**MPT 1**
**February 2021**

***In re Mills*** **(February 2021, MPT-1)**
In this performance test, the client, Charlotte Mills, is considering whether to pursue legal action against Ramble Group (Ramble) for breach of contract. The dispute arises from an event planning engagement that Mills undertook for Ramble. After Mills had begun preparations for the event (a spring festival with a 5k run), Ramble decided to use another event coordinator. The task is to draft an objective memorandum analyzing whether there is an enforceable contract between Mills and Ramble and what damages Mills may be able to recover in an action for breach of contract. Examinees must consider the import of Mills's written proposal (which was not signed by either party) and review the email exchanges between Mills and Ramble's owner, Kathryn Burton, to determine whether the elements required for contract formation are present. The File contains the instructional memorandum from the supervising attorney, a summary of the client interview, the written event planning proposal, and email correspondence. The Library contains three Franklin appellate cases.

Memorandum

To: Isabel Banks

From: Examinee

Date: February 23, 2021

Re: Charlotte Mills matter

**Issue 1:** Was there an enforceable contract between Mills and Ramble?

**Analysis:**

*Formation*

The elements for formation of a valid contract are offer, acceptance, intent to create a contract, and consideration. (Daniels Fr. Ct. App. 2011). In order for acceptance and intent to be found, there must be a meeting of the minds on all material matters. (Id.). If the parties intend to reduce their proposed agreement to writing before it can be considered complete, there is no contract until the formal agreement is signed. (Green Fr. Ct. App. 2005). In Green, there was evidence that the parties intended to be bound only by a written contract, and the preliminary negotiations never reached the point where there was a meeting of the minds on all material matters. (Id.). There is no meeting of the minds while the parties are merely negotiating. (Id.). To be final, the agreement must extend to all terms that the parties intend to introduce, and material terms cannot be left for future settlement. (Id.). However, when all parties agree, either orally or in writing, upon all the terms and conditions of an agreement with mutual intention that it shall be binding, the mere fact that a formal written agreement has not yet been prepared or signed does not alter the binding validity of the agreement. (Daniels Fr. Ct. App. 2011). Whether an agreement not reduced to a formal signed

writing is binding on the parties is determined from all the surrounding circumstances, giving effect to the mutual intention of the parties as it existed at the time the agreement was formed. (Alexander Fr. Sup. Ct. 2008). The greater the complexity and importance of the transaction at issue, the more likely it is that the informal communications are intended to be preliminary only. (Haviland Fr. Ct. App. 2009).

Additionally, in Jasper, the court held that the specificity required for an enforceable contract depends on the circumstances. (Jasper Fr. Ct. App. 2014). There, the court held that the contract was enforceable despite the design specifications, price, and time of performance not yet being agreed upon because the contract contained a right of prior approval, which is construed as implying a covenant of reasonableness. (Id).

Statements by both parties may be sufficient evidence that the parties intended to be bound. (Daniels Fr. Ct. App. 2011). In Daniels, the court held an emailed acceptance of an offer to be sufficient acceptance and the other party's statement that they wanted to "get this thing rolling" sufficiently clear that both parties intended to be legally bound by their agreement despite it not yet being reduced to a formal writing signed by both parties. (Daniels Fr. Ct. App. 2011).

Here, Charlotte's June 4, 2020 email to Kathryn consisted of an offer, wherein she attached her proposal for coordinating the Springfest 2021 event Kathryn requested. Kathryn accepted that proposal in her June 7, 2020 email wherein she stated, "I've reviewed your proposal - everything looks good." Kathryn asked for clarification about Charlotte's fees, and after receiving that clarification, Kathryn sent an email on June 8, 2020 to Charlotte stating, "That sounds fair."

Although some material terms were missing from the proposal sent by Charlotte (venue and date), the parties agreed to those terms in later emails. Those terms were determined by email. Specifically, the parties' June 8 and 9 emails establish that the event was to occur on the first weekend in April at either Discovery Park or Garden Grove Promenade. This is sufficiently definite to give rise to a legal obligation.

The parties had moved past negotiations and demonstrated an intent to be bound by their agreements despite that agreement not being reduced to a formal writing. Charlotte proceeded with the pre-event planning and managing the logistics for the event and kept Kathryn informed throughout the process. At no point did Kathryn oppose the actions taken by Charlotte. Charlotte's June 9 email stating, "we really need to get going on this" and Kathryn asking Charlotte to get started on the website design demonstrate Kathryn's intent to be bound by the contract.

The element of consideration is met because Kathryn paid the agreed-upon deposit to Charlotte, and Charlotte proceeded with her performance on the contract. The parties also agreed on the price structure and that Kathryn would reimburse Charlotte for her expenses incurred in planning the event. Further, the complexity of the event at issue does not support an argument that Kathryn only intended to be bound by a formal written agreement. This agreement is unlike agreement in Haviland, which involved a multi-million dollar contract. Here, the agreement only involved tens of thousands of dollars, not millions.

The statements made by email here were similar to those made in Daniels and suggest that the parties intended to be bound by their agreements reached by email. Because all elements necessary for a contract are present here, Charlotte is able to demonstrate that a valid contract was formed.

*Parol Evidence Rule*

The parol evidence rule prevents a court from considering prior or contemporaneous agreements that are inconsistent with the terms in the written agreement. (Thompson Fr. Ct. App. 2017). When the parties intend to reduce their entire agreement to writing, the terms of the agreement are to be ascertained from the writing alone. (Id.). However, where an entire agreement is reduced to writing, extrinsic evidence will be admissible for the sole purpose of interpreting ambiguous or uncertain contract terms. (Id.). Where the parties do not intend to reduce their entire agreement to writing, both

written and oral communication may be admissible where relevant to prove the terms of the contract. (Id.).

A written agreement is a final expression, and the parol evidence rule bars extrinsic evidence related thereto, when both parties have signed it. (Id.). The court in Thompson held that when contracting parties have entered into a valid written agreement dealing with the particular subject matter, and the evidence indicates that the parties intended that agreement to be the final expression of their agreement (as by both parties having signed it), the written contract supersedes all negotiations concerning its matter that preceded or accompanied the execution of the contract. (Id.). In Thompson, the alleged oral agreement concerned "exactly the same subject matter as the underlying written employment contract," "directly contradict[ed] a specific provision in the agreement," and would have added "a material term that the parties did not reduce to writing." (Id.). There, the court held that because the alleged oral agreement was inconsistent with the written contract and the contract contained no ambiguous or uncertain terms, the alleged oral agreement was barred by the parol evidence rule and thus unenforceable.

Here, the emails exchanged and evidence of the parties' telephone conversations will be admissible because the parties did not enter a written agreement consisting of a final expression. Neither party signed the proposal sent by Charlotte and not all material terms were contained therein. However, even if the proposal was considered a final expression, the emails would still be allowed as evidence to clarify an ambiguous term (the price) and to establish the venue and date of the event.

*Statute of Frauds*

An agreement that by its terms is not to be performed within one year from the date of its making is invalid unless it is memorialized in writing and executed by the party to be charged. Here, the contract does not have to be contained in a signed writing in order to be enforceable because the contract terms were to be performed within a year.

Kathryn reached out to Charlotte in June 2020 and the event was to take place in April 2021. Regardless of the exact date the contract is determined to have been formed, it was to be performed within a year because the contact between the parties began less than a year before performance was to occur. Therefore, the Statute of Frauds does not apply here.

**Issue 2:** What damages might Mills be entitled to if she were to sue Ramble for breach of contract?

**Analysis:**

Statutory damages for breach of contract include damages for all detriment proximately caused thereby, or which, in the ordinary course of things, would likely result therefrom. (Fr. Civil Code 100). Unascertainable damages cannot be recovered for breach of contract. (Id.). Sect. 100 has been liberally construed to prevent defendants from avoiding the consequences of their actions. (Daniels Fr. Ct.  App. 2011). So long as there is certainty as to the fact of damages, damages that can be calculated with a reasonable certainty will be upheld. (Id.). In Daniels, the court held that expenses incurred prior to the breach and the benefit of the bargain that the nonbreaching party would have realized absent the breach were ascertainable damages proximately caused by the breach. (Id.).

Here, Charlotte's damages can be calculated with reasonable certainty and the fact of damages will be established by the breach of contract. Charlotte's out of pocket expenses at the time of breach were $3,000, for which the parties agreed she would be reimbursed. Her expected benefit of the bargain was $15,000 for the first 1,000 general admission registrations and an additional $2 per additional registrant and an additional $1 for every fun-run-only registrant. Kathryn's June 7, 2020 email indicates that the prior year she had 2,500 general admission sales and 500 fun-run-only registrants, and that she anticipated that amount doubling this next year.

Therefore, the court should determine that Kathryn is entitled to her $3,000 expenses plus her anticipated lost profit for the event: $15,000 plus additional fees based on registration numbers minus her additional expected costs and the $2,000 deposit already paid by Kathryn. The court may base the fees for additional registrants on Kathryn's anticipation of doubling her participants this year or on the participation from last year. There is no issue with failure to mitigate here because Charlotte attempted, unsuccessfully, to obtain another gig for the date at issue.

**MPT 2**
**February 2021**

***State v. Kilross*** **(February 2021, MPT-2)**
This performance test requires the examinee to draft a persuasive argument in support of a motion to exclude the use of certain evidence at trial. The State of Franklin has charged the client, Bryan Kilross, with robbery of a liquor store. Because Kilross has no alibi witnesses, it is likely that he will have to testify in his defense, but defense counsel is concerned that Kilross's prior felony conviction for robbery will prejudice his case. The examinee is asked to draft the argument in support of a motion to preclude admission of the prior conviction as impeachment under Franklin Rule of Evidence 609. The File contains the task memorandum from the supervising attorney, the firm's guidelines for writing persuasive briefs, the transcript of the client interview, a file memorandum from an investigator, a copy of the indictment for the previous robbery charge, and a transcript of the plea hearing for that charge. The Library contains the Franklin statutes defining the crimes of theft and robbery, Franklin Rule of Evidence 609, and two appellate cases.

**PROPOSED MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS**

**To: Marie Smith**

**From: Associate**

**Date: 23 February 2021**

**Re: State v. Kilross**

I. Mr. Kilross's prior conviction for robbery should not be admitted into evidence under FRE Rule 609, as its probative value does not outweigh its prejudicial effect and the prosecution will not be able to prove an element of deception.

**A. The court should refuse to admit evidence of Mr. Kilross's prior conviction for robbery under FRE Rule 609(a)(2), as the conviction does not fall under the category of crimes that must be admitted due to their element of dishonesty and the prosecution will not be able to otherwise prove an element of deception.**

Pursuant to FRE 609(a)(2), a prior criminal conviction must be admitted in order to impeach a witness if, regardless of the severity of the offense, the court can readily determine that the elements of the crime prove a dishonest act or false statement. In *State v. Thorpe* (2012), the Franklin Supreme Court held that the trial court abused its discretion when it admitted the defendant's guilty pleas for prior robbery charges and was impeached, as the prosecution did not sufficiently prove that an element of deception was met.

The court in *Thorpe* held that the word dishonesty has two meanings, one broad and one specific. The broad meaning is that of a breach of trust, and the court held that robbery would fit into this description. However, the court also held that, since the Franklin Rules of Evidence are identical to the Federal Rules of Evidence and Congress's intent can be examined in order to interpret a rule, Rule 609(a)(2) should apply only to crimes that fit a narrower definition of dishonesty, as was Congress's intention in establishing Federal Rule of Evidence 609. This narrower definition of dishonesty is "deceitful behavior, or a disposition to lie, cheat, or defraud." *Thorpe*. The court in *Thorpe* held that robbery does not fall into this definition, as it is a crime of violence and not of deceit. The court held that Franklin's statutory definition of robbery does not specifically include any requirement that the prosecution prove an act of dishonesty, nor does the predicate offense of theft.

A recent amendment to the Franklin Rules of Evidence states that a prior conviction may be used for impeachment purposes if the facts in the record specifically establish an act of dishonesty. In *State v. Frederick*, the court held that the prosecution sufficiently proved acts of deception needed to use the prior crime to impeach the

defendant, as the defendant admitted at her plea hearing that she had lied to a security officer about shoplifting.

The facts in this case are dissimilar to those in *Frederick* and more closely mirror the facts in *Thorpe*. In *Thorpe*, the defendant pled guilty to two unarmed robberies, and those convictions were used for impeachment under Rule 609. However, as deception is not an element of robbery, the prosecution would have had to sufficiently prove an act of deception in order to impeach Thorpe under Rule 609(a)(2). The court held that they did not do so, as they did not point to anything in the record that established that Thorpe engaged in an act of deception.

Similarly, in this case, the State will not be able to point to anything in the record that proves that Mr. Kilross engaged in an act of deception or false statement when he committed the felony of robbery on May 30, 2013. There is nothing in the language of the indictment that would be sufficient to prove deception. Additionally, there is no language in the transcript from Mr. Kilross's plea hearing on July 17, 2013 that would be sufficient. While the state may attempt to argue that they can prove an element of deception due to Mr. Kilross's co-defendant's statement that he had a gun when in fact it was a toy, this was not a statement made by Mr. Kilross himself. There is nothing from the facts that suggests that Mr. Kilross committed any act of deception or made a false statement during the commission of the robbery in 2013.

Because the element of deception cannot be explicitly proven, the state will not be able to use Mr. Kilross's prior conviction for robbery to impeach him, and the court should refuse to admit the conviction under Rule 609(a)(2).

**B. The court should refuse to admit evidence of Mr. Kilross's prior conviction for robbery under FRE Rule 609(a)(1)(B), as the probative value of the evidence does not outweigh its prejudicial effect to Mr. Kilross.**

Pursuant to FRE Rule 609(a)(1), a prior criminal conviction must be admitted for impeachment purposes if it is punishable by imprisonment for more than one year and the probative value of the evidence outweighs its prejudicial effect to the defendant. In *State v. Hartwell*, the court laid out a four factor test that needs to be considered when weighing the probative value against the prejudicial effect. The four factors are the nature of the prior crime, the age of the prior conviction, the importance of the defendant's testimony, and the importance of the defendant's credibility. This is a heightened balancing test that creates a preference for exclusion. *Hartwell.* Mr. Kilross is charged with armed robbery, which is a felony and therefore falls under the type of crimes covered by FRE Rule 609(a)(1). Therefore, the court should use the *Hartwell* factor test in determining whether to admit his prior conviction for robbery.

The first factor is the nature of the prior crime. The court should consider the impeachment value of the prior conviction and its similarity to the charged crime. The impeachment value means how probative the prior conviction is of the witness's

character for truthfulness, and crimes of violence typically have a lower probative value, as they do not imply any dishonesty. Additionally, the more similar the prior crime is to the present charge, the stronger the grounds for exclusion, as admission of a similar offense is more likely to lead the jury to believe that just because a defendant was convicted before, he probably also committed the same offense again. Mr. Kilross is charged with armed robbery, which is a crime of violence and therefore does not imply dishonesty. Furthermore, the crime of armed robbery is virtually identical to his previous conviction of robbery. Therefore, the first factor leans heavily towards exclusion of Mr. Kilross's prior conviction.

The second factor is the age of the prior conviction. Although convictions over ten years old are presumptively excluded, the passage of time can reduce a newer conviction's probative value, "especially where other circumstances suggest a changed character." *Hartwell.* Mr. Kilross's prior conviction is from eight years ago, which is already a relatively long amount of time, putting the conviction at the far end of the ten year spectrum. Mr. Kilross has also had a spotless criminal record since then, going eight years without being charged with another crime, and receiving only a couple of speeding tickets for which he promptly paid the fines. He has also been working at a warehouse for a long period of time, where he has worked his way up to a shift supervisor position. Finally, he showed remorse for his actions during the prior crime, stating at his plea hearing in 2013 that he was very sorry, knew his actions were wrong, and had already paid back all of the money to the store as restitution. Because of all of these facts, the second factor also leans heavily towards exclusion of Mr. Kilross's prior conviction.

The third factor is the importance of the defendant's testimony. If the defendant's only rebuttal comes from his own testimony, then the court should consider whether the danger of impeachment would prevent the defendant from taking the stand to testify. In this case, Mr. Kilross is presenting an alibi defense. However, his alibi is that he was driving around by himself, and in order to present this defense to the jury, he must rely strictly on his own testimony and take the stand. His girlfriend, Janice Malone, stated that she did not have any contract with Mr. Kilross on the night in question after around 6:00 p.m., and she will not be testifying. Therefore, the third factor leans heavily towards exclusion of his prior conviction.

The fourth factor is the importance of the defendant's credibility. When it is the focus of the trial, the significance of admitting a prior conviction is heightened. Here, for the reasons stated above, Mr. Kilross's credibility is a central issue in the case. The only other person testifying is the liquor store clerk who identified Mr. Kilross in a lineup. Like in *Hartwell,* Mr. Kilross's credibility is important to the case, but all of the other factors weigh against the use of the prior conviction.

This case is very similar to that of *Hartwell.* In that case, the defendant was charged with a crime of violence identical to his prior conviction; the prior conviction was six years old and the defendant had a spotless record since then; the defendant's testimony was critical to his case; and the defendant's credibility was the central issue. The court

held that the state had failed to meet its burden of establishing that the probative value of admitting the prior offense outweighed its prejudicial effect. Similarly, in this case, the elements of the four factor test show that the prejudicial effect of admitting Mr. Kilross's prior conviction would far outweigh any probative value.

Therefore, the state will not be able to meet the burden of establishing that the probative value would outweigh the prejudicial effect, and the court should refuse to admit Mr. Kilross's prior conviction under FRE Rule 609(a)(1).

## MEE Question 1

A woman owns and operates a food-truck business. Business has been good. The woman asked a man she knew to work with her. "It would be great if you'd help with my food-truck business. There is just not enough time in the day. I need someone to do the early morning produce shopping for me at the farmers' market. Are you interested?"

The man has a job as a night watchman and had been looking for a way to make extra money. He answered, "Sure, I'm interested. Text me at night what type of produce you want me to buy in the morning when I get off work. The market opens just as I get off my night shift. I could stop by the market with my car and then drop off the purchases at your truck." He then asked, "And how much would I be paid?"

The woman responded, "Texting works for me. I'll go to the market with you the first few times to give you a general idea of what I'm looking for. But then you'd be on your own, making the choices of which vendors to use and which produce to buy. Please use your own credit card to make the purchases, and I'll reimburse you."

Then the woman paused and continued, "As for pay, I can afford to pay you only $20 per daily delivery. I know that's a bit low, but the business doesn't have the cash flow yet. So, my offer to you is that, in addition to $20 per day, I will give you 10% of the food truck's profits."

The man thought for a bit and said, "Okay. It's a deal." They shook hands.

For the first few months, the arrangement worked well. The woman sent texts to the man each night indicating the type of produce to buy, and the man selected and purchased the requested produce in the morning from vendors he selected. He then dropped the produce off at the woman's food truck. The man paid the vendors with his own credit card and later was reimbursed by the woman. Except for the man's purchase and delivery of the produce, the woman did all the work related to the food-truck business.

One morning, while parking at the market, the man negligently ran his car into a farmer's stall, causing extensive damage. The man truthfully told the farmer that, although the accident was the man's fault, he had no money to pay for the farmer's damage and his automobile insurance had lapsed.

The farmer wrote the woman a letter demanding that she pay him for the losses caused by the man's negligence. The woman has asked her attorney what legal relationship she has with the man and what the liability implications would be in each case.

1. (a) Are the woman and the man partners in the food-truck business? Explain.

   (b) Assuming that the woman and the man are partners in the food-truck business, would the woman be liable to the farmer for the damage proximately caused by the man's negligence? Explain.

2. (a) Is the man an employee of the woman? Explain.

   (b) Assuming that the man is an employee of the woman, would the woman be vicariously liable to the farmer for the damage proximately caused by the man's negligence? Explain.

3. (a) Is the man an independent contractor for the woman? Explain.

   (b) Assuming that the man is an independent contractor for the woman, would the woman be vicariously liable to the farmer for the damage proximately caused by the man's negligence? Explain.

This is a question that primarily deals with tort law and with the law of partnerships.

1. Partnership

(a) Partners are co-owners of a business for profit. The default status of a partnership is that of a general partnership. There are a number of factors that are together considered and weighed to determine whether a partnership has formed. These factors get at whether the parties are functioning as co-owners. It is important to note that there is no intent required to form a partnership or to join a partnership as a partner. Rather, there is an objective test of whether the relationships amount to partnership relationships. No official documentation or filing is necessary for partnership formation.

One particularly important attribute of co-owners is that they share the profits/revenue. Here, the man does in fact receive 10% of the food truck's profits. At first glance, this seems to indicate that the man might be a partner; however, it is noteworthy that this is a very small portion of the profits, which tends to weigh in favor of there not being a partnership in light of the below additional factors. In addition, it is noteworthy that the woman made the statement that she is using this profit-sharing because she knows the base compensation of $20 per daily delivery is a bit low. This seems to suggest that the profit-sharing as payment is due to the woman's lack of liquid assets at this time. In sum, a small share of profits is itself not wholly determinative of the question of partnership.

Another consideration is whether the alleged partner shares in covering expenses. For instance, a person offering a space rent-free or covering a significant portion of expenses is good indication that person is a partner. Here, the man does not share in covering expenses. It is true that he initially covers the cost of purchases by using his own credit card. However, he is reimbursed for these charges. This tends to show that the man is not a partner.

Another factor to consider is who does the work of the business. While in some cases

one partner might do almost all the work and another very little, it is a consideration. Here, the woman did all of the work related to the food truck business except for the man's limited purchase and delivery responsibilities. This leans in favor of no partnership.

Here, the woman and man do not have the characteristics of a partnership relationship. The man and woman are not partners in the food truck business.

(b) Partnership liability.

In a general partnership, which the case here, partners are held jointly and severally liable for torts committed by partners dealing in the course of the business. This means that each partner may be held personally liable for the torts of his/her partners. However, the doctrine of exhaustion has a protective effect over the personal assets of the partners. That is because exhaustion doctrine requires that a claimant pursue relief through the assets of the partnership before going after the partners' personal assets. In a limited partnership, the limited partner is liable only for the percent of his investment in the partnership.

Here, if the woman and man were partners, yes, the woman would be liable to the farmer for the damage proximately caused by the man's negligence, as the man would be her partner. While the farmer would first have to sue for the partnership's/business' assets, once the assets of the food-truck business were gone, the woman, as partner, could be held personally liable. She would be held jointly and severally liable with her partner, the man. The woman would have the option to later sue the man as an individual for indemnification or damages.

2. (a) and 3. (a) The question is whether there is an employer-employee relationship formed between the woman and the man, respectively. This is closely related to the question of whether the man is an independent contractor for the woman. In distinguishing between whether there is an employer-employee relationship or

independent contractor relationship, it is most helpful to look at the degree of control the employee or independent contractor has in terms of determining the **how** (the means and manner) of performing responsibilities.

Here, the man exercises a fair degree of control over the manner of how he performs. For instance, the woman said, "you'd be on your own making the choices of which vendors to use and which produce to buy." This is important because after the woman indicates the type of produce, the man purchases it independent of specific instructions from the woman. This is more akin to an independent contractor.

The man makes the purchases with his car and his own credit card, meaning he also uses his own equipment/instruments in performing. An independent contractor is more likely to use his own equipment, whereas an employee is more likely to use equipment/supplies owned or possessed by the employer. This leans in favor of the man being an independent contractor.

Other factors are that an independent contractor generally has specialized skills and tend to be paid higher/based on performance. As the man does not use specialized skills in his performance, this would lean toward the man being an employee.

Nevertheless, the man's independence in the day-to-day performance of his duties is weighted most heavily, along with the using of his own instruments. This favors the man being an independent contractor.

In sum, the factors lean toward the man NOT being an employee of the woman. The factors lean toward the man being an independent contractor for the woman.

2. (b) The question is whether this employer, the woman, may be held vicariously liable for the negligence of her employee, the man.

An employer may be held vicariously liable for negligence by an employee if that

employee was acting within the scope of his employment when negligent. If an employee is largely acting in the scope of his employment with only a small deviation, this is still considered within the scope of employment, and the employer is still liable. A larger deviation, a frolic, is considered outside the scope of employment and the employer is not liable.

Here, the man's alleged negligence occurred when he was parking at the market, which is where he conducts his duties in the supposed employer-employee relationship. This is squarely within the man's scope of employment.

For assessing employer liability, it is important to consider whether the employee was acting without permission. Here, the man had the woman's permission to go to the market as an employee. He was carrying out the duties of the employment to make purchases and deliveries. The fact that the man was acting within the scope of his employment, with permission from the employer, and was executing the duties of his employment support that the woman as employer will be held liable for the negligence of the man in his role as employee under the doctrine of respondeat superior ("respond to the master").

It should be noted that employer liability for an employee's intentional torts is different. However, because this is a negligence claim, this rule does not apply here.

3. (b) Generally speaking, it is more common that an employer will be held for liable for the negligence/torts of their employer than it is that they will be held liable for the negligence/torts of an independent contractor. This makes sense policy-wise because independent contractors have more freedom and control to determine how they execute their duties. The general rule is that one is not responsible for the negligence/torts of an independent contractor.

One exception can occur if the woman holds out the man as an employee. Here there was nothing to indicate that this occurred to the injured man such as through the use of

logos on clothing or vehicles, use of a title or powers, or otherwise. There were no logos; he used his own truck; and indicated he would use his insurance policy. Thus, the general rule applies and the woman would not be liable to the third party, assuming the man is an independent contractor.

## MEE Question 2

On July 1, 2015, Testator duly executed a typewritten will that had only the following three dispositive provisions:

1. I give the portrait of my grandparents to my brother, Adam.

2. I give my antique bookcase to my sister, Beth.

3. I give all of my tangible personal property not otherwise effectively disposed of to the person I have named in a letter I signed and dated June 15, 2015. I have put that letter in the night table drawer in my bedroom in my home along with this will.

Testator died on February 10, 2019, a domiciliary of State A. Both the typewritten will and the letter of June 15 were found in the night table drawer. In clause 2 of the will, the phrase "antique bookcase" had been scratched out by Testator and immediately above it he had typed in the word "motorcycle." And, on the back of the will, the following language appeared wholly in Testator's handwriting: "I don't want Adam to have the portrait of my grandparents. I want it to go to my first cousin, Charles." No signatures appeared on the back of the will beneath this writing.

In the letter referred to in clause 3 of the will, Testator named his niece, Donna, who is Beth's daughter, as the beneficiary.

Testator's only surviving blood relatives are Adam, Beth, Charles, and Donna. In addition to the portrait of his grandparents, the antique bookcase, and the motorcycle, Testator's only other asset was a bank account with a balance of $10,000.

State A permits wills to be completely or partially revoked by the execution of a subsequent will or codicil, or by physical act or by cancellation when accompanied with an intent to revoke the will or codicil. State A law also provides that "unsigned holographic wills or codicils are valid." There are no other relevant statutes.

To whom should the property in Testator's estate be distributed? Explain.

To whom should the property in Testator's estate be distributed?

The first issue is whether the handwriting stating "I don't want Adam to have the portrait of my grandparents. I want it to go to my first cousin, Charles" is a valid revocation of clause 1. State A law controls the revocation, and states that wills may be completely or partially revoked by the execution of a subsequent will or codicil, or by physical act or by cancellation when accompanied with an intent to revoke the will or codicil. State A law also provides that "unsigned holographic wills or codicils are valid."

A codicil is a writing, in a person's own handwriting, meant to supplement or modify a will. Here, Testator's handwritten statement is a valid codicil because it is wholly in Testator's handwriting and State A allows unsigned codicils as valid.

Testator's writing was also a physical act, which demonstrated his intent to revoke the bequest to Adam because it was expressly stated. Because it is both a valid codicil and physical act with intent to revoke, it is highly likely that clause 1 will be considered revoked and replaced by the codicil. The portrait of the grandparents should be distributed to Charles.

The next issue is whether the bequest of the antique bookcase was revoked.

Here, Testator again engaged in a physical act by crossing out "antique bookcase", and demonstrated his intent to revoke by changing the bequest to motorcycle. The revocation of the antique bookcase bequest to Beth is likely valid.

However, here, the change in the bequest was not accomplished properly. A codicil must be handwritten, therefore the typed word "motorcycle" will not function as a valid codicil. Further, it cannot be a valid subsequent will because it is not attested nor witnessed. The court could allow the revocation, ignore the change, and the antique bookcase and the motorcycle would both pass to the residual unless otherwise accounted for.

The next issue is whether another document may be incorporated into a will by reference. In general, another document which exists at the time of execution of the will, and is reasonably identifiable, may be incorporated into the will by reference.
Here, Testator signed and dated the document before the will was executed, so it was in existence at execution of the will, and the document was located. The document may be incorporated into the will by reference.

Because the document named his niece Donna, who is surviving at the time of distribution, as beneficiary to all tangible personal property not otherwise effectively disposed of, she will inherit the antique bookcase and the motorcycle.

The final issue is the bank account. Because the will does not account for the bank account and it does not fall into the expressly distributed tangible personal property, the bank account will fall into residual and pass through intestacy. The $10,000 will pass to Adam and Beth as Testator's siblings. Testator has no surviving children or spouse. Next in intestacy would be Testator's parents. With no surviving parents, the next would be descendants of the parents. Here, Testator has one brother and one sister, who will take the $10,000 divided equally.

## MEE Question 3

A man was driving his truck on a divided highway in State B when the truck collided with a car driven by a woman. As a result of the collision, the man lost control of his truck, which skidded off the road into a deep ravine. The woman's car was knocked into the highway median and rolled over several times before coming to a stop. The truck and its cargo were damaged beyond repair, but the man was not injured. The woman, on the other hand, suffered serious injuries. A passenger in the woman's car was also seriously injured.

Two lawsuits resulted from the collision.

In the first lawsuit, the man, a citizen of State B, sued the woman, a citizen of State A, in the United States District Court for the District of State A. The man alleged that the woman had caused the accident by negligently changing lanes while he was attempting to pass her and that he, the truck driver, had exercised due care and caution at all times. The man's complaint sought damages of $98,000—the value of the truck, trailer, and cargo. The woman answered the complaint, denying that she had driven negligently and asserting that the man had caused the accident by driving well above the speed limit and failing to look out for other vehicles on the road. The woman raised no other claims or defenses in her answer.

Following a bench trial in which both sides offered evidence as to the cause of the accident and the actions of each party, the judge entered judgment for the woman. The judge issued a short opinion finding, as a matter of fact, that "both the woman and the man operated their vehicles negligently" and that "both were at fault in causing the accident." The judge further correctly concluded, as a matter of law, that the contributory negligence law of State B applied. In addition, the judge concluded that the man could not recover because his negligence had contributed to the accident. The judgment was promptly entered denying all relief to the man and awarding costs to the woman. The man did not appeal, and the judgment became final three months ago.

One month ago, the woman and the passenger joined together in a second lawsuit. In this lawsuit they sued the man to recover damages for the personal injuries they had suffered in the accident as a result of his negligence. Like the woman, the passenger is a citizen of State A. This lawsuit was filed in the United States District Court for the District of State B. The woman and the passenger are each seeking damages well in excess of the $75,000 diversity-jurisdiction threshold, and their claimed injuries warrant such damages. The man has filed an answer denying liability and raising several defenses including that the claims by the woman and the passenger are precluded by the earlier suit.

1. Do the Federal Rules of Civil Procedure permit the woman and the passenger to join their individual claims in a single lawsuit against the man? Explain.

2. Is the woman precluded from bringing her claim as a result of the judgment in her favor in the lawsuit brought by the man in federal court in State A? Explain.

3. Is the man precluded from denying that he was negligent with respect to the passenger as a result of the judgment against him in the lawsuit he brought against the woman in federal court in State A? Explain.

**Joinder**

The Federal Rules of Civil Procedure permit the woman and the passenger to join their individual claims in a single lawsuit against the man. The issue is whether the claims arise out of the same transaction or occurrence.

In order for a federal court to have jurisdiction over a claim, the court must have federal question jurisdiction or diversity jurisdiction. Federal question jurisdiction arises when the claim arises under federal law. Diversity jurisdiction arises when all plaintiffs are diverse from all defendants and when the well-pleaded complaint states a claim for over $75,000. A party is a citizen of whatever state they are domiciled in. A single plaintiff may aggregate multiple claims against a single defendant; however, separate plaintiffs may not aggregate multiple claims against a single defendant. Multiple plaintiffs may join their individual claims against a single defendant when their claims arise out of the same transaction or occurrence so it would make sense to try both claims in the same trial.

Here, the court first must have jurisdiction over the claims. The woman and the passenger are suing the man for personal injuries which is a tort claim, so there is no federal question jurisdiction. However, the court would have diversity jurisdiction. The woman is a citizen of State A and the passenger is a citizen of State A. The man is a citizen of State B. Thus, there is complete diversity between the parties because all of the plaintiffs diverse from all of the defendants. The complaint states a claim for over $75,000, and since the damages are measured from the well-pleaded complaint, the court has diversity jurisdiction. Thus, a court can join these two if they arise out of the same transaction or occurrence because there is jurisdiction. Here, both of the injuries occurred from the same car accident where the woman and the passenger were both in the same car. It would make sense to try both of these at the same trial and they arise from the same transaction or occurrence. Thus, the woman and the passenger may properly join the claims in a single lawsuit.

**Claim Preclusion**

The woman is precluded from bringing her claim as a result of the judgment in her favor in the lawsuit brought by the man in federal court in State A. The issue is whether the woman had a mandatory counterclaim that she failed to raise.

A defendant has a mandatory counterclaim if the defendant has a claim against the plaintiff and the claim arises out of the same transaction or occurrence as the plaintiff's claim. If the defendant does not bring the counterclaim at the time of the plaintiff's claim, he or she is barred from raising it later.

Here, in the first lawsuit, the man was the plaintiff and sued the woman for negligence. At that time, the woman knew that she had suffered serious injuries due to the crash and thus had a counterclaim against the driver. However, the woman did not raise this counterclaim, she simply denied that she had been driving negligently and asserted an affirmative defense that the man had caused the accident by driving negligently. The woman had a mandatory counterclaim that she had to assert at the time of the first lawsuit or she was precluded from raising it in the future. Thus, the woman should be precluded from bringing her claim in the second lawsuit.

**Issue Preclusion**

The man will be precluded from denying that he was negligent with respect to the passenger as a result of the judgment against him in the lawsuit he brought against the woman. At issue is whether he had the opportunity to fully and fairly litigate the issue at the first trial.

A party will be precluded from raising an issue that has been previously litigated if there has been the chance to fully and fairly litigate the issue. If a person is a party to a previous litigation and has an opportunity to defend the right there, the issue is fairly litigated.

Here, the man was the plaintiff in the first lawsuit. He wanted to prove that he was not negligent in the first trial because there was the issue of contributory negligence that was litigated. Thus, he had the opportunity to fully and fairly litigate the issue in the first trial. The issue was fully decided and judgment became final. Thus, it would be unfair to allow him to deny negligence in this lawsuit. Therefore, the man will be precluded from denying that he was negligent with respect to the passenger.

## MEE Question 4

KeyCo, a company that manufactures keys, has had significant cash flow problems as a result of market trends away from keys and toward electronic locks. Accordingly, last year KeyCo borrowed money on three occasions.

On February 1, KeyCo borrowed $200,000 from Firstbank. Pursuant to an agreement signed by both parties, KeyCo promised to repay the loan within two years and granted Firstbank a security interest in "all of KeyCo's assets" to secure its repayment obligation. On the same day, Firstbank filed a properly completed financing statement in the appropriate filing office, listing KeyCo as the debtor and indicating the collateral as "all of KeyCo's assets."

On April 1, KeyCo borrowed $400,000 from Secondbank. Pursuant to an agreement signed by both parties, KeyCo promised to repay the loan within four years and granted Secondbank a security interest in "all of KeyCo's equipment" to secure its repayment obligation.

On June 1, KeyCo borrowed $600,000 from Thirdbank. Pursuant to an agreement signed by both parties, KeyCo promised to repay the loan within six years and granted Thirdbank a security interest in "all of KeyCo's equipment" to secure its repayment obligation. At the time of this transaction, Thirdbank knew about KeyCo's transactions with Firstbank and Secondbank as described above.

On August 1, Thirdbank filed a properly completed financing statement in the appropriate filing office, listing KeyCo as the debtor and indicating the collateral as "all of KeyCo's equipment."

On October 1, Supplier obtained a judgment against KeyCo for an unpaid debt and, in connection with that judgment, obtained a lien on KeyCo's key-manufacturing machine.

Except as described above, no financing statements have been filed that list KeyCo as the debtor.

KeyCo has defaulted on its obligations to Firstbank, Secondbank, and Thirdbank. Each of those banks, as well as Supplier, is asserting an interest in the key-manufacturing machine.

1. Which banks, if any, have enforceable security interests in the key-manufacturing machine? Explain.

2. Which banks, if any, have perfected security interests in the key-manufacturing machine? Explain.

3. What is the order of priority of the enforceable security interests and Supplier's lien on the key-manufacturing machine? Explain.

**1. The issue is which banks, if any, have enforceable security interests (SI) in the key-manufacturing machine.**

A security interest (SI) occurs where a party, the debtor, uses collateral to secure a loan from a secured party (SP), who has the ability to foreclose on the collateral if the debtor defaults on their payments. A SI is created and becomes enforceable when the SI attaches. Attachment occurs where: the SP gives value to the debtor, the debtor has the right to transfer their rights in the collateral to the SP, and the parties complete a valid security agreement (SA). A valid SA requires a document signed by the debtor, which identifies the SP and the debtor, and sufficiently describes the collateral. A sufficient description will not be found where the security agreement states "all property" or "all assets". However, a description that describes a UCC type of collateral (machinery, equipment, etc.) will be sufficient. A party's knowledge that another party has a SI in the collateral will not affect priority or enforceability.

Here, First Bank gave the debtor value ($200,000), the parties signed a valid security agreement, and it would appear from the facts that the debtor had a right to the collateral. However, the description of the collateral as "all assets" will likely be found to lack the specificity necessary to be enforceable. Assuming so, First Bank does not have a valid SI. Second Bank gave value, ($400,000), the parties had a valid SA that sufficiently described the collateral as "all equipment", and again the debtor had rights to assign the collateral. Second Bank's interest attached for "all equipment." Third Bank gave value ($600,000), the parties executed a valid SA in "all equipment", and the debtor had rights in the collateral. Third Bank's SI attached as well.

Second Bank and Third Bank have attached SIs in the key-making machine as it is equipment.

**2. The issue is which banks, if any, have perfected SIs in the key-manufacturing machine.**

Perfection is the process by which a SI can gain priority over other SIs in the same collateral. Perfection requires attachment and for the SP to file a financing statement (FS) with the secretary of state's office in the state where the debtor is located. The FS must state the names of the parties and a description of the collateral. The FS may describe collateral by any method, including overly broad grouping such as "all assets."

Here, only Third Bank has a perfected SI in the key-making machines as they are the only party who had an attached SI and who properly filed with a FS. First Bank followed the necessary formalities for filing its FS, but given the fact that it failed to sufficiently describe the property in its original SA, their interest did not attach, and therefore the interest cannot perfect.

Third Bank is the only party with a perfected SI in the machines.

**3. The issue is in what the order of priority is concerning the enforceable SIs and supplier's lien on the key-manufacturing machine.**

Generally, SPs will have superior right based on first in time. An attached SI has priority over an unattached SI. A perfected SI has priority over an un-perfected SI. Between two perfected SI, the party who perfects or files their SA first wins. A lien creditor will be deemed to have a perfected SI in collateral once they have obtained a judgment on the collateral which allows them rights in the collateral.

Here, Third Bank would have first priority as they were the first party to perfect their SI (August 1). Supplier will have second priority as the got a judgment on the machines on October 1. Second Bank will have third priority as they have an attached SI. First Bank will not have a valid SI as they failed to sufficiently describe the collateral.

## MEE Question 5

Thirty years ago, a man purchased a 170-acre tract of farmland. The farmland was bordered on the east by a county road that connected to the main street of a small town where the man worked in the local feed store. On the west, the farmland was bordered by a state highway.

Immediately after acquiring the farmland, the man built and moved into a house on its easterly portion. He constructed a vehicle shed on the westerly portion of the farmland in which he stored farm tractors and some of his cars. He then built a 10-foot-wide east-west gravel road that stretched across the entire farmland connecting the county road to the state highway. This gravel road allowed the man to travel between his house and the vehicle shed and also to drive tractors and cars out of the shed and onto the county road. It additionally gave him two routes from his house to the small town. It took the man 15 minutes to drive to town using the county road; using the state highway, which resulted in a more circuitous trip, took 45 minutes.

After building the gravel road across the farmland, the man usually used the county road to drive to work, although occasionally he used the state highway. On weekends, however, when he wasn't working, he frequently used the state highway because it allowed him to easily reach other towns where he visited friends.

Two years ago, the man conveyed the westernmost 90 acres of the farmland, including the vehicle shed, to a woman who worked in the same feed store as the man. This 90-acre portion included the western portion of the gravel road that the man had constructed across the property. The deed conveying the westernmost 90 acres to the woman did not mention the gravel road, and the deed was not recorded. The woman built a house on the 90 acres and moved in. She used the gravel road across the man's land to access the county road when driving to work.

One year ago, the woman conveyed her 90 acres to a friend, who moved into the house the woman had built. The friend worked in the same small town as the man and the woman, and the friend also used the gravel road across the man's land to access the county road. The deed conveying the property to the friend stated that the woman was conveying to the friend the 90 acres, together with "the right to use the gravel road" crossing the adjacent 80 acres owned by the man to reach the county road. This woman-to-friend deed was promptly recorded.

Five months ago, the man conveyed his 80 acres to a builder by a deed that made no mention of the gravel road. The builder paid the man fair value for the land and promptly recorded this man-to-builder deed.

Four months ago, the builder erected a barrier across the gravel road. The barrier prevented the friend from using the gravel road across the builder's land to reach the county road.

Three months ago, the friend recorded the man-to-woman deed.

The land is in a state that has a notice-type recording act and uses a grantor-grantee index. In this jurisdiction, the time to acquire an easement by prescription is 20 years.

1. Before the man's conveyance to the builder, did the friend have an implied easement from prior use over the man's 80 acres? Explain.

2. Assuming that the friend had an implied easement from prior use, did the builder take ownership of the 80 acres free and clear of that easement? Explain.

1. The friend has an implied easement to use the grave road from prior use over the man's 80 acres before the man's conveyance to the builder.

An easement is a nonpossessory interest in land. The easement holder is free to use and land for his own benefit. An easement appurtenant requires a dominant land and a servient land, where the servient land carries burden to provide the easement to the dominant land. An easement can be created expressly or implied. An express easement often requires a writing that satisfies the statute of fraud to reflect the intent of the grant of easement. However, an easement can also be implied from prior use if there is no writing manifesting the express intent. Under common law, an implied easement from prior use requires: (1) there is a common ownership of the servient and the dominant lands at a time, (2) the owner of the land has been using the easement before the dominant and the servient lands are separated, (3) the use of the easement is reasonably necessary, and (4) when the dominant and the servient lands are separated, the landowner intends the easement to be used by the successors.

Here, the facts clearly indicate that the westerly land is the dominant land, and the easterly land is the servient land, and the 10-foot-wide gravel road on the easterly land is the easement. According to the rule of implied easement from prior use, the first element is met because both the westerly land and the easterly land were co-owned by the man thirty years ago, in a unity of land. The second element is met because the man has been using the gravel road. In particular, the facts indicate that the gravel road allows the man to travel between his house and the vehicle shed and also to drive tractors and cars out of the shed and onto the county road. Further, the man usually used the county road, and occasionally used the state highway, thereby using the gravel road to cross the entire farmland. The third element is met because it appears that the use of the gravel road to access the county road is reasonably necessary because it takes 15 minutes to drive to town using the county road, while it takes about 45 minutes to use the state highway without crossing the farmland using the gravel road. The last element is also met because before the 80 acres was conveyed to the builder, both the woman and the friend were the successors of the westerly land and had used the gravel road, which demonstrated the intent of the man (original owner) to allow the successors to use the easement.

Therefore, the friend will have an implied easement to use the grave road to access the county road.

2. The builder will not take the ownership of the 80 acres free and clear of the grave land easement.

An easement runs with the land, unless a bona fide purchaser takes the land without notice. A bona fide purchaser is a purchaser of a land for value without notice. A notice can be actual, inquiry, constructive, or record. An actual notice is the purchaser's actual knowledge of the easement. An inquiry notice is a notice that the purchaser can obtain

through a regular inspection of the land. A constructive or record notice is a notice the purchaser can obtain by searching the title of the land.

In this case, the builder probably would not have constructive notice of the implied easement because the woman recorded the deed between her and her friend, but the original deed between the man and woman was not recorded until after the builder recorded his deed and would have checked the index.

However, the builder appears to have had inquiry notice. If he conducted an inspection, he would likely become aware that there is a gravel road across the land that has been used by the adjacent landowner. Thus, an inquiry would give the builder notice. Therefore, the builder will have inquiry notice about the easement, and he is not qualified as a bona fide purchaser without notice. Consequently, he will take the 80 acres land with the easement.

## MEE Question 6

A grocer planned to open a supermarket and needed shopping carts for her store. On March 1, she went to the showroom of a shopping-cart supplier to look at a variety of samples of modern shopping carts. After looking around the showroom, the grocer pointed to a shopping cart that bore a price tag of $125 and said to the supplier, "These are the carts I want for my store. When can you get me 100 of them?" The supplier said that he could deliver 100 of those shopping carts to the grocer's supermarket within 30 days. The grocer responded, "That's great. Please ship me 100 of these shopping carts by March 31, and I will wire you payment of $12,500 as soon as they arrive." The supplier said, "You've got a deal!"

On March 2, the grocer sent the supplier an unsigned note, handwritten on plain paper, stating in its entirety: "It's a pleasure doing business with you. This will confirm the deal we made yesterday for 100 shopping carts at $125 each." The supplier received the note on March 4 and read it immediately but never responded to it in any way.

On March 31, the grocer received an envelope delivered by an express delivery service. Inside the envelope was a document printed on the supplier's letterhead. The document stated, in its entirety: "Thanks so much for your business. The 60 shopping carts you ordered from us are on the way. Be on the lookout for our delivery truck—it may even arrive today! Please send us payment of $7,500 (60 carts x $125/cart) as soon as you receive the carts."

Later that day, the supplier's truck arrived at the grocer's supermarket, and the truck driver said to the grocer, "I've got 60 shopping carts for you in the truck." The grocer replied, "I didn't order 60 shopping carts; I ordered 100. You go back to your boss and tell him to send me the right order." The grocer refused to allow the truck driver to unload the 60 shopping carts from the truck and did not pay for them.

The grocer would like to sue the supplier for breach of contract for failing to deliver 100 shopping carts.

Is there an enforceable contract requiring the supplier to sell 100 shopping carts to the grocer for $125 each? Explain.

There is no enforceable contract requiring the supplier to sell 100 shopping carts to the grocer for $125 each.

Article 2 of the UCC governs the sale of goods. Goods are any movable item. In order for there to be a contract, there must be mutual assent and consideration. Mutual assent means that there is an offer and an acceptance. An offer creates the ability of acceptance in the other person. Acceptance is when the person accepts the offer. Consideration is the bargained-for exchange. Once there is mutual assent and consideration, there is a valid contract unless there are any defenses to contract formation. One defense to contract formation is the statute of frauds. Any contracts for the sale of goods over $500 must be reduced to writing or the contract will not be enforceable. The contract must contain the material terms and be signed by the party who will be bound. The UCC allows a merchant's confirmatory memo to count for the statute of frauds requirements. A merchant's confirmatory memo must include a price term, a quantity term, and the merchant's signature. The UCC will allow the merchant's letterhead to count as a signature.

Here, the grocer was shopping for shopping carts. Shopping carts are a movable item, so the UCC governs the contract. The grocer entered the shopping-cart showroom and looked around. He and the shopping cart supplier spoke a bit and then the grocer said, "please ship me 100 of these shopping carts by March 31 and I will wire you payment of $12,500 as soon as they arrive." This was an offer because he was creating the ability to accept this offer in the supplier. The supplier in fact accepted it by saying, "you've got a deal." There was consideration for this agreement because the supplier would send the shopping carts and the grocer would send $12,500. Therefore, absent any applicable defenses, there is a valid contract.

However, since this contract is for the sale of goods and is greater than $500, it falls under the statute of frauds. The grocer attempted to reduce the contract to writing by sending the supplier a note that said, "It's a pleasure doing business with you. This will confirm the deal we made yesterday for 100 shopping carts at $125 each." This has the

necessary terms but was not signed by the supplier, so it is not sufficient to bind the supplier to the 100 shopping cart term. Therefore, there is no contract that is enforceable for 100 shopping carts. The supplier sent a memo that said that he was sending 60 shopping carts and $7,500 was due on the supplier's letterhead. This works as the supplier's signature. Therefore, there is a contract for 60 shopping carts that can be enforceable against the supplier since the supplier signed it. However, there is no enforceable contract for 100 shopping carts since there is no signed writing by the supplier for 100 shopping carts.