **operation or maintenance** of any building or public park."

Now that we have the rule, let's apply the cases to these rules. The Supreme Court in Farrington (2015) held that the Plaintiff won. The Defendant in this case is the Valley County Housing Authority (hereinafter "Defendant"). Defendant argued that the Tort Claims Act does not apply to grounds and only applies to buildings and parks. Section 41-6 states that the Franklin legislature intended to ensure the safety of the general public by imposing on public employees a duty to exercise reasonable care in maintaining premises owned and operated by governmental entities. There is no intent to exclude from that waiver liability for injuries arising from defective or dangerous conditions on the property surrounding a public building. The Tort Claims Act waives immunity for unsafe conditions in buildings or on the grounds surrounding the buildings. The Court held that loose dogs running around could represent an unsafe condition upon the land and therefore, the Court held for the Plaintiff here and waived immunity, allowing the Valley County Housing Authority to be sued. This case here is related to this case because the grounds of the parking lot are involved here.

There was no building or park involved in this case. Rather, it was a parking lot. The Court will establish that Franklin legislature intends to ensure the safety of the general public by imposing on public employees a duty to exercise reasonable care in maintaining premises owned and operated by governmental entities. Here, Mr. Small had the duty to exercise reasonable care in maintaining premises of the parking lot. IF he removed the barricades and allowed for a more open parking lot and easier access to the exits, reasonable care may have been established. But he did not. Instead, he kept the barricades there for over two years.

Here, the facts state that due to this car wreck, Ms. Klein suffered severe injuries, serious back injury and a broken wrist. She also suffered car damage and had to pay a $500 deductible for her insurance to cover the cost of repair. She has missed 3 weeks of work due to these injuries. She is a physical therapist, so she obviously needs her back and wrist and her body to be in great shape or at least good shape in order to conduct her activities on the client and to help restore her clients' physical abilities. Ms. Klein also cannot engage in usual activities and she has suffered $57,500 in expenses as a result of lost income, medical expenses, and her auto insurance deductible. She wants to recover those expenses and for the pain that she has suffered. These facts definitely go to Ms. Klein's favor in winning this suit because it is clear that according to section 41-6 of the Act that she has suffered not only bodily injury but also property damage as a result of Mr. Small's negligence while acting within the scope of his duties in the operation of the parking lot B on May 23, 2020. The Collision Report also states these injuries and property damage.

The next issue that we need to discuss focuses on the case of Rodriguez. In this case, the Franklin Court of Appeals held that the Town of Cottonwood is not liable and would grant them sovereign immunity. Here, a child was injured on playground as a result of negligent supervision of the Camper employees. The Court states that language in Section 41-6 refers only to the "operation" or "maintenance" that results in a condition creating a risk of harm and that no waiver of immunity is available for negligent performance of an employee's duties **unless the negligent performance of those duties resulted in a dangerous or defective condition in a public building or public park**. The Court held that the liability

cannot be based solely on negligent supervision. The Court explained that negligent supervision is a tort at common law, but it is not one of the torts for which immunity is waived by Section 41-6 of the Tort Claims Act. Here, the facts make it clear that Mr. Small's operation and maintenance of Lot B resulted in the dangerous and defective condition in the public parking lot. The facts state that there is only one exit was available. The road is a single dirt road funneled into one exit. Already, we can tell this is dangerous because the rodeo is the "most well-attended event at the annual State Fair" and in fact was sold out this year. Also, according to the investigator's report, the stadium holds 6,000 seats and the parking lot holds 5,000 cars so there is definitely a need for more than one exit since there are so many cars. Thus, it would make sense to have more than one exit open. The facts state that the parties were driving at a reasonable speed so we know it is not the drivers' fault here or Ms. Klein's fault given their attentive driving (stated in Collision report).

In addition, in the investigator's report, he refers to two employees he spoke to regarding this accident. By his observations, he could tell there were two exits - Central Ave and Lomas Blvd (one used here). They are both paved exists; however, only Lomas is used and Central was barricaded by galvanized steel barriers that were not affixed to the ground and could be moved if desired. In addition, there is only one gravel roadway through the center of Lot B that leads to both exits. ON the night he attended the concert, the investigator also saw that only the Lomas Blvd exit was open and that Central Av exit was again barricaded. The investor spoke to Ed Cranston, who also worked during the night of the wreck. He was nearby, saw it, and remembers Janet yelling. Ed said that he told Randy Small, his supervisor, that the barricades to Central Av exit should be moved so that the Central Av can be used. He states that the Central Av exit has been barricaded since he started working for the parking bureau 2 years ago. The investigator also spoke to Emma Moore and she said that the barricades have been in place for "years." She states that she thinks the accident was the result of Randy Small's, her supervisor, negligent supervision of her team and the parking lot operations. She and other staff members warned Randy about it causing an accident one day. She states that Randy is a terrible supervisor and is super lazy, but that she is not allowed to move barricades without Randy (her supervisor's) permission. These facts clearly state that not only is the parking lot clearly tight and jammed-pack, but

by Randy not opening the Central Av exit that is negligently supervising the parking lot and causing it to be negligent operated and maintained. Thus, the immunity would be waived here and the State of Franklin would be liable due to Randy Small's negligence of maintaining and operating Parking Lot B.

Issue 2: Did the State of Franklin receive sufficient notice as required by the Franklin Tort Claims Act?

Yes, the State did receive sufficient notice as required by the Act. The issue here is whether Ms. Klein provided sufficient notice to the State of Franklin as required by the Franklin Tort Claims Act.

The Act provides that every person shall present to the Risk management Division for claims against the State within 90 calendar days after an occurrence giving rise to a claim for which immunity has been waived under the Act. The notice must state the time, place and circumstances of the loss or injury.

The Supreme Court of Franklin held in Beck in 2013 that the City was granted the motion for summary judgment because the accident report was not sufficient written notice to notify the City that a lawsuit could be coming their way. The court held that 41-16(a) requires the governmental entity to be given *written notice* of the alleged tort. The Supreme Court continues to say that section 41-16(b) provides an exception to this requirement in (a) where the governmental entity allegedly fault had actual notice of the tort. The Court says that the purpose of 41-16(a) and (b) is "to ensure that the agency allegedly at fault is notified that it may be subject to a lawsuit." The Court states that a police report or other accident collision report could serve as actual notice under 41-16(b) but only where the report contains information that puts the governmental entity allegedly at fault on notice that *there is a claim against it.* The basic purpose that Ms. Klein would need to meet based off of this case is to provide written notice to the applicable parties under the Tort Claims Act in order to reasonably alert the State to the necessity of investigating the merits of a potential claim

against it and to give the State and applicable governmental entity notice of a likelihood that litigation may ensue.

Here, Ms. Klein wrote to the Risk Management Division on August 30, 2020, so just under 45 days from the date of the occurrence, May 23, 2020. The time is sufficient. She notified the proper entity as well. In the notice, she provides she is suing the State for injuries she suffered and clearly describes the accident as well as all of her injuries and losses due to the accident. She goes on to state that the Hopps Rodeo is the most well-attended event and that the parking is crazy because there is only exit available and there should be two available or more or a wider roadway to exit. She also states Mr. Small's name and says that because of his negligent supervising of the parking lot and not opening the other exit after the rodeo (especially because the barricades can be removed, as proven and stated by the two employees that the Investigator spoke to and also the Investigator's own perception and when he actually saw that the barricades could be removed.

To clearly state again, Ms. Klein must present to the Risk management Division for claims against the State within 90 calendar days after an occurrence giving rise to a claim for which immunity has been waived under the Act. She did so here by writing to the Risk Management Division on August 30, 2020, so just under 45 days from the date of the occurrence, May 23, 2020. The notice must state the time, place and circumstances of the loss or injury. The notice stated that the wreck occurred on Memorial Day weekend at the Hopps Rodeo, and she also clearly states the circumstances of the loss and injury she recovered. Thus, Ms. Klein has provided sufficient and proper notice to the State of Franklin.