

July 2021

Remote

New York State

Bar Examination

MEE & MPT Questions

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MEE QUESTION 1

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

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

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

1. Under the applicable standard of care, are the facts sufficient for a jury to find that the son acted negligently? Explain.
2. Under the applicable standard of care, are the facts sufficient for a jury to find that Big Box acted negligently? Explain.
3. Can the customer be held liable for enhancing the son's injury? Explain.
4. Assuming that only Big Box and the customer were negligent and can be held liable, can the son recover the full amount of damages from Big Box only? Explain.

Do not address the effect of any "Good Samaritan" statute.

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MEE QUESTION 2

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

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

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

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

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

Carlos and Diana have decided that they can best carry out the new business plan by creating a benefit corporation in State B to operate in State A with the stated social and

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environmental purpose of “promoting sustainable and organic vineyard, winery, and production practices.” They will incorporate the new benefit corporation as Organic Wines Corp. and be its only initial shareholders. Once this corporation is created, they will cause Winery Inc. to merge into it with all the Winery Inc. shares converted into shares of Organic Wines Corp.

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

1. Can Ethan block the merger of Winery Inc. into Organic Wines Corp. by voting against it? Explain.
2. If Winery Inc. merges into Organic Wines Corp., does Ethan have a right to demand that he receive payment in cash (instead of receiving shares in Organic Wines Corp.) equal to the fair value of his shares in Winery Inc.? Explain.
3. Assume that Ethan becomes a shareholder of Organic Wines Corp. Could Ethan successfully sue the Organic Wines Corp. directors in State A for promoting sustainable and organic practices at the expense of maximizing shareholder profits? Explain. Do not discuss whether that suit would have to be direct or derivative.

MEE QUESTION 3

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

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

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

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

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

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

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

1. Did the State A court’s exercise of personal jurisdiction over the woman violate her rights under the due process clause of the Fourteenth Amendment? Explain.

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2. Assuming that the State A court properly exercised personal jurisdiction over the woman, and that the man's paternity is undisputed, does the court have subject-matter jurisdiction to
- (a) award the man sole custody of the daughter? Explain.
 - (b) require the woman to pay the man child support? Explain.

MEE QUESTION 4

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

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

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

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

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

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

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

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

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

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

Do not discuss any confrontation clause issues.

MEE QUESTION 5

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

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

Three years ago, Bill and Doris died.

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

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

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

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

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

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

1. Does the state anti-lapse statute or Clause 3 of the testator's will determine who takes the share of a beneficiary who predeceased the testator? Explain.
2. Assuming that Clause 3 of the testator's will applies, who is entitled to the testator's house? Explain.

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3. Does the residuary bequest to Bill lapse because of the express survivorship requirement in Clause 2 of the testator's will? Explain.
4. Who is entitled to Bill's one-half share if the bequest to Bill lapses? Explain.
5. Who is entitled to Bill's one-half share if the bequest to Bill does not lapse? Explain.

MEE QUESTION 6

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

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

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

After exhausting all prerequisite administrative remedies, the woman filed an action in the US District Court for the District of State A. Her lawsuit was against the attorney who had fired her. The woman's complaint states two causes of action. First, the complaint asserts that the attorney fired her because of her age, in violation of the federal Age Discrimination in Employment Act of 1967 (ADEA) (under which the attorney is considered an "employer"). Second, the complaint alleges that the attorney made defamatory comments about the woman to other employees of the law firm, thereby committing a tort under State A law. In particular, the woman's complaint alleges that the attorney made comments to others "to the effect that [the woman] was dishonest and a thief," and that "such comments were false and defamatory." The woman's allegations include the approximate dates of the comments and the identity of persons

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to whom they were made, but the complaint does not recite the exact allegedly defamatory language used by the attorney.

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

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

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

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MPT 1 – Winston v. Franklin T-Shirts Inc.

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

MPT 2 – In re Canyon Gate Property Owners Association

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

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Sample Essay Answers

July 2021 NEW YORK STATE BAR EXAMINATION

SAMPLE ESSAY ANSWERS

The following are sample candidate answers that received scores superior to the average scale score awarded for the relevant essay. They have been reprinted without change, except for minor editing. These essays should not be viewed as "model" answers, and they do not, in all respects, accurately reflect New York State law and/or its application to the facts. These answers are intended to demonstrate the general length and quality of responses that earned above average scores on the indicated administration of the bar examination. These answers are not intended to be used as a means of learning the law tested on the examination, and their use for such a purpose is strongly discouraged.

ANSWER TO MEE 1

1. Are the facts sufficient for a jury to find that the son acted negligently?

The facts are sufficient for a jury to find that the son acted negligently under the applicable standard of care. The issue is whether the son breached the duty of care of a child of similar age and intelligence.

The prima facie case for negligence is (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) the breach is the factual and legal cause of the harm, and (4) injury to the plaintiff's property or person. In general, the duty of care owed to all foreseeable plaintiffs is that of reasonable care. A child is held to the standard of care of a child of similar age, intelligence, and experience. In addition, any physical attributes that are relevant are considered in determining whether the duty of care was breached.

Here, the son is 6 years old and will be held to the standard of care of a child of similar age and experience. In addition, he is visually impaired. This is a relevant trait in determining whether the son breached the duty of care by running out of his mother's grasp to the candy display. It likely was negligent for the son to run out of his mother's grasp. His mother took care to restrain him by placing her hand on his shoulder and told him clearly to remain in her grasp. Nonetheless, he broke free of her grasp. On the one hand, it might be reasonable for a 6-year-old young child to run free of his mother's grasp, especially in a large store when he sees candy. However, because he was visually impaired, and knew that he was visually impaired, it was likely negligent for him to run away. While the facts are likely sufficient to support a finding that the son acted negligently, it will be a question of fact for the jury.

2. Are the facts sufficient for a jury to find that Big Box acted negligently?

The facts are sufficient for a jury to find that Big Box acted negligently. The issue is whether Big Box breached its duty of care to the son.

The prima facie case for negligence is laid out in 1. above. As discussed above, the general duty of care is that of a reasonably prudent person. This duty is owed to all foreseeable plaintiffs. However, in the case of an invitee, someone who is on the premises for business purposes of the landowner, the landowner owes a heightened duty of care to inform about or make safe known, hidden dangerous conditions, and also to conduct reasonable inspections. Here, the son is present at the store with his mother, who is an invitee. Thus, the son is an invitee as well.

The issue is thus whether Big Box breached this duty of care. Big Box had a policy in place to ensure that employees promptly clean known hazards on the floor. However, it did not assign an employee to monitor floor conditions. In addition, employees never

know when another employee had most recently inspected or cleaned the floor. This is likely a breach of the duty of care because Big Box, as a landowner, owed a duty to its shopper, invitees, to conduct reasonable inspections. The facts indicate that the dining area is self-serve, where it would be foreseeable that people would spill in the area. In addition, the area had been stocked several days before the incident. On the day of the incident, a store employee walked by the area but did not notice the cheesecake on the floor. Overall, Big Box likely breached its duty of care by not enforcing standards for conducting reasonable inspections of the area.

The plaintiff will be able to prove causation and damages, as well. Causation requires that the defendant's breach of the duty of care be both the actual cause and the proximate cause of the plaintiff's harm. An event will be the actual cause of a harm when but-for its occurrence, the event would not have happened. Here, Big Box's breach is the actual cause of the son's harm because but for Big Box not having reasonable inspection procedures, the son would not have slipped on the cheesecake that was negligently left there. Proximate cause, on the other hand, is a limitation on liability and holds the defendant liable only for foreseeable harms flowing from his conduct. Here, the defendant's conduct was also the proximate cause of the son's harm. It is foreseeable that if inspections are not conducted in an area where people self-serve food, food will spill and remain on the floor, where customers will slip on them and be injured. Thus, the defendant's conduct is both the actual and proximate cause of the son's injuries.

Lastly, the son can show damages, as he fell on the floor, suffering physical injury, and was also further damaged by the customer's assistance in the form of a twisted arm, as discussed below. Thus, the facts show that a jury could find that Big Box acted negligently under the applicable standard of care.

3. Can the customer be held liable for enhancing the son's injury?

The customer can be held liable for enhancing the son's injury. The issue is whether he negligently rescued him.

While there is no general duty to assist others in peril, one who comes to the aid of another must conduct that rescue with reasonable care. Where a rescuer negligently rescues someone, making his condition worse, he will be held liable for the subsequent injuries. Here, a customer tried to help the son to stand up, but in so doing negligently twisted his arm. The customer did not have a duty to assist the son. However, by attempted to come to his rescue, the customer assumed a duty that he would act reasonably in so doing. Because the customer negligently twisted his arm, he breached that duty. In addition, this breach of the duty was the actual cause of the son's subsequent harm, because but for this negligent rescue, the son's arm would not have been twisted. It is also a proximate cause of the harm, because it is foreseeable that if a rescue is

undertaken negligently, further harm, such as a twisted arm, will occur. In addition, damages in the form of a twisted arm can be shown here.

Thus, the facts are sufficient to show that the customer can be held liable for enhancing the son's injury.

4. Assuming that only Big Box and the customer were negligent and can be held liable. can the son recover the full amount of damages from Big Box only?

If only Big Box and the customer were negligent and are held liable, the son can recover the full amount of damages from Big Box. The issue is whether the negligent parties will be jointly and severally liable.

In general, a tortfeasor is liable for all foreseeable harm resulting from his conduct. This includes intervening acts of rescue, because peril invites rescue. Thus, it is foreseeable that someone would come to the aid of another in peril, and possibly make the harm worse.

Here, Big Box will be found negligent, as discussed above in 2. In addition, even if the customer was negligent himself in inflicting the additional harm, this additional harm is within the scope of foreseeability flowing from Big Box's harm. Thus, Big Box will be jointly and severally liable to the son for the full amount of damages for the son's injuries.

Note, however, that while Big Box will be liable to the son for the full amount of injuries, it may have a claim for contribution from the customer. Contribution allows one tortfeasor to recover a portion of the damages from another tortfeasor where each was found partially responsible for the harm. Nonetheless, this will not affect how much the son can recover directly from Big Box.

Thus, the son will be able to recover the full amount of damages from Big Box if both Big Box and the customer were negligent.

ANSWER TO MEE 1

1. There are sufficient facts for a jury to find that the son acted negligently.

There are sufficient facts for a jury to find that the son acted negligently. Because the son was only six and a minor, and was not engaged in adult activities, the standard for negligence will be a reasonable six-year-old who was also visually impaired.

Here, the facts indicate that the son knew he was supposed to be by his mother's side--she physically restrained him to the best of her abilities, and orally instructed him to remain in her grasp. A reasonable person, even at six, should know that this means they are not supposed to freely roam around, and should be by the mother's side. Moreover, the fact that the son is visually impaired should be something that would deter a reasonable six-year-old from running around without direction. The fact that the son in this case not only left his mother's physical control is indicative that the son acted negligently. The mother's control was not even lax, so there is showing that the son acted at least negligently. He also ran towards the display, despite being visually impaired. A reasonable and prudent six-year-old would exercise more caution when roaming around, and would probably not be running around because of the impairment. Thus, there are sufficient facts here for a jury to find that the son acted negligently.

2. There are sufficient facts for a jury to find that Big Box acted negligently.

There are sufficient facts to find that Big Box breached their duty and acted negligently under a theory of premise liability. In a commercial place of business, the premises owner has a duty to customers to maintain a safe environment. There is vicarious liability for negligent employee actions.

Here, the son slipped and fell on a flattened piece of cheesecake. From the facts, it seems like the cheesecake had been there awhile, and had been flattened and dirty because of how much time had lapsed. Under a theory of premise liability, Big Box had a duty to notify customers and to clean the cheesecake within a reasonable amount of time from when it fell on the floor. Big Box acted negligently here, because they did not implement or enforce ordinary standards of care. They cannot account for the last time that an employee inspected the floor or when the floor had last been cleaned. The fact that area where the cheesecake fell had not been stocked for several days, and that an employee never noticed the cheesecake on the floor is no excuse from Big Box's duty. Ordinary care would mean that Big Box has rules for employees to be careful and vigilant of fallen foods, especially if they were going to be tripping hazards. The fact that there are other food displays should mean that there should be a heightened awareness that slippery food could potentially fall on the floor and injure customers. The cheesecake on the floor actually and proximately caused the son's injuries--but for the cheesecake, the son would not have fallen. And, as a result of falling on the cheesecake, the son suffered

injuries. All the elements for negligence under a theory of premise liability have been met, so there are sufficient facts to find that Big Box acted negligently.

3. The customer can be held liable for enhancing the son's injury.

The customer can be held liable for enhancing the son's injury, but only for the enhancement. Generally, there is no duty to rescue. However, if a rescuer undertakes a rescue, he has a duty to rescue in a non-negligent manner. If the rescuer acts negligently, he can be held liable only for any further injuries caused by the negligent rescue.

After falling, the customer here had no duty to help the son. The customer chose to help, creating a duty to the son to act non-negligently. However, the facts here indicate that the customer did in fact act negligently and twisted the son's arm, further enhancing the son's original injuries. There is actual and proximate cause here. But for the customer's negligent action, the son's arm would not have been injured. There is also foreseeability--it was foreseeable that if the customer stepped in to help but then acted negligently, the son could have been hurt more. The son was within the zone of danger. Lastly, the negligent rescue caused actual injury to the son, with the result of the twisted arm. Because all the requirements have been met for negligence, the customer can be held liable for enhancing the son's injury.

4. The son can recover the full amount of damages from Big Box only.

The son can recover the entire amount of damages from Big Box only because this is a traditional comparative negligence jurisdiction. Comparative negligence apportions the damages pro rata based on how much each defendant is deemed to be negligent. Traditional comparative negligence jurisdictions also allow for joint and several liability amongst the tortfeasors. Joint and several liability means that the plaintiff can recover his damages in full against any tortfeasor, but the tortfeasor may then claim against any other negligent parties. Rescuers are foreseeable in negligent acts.

Because we are assuming that Big Box is negligent, they are on the hook for any damages resulting from their negligence. It does not matter that the customer later enhanced the son's injury--Big Box can be liable for those damages as well, because they were the result of Big Box's negligence. Because rescuers are foreseeable, any negligence in their rescue can also be attributable to the original tortfeasor. Here, Big Box would be liable for damages caused by the customer. Comparative negligence and joint and several liability work to allow the son to recover in full against Big Box, even if most of the damages arise from the customer. Big Box can claim for any prorated damages against the customer, but the son's action against Big Box will be allowed in full.

ANSWER TO MEE 2

1. Can Ethan block the Merger?

The main question here is whether the proposed merger of Winery Inc. into Organic Wine Corp. requires unanimous shareholder approval or whether a lesser amount of votes may suffice to complete the merger. It is likely that Ethan will not be able to block any merger between Winery Inc. and Organic Wines Corp. solely by voting against it. Absent a shareholders' agreement, courts will apply MBCA rules as to shareholder voting requirements. Carlos, Diana and Ethan all have equal shares in Winery Inc., meaning that each have a 1/3 voting interest in the company. Mergers are a special type of corporate transaction so they must follow a specific process for approval. First, the merger must be recommended and approved by the board of directors and then the merger recommendation must be passed by a majority of outstanding shareholders. The board would have to call a special meeting to discuss the merger proposal, which Carlos or Diana would be able to do. In order for board action to be valid, there must be a quorum, meaning a majority of members are present, which would again be accomplished solely through Carlos and Diana. If there is a quorum, then a majority of the board members at the meeting may vote to approve of a matter. Unless the shareholder agreement states otherwise, mergers may be approved by a majority vote of all outstanding shares. Here, not only do Carlos and Diana have 2/3 of the board seats but they also have 2/3 of the outstanding shares in the company. Therefore, Carlos and Diana on their own have sufficient power to pass the merger proposition. Many shareholder agreements require a 2/3 vote, or supermajority vote, in the instances of corporate combinations such as mergers or sales of all or substantially all assets. However, even if this were the case here, Carlos and Diana would still have sufficient power to make the merger happen. Therefore, Ethan cannot block the merger of Winery Inc. into Organic Wines Corp. by voting against it.

2. Does Ethan have a right to demand that he receive payment in cash equal to the fair value of his shares in Winery?

Although Ethan will not be able to block the merger from occurring, he is not without rights when it comes to his ability to cash out his interest in the company prior to the merger. Under the MBCA, in the case of a merger in which a minority party dissents but the merger still passes muster regardless, the minority party may seek appraisal rights given the following requirements were met. The minority party must make known his intent to vote against the merger prior to the shareholder vote. Moreover, the minority dissenter must actually vote against, or abstain from voting on, the merger when the shareholder vote takes place. Finally, the minority dissenter must go to the company and demand his appraisal rights. If Ethan does all of these things, he will be entitled to receive cash equal to the fair value of his shares, determined by a court in most instances,

in exchange for the giving up of his shares, as opposed to receiving shares in the new company.

3. Could Ethan sue Organic Wines Corp. directors in State A for failing to maximize shareholder profits?

The main issue in this question is which state's laws on benefit corporations govern Organic Wines Corp.'s actions. Ethan will likely not be able to successfully sue the Organic Wines Corp. directors in State A for failure to maximize shareholder profits because this dispute should likely be governed by the laws of State B regarding benefit corporations. State A's law does not explicitly provide for benefit corporations. Meanwhile, State B's laws have been modified to provide for the formation of benefit corporation. When there is a conflict between two state laws and there is no federal law on point that reigns supreme, then one must do a choice of law analysis to determine which state's laws should apply to the case at issue. Generally, many factors are looked at in choice of law analysis, such as where actions are taking place, where the parties in the dispute are located, where operations of a company are handles, or where a piece of property is located. However, there is a special rule for choice of law issues with regards to corporate law. The rule is that that if there is an issue regarding choice of law, a court should apply the law of the state in which the company is incorporated within when trying the case. The remaining entity post-merger is Organic Wines Corp. Organic Wines Corp was incorporated in State B, which recognizes the formation of benefit corporations.

Therefore, State B's laws will apply and the company's directors will be allowed to promote sustainable and organic practices at the expense of maximizing shareholder profits.

ANSWER TO MEE 2

1. Can Ethan block the merger by voting against it?

At issue is the shareholder approval required for making a fundamental change to the corporation.

Fundamental corporate changes, such as a merger, require that the board of directors make a recommendation and then submit it to shareholders for approval. Here, Winery Inc is poised to merge into Organic Wines Corp, a fundamental change. Two-thirds of the directors seem to have made a valid recommendation the change, so all that is required is shareholder approval.

Because there is no shareholders agreement specifying the amount of votes needed for a fundamental change, the default is a simple majority of all shares outstanding and eligible to vote. Since Carlos, Diana and Ethan are the only shareholders and hold equally, and Carlos and Diana approve of the merger, 66% of the shares vote in favor of the merger. Therefore, the merger is approved and Ethan does not have enough votes to stop it.

2. If the merger takes place, can Ethan demand payment in cash rather than shares?

The issue is whether Ethan must take shares in the new corporation or whether he can be paid in cash.

When a fundamental corporate change takes place, like a merger, dissenting shareholders are entitled to appraisal rights. To do so, they must notify the board before the transaction and vote against the transaction. If the transaction still goes through, dissenting shareholders are entitled to the fair market value of their shares. Because a merger changes the fundamental rights a shareholder possesses, they must have a way out of the merger if they disagree with it.

Here, Ethan is a dissenting shareholder and the merger will go through. He cannot be forced to take shares in the new company because that effectively removes his rights as a dissenting shareholder, as he'd be in the same position as if he supported the merger.

In publicly traded companies, there is the "market-out" exception. Under the exception, dissenting shareholders do not have appraisal rights because they could sell their shares for fair market value on a listed exchange, such as the NYSE. Because this is a closed corporation, the shares are not publicly traded and so Ethan has no market where he can sell his shares.

Therefore, Ethan is entitled to receive the fair market value of his shares, in cash, so long as he properly follows the procedure for appraisal rights.

3. State A Suit

The issue is whether Ethan has a right to sue the corporation for a State A violation after it incorporates in State B.

Under the Internal Affairs doctrine, matters of incorporation and internal affairs are governed by the laws of the state in which the company is incorporated. State A does not allow B-Corporations while State B does allow B-corporations.

Here, the new company, Organic Wine Corp, would be incorporated in State B, which does allow for B-corporations. The controlling law, then, would be State B, since that is

the state where the new company would be incorporated. State A's statutes prohibiting benefit corporations are irrelevant in this situation.

Therefore, Ethan cannot successfully sue the new corporation in state A for promoting sustainable practices at the expense of maximizing shareholder value.

ANSWER TO MEE 3

1. State A Personal Jurisdiction Over The Woman

Issue is whether the state court could have personal jurisdiction over the woman without offending her due process rights.

A state's long arm statute first gives a state personal jurisdiction over a party in their court. This longarm statute must comport with constitutional limitations. Here, the state's longarm statute extends to non-residents for purposes of determining paternity, child custody, and child support if the individual engaged in sexual intercourse in the state and the child may have been conceived by that act of intercourse. Here, if the statute meets constitutional limitations, would grant the court jurisdiction over the woman as the child was conceived from intercourse that occurred in the state and gave birth to the daughter in the state. Therefore, if the statute is constitutional, the state will have jurisdiction over the mother.

In determining the constitutionality of the statute to court will determine if the woman has minimum contacts in the state so as to ensure that personal jurisdiction over the woman will not offend traditional norms of fair play and substantial justice. Minimum contact will first look to see if the woman purposefully availed herself to the forum and then whether personal jurisdiction would be foreseeable that she would be hauled into the court in State A.

Here, the woman likely purposefully availed herself to the state fifteen years ago when she moved to State A for a temporary job. While there she engaged in conduct with the plaintiff's father who also lived in State A. Living in State A, working, and having a baby in the state likely availed the woman to the benefits of the state and therefore she purposefully availed herself to the state. Further, these contacts likely made it foreseeable that she might be hauled into court in State A based on her contacts in the state.

A state may have specific or general jurisdiction. Under specific jurisdiction, the defendants contacts giving rise to the suit are related to the forum/arose in the forum.

Here, the contacts arising to this dispute, the sexual intercourse leading to custody cases arose in the state and therefore is related to the woman's contacts in the state. Therefore, the court likely has specific jurisdiction over the woman. The state likely will not have general jurisdiction because the woman is not at home in the State. A person is at home where they are domiciled, or where they have a presence and intend to return. Here, the woman currently lives in State B and when she moved to State B likely had no intent to return to State A after leaving more than 10 years ago. Therefore, the court will likely only have specific jurisdiction over the woman rather than general jurisdiction over the woman.

Lastly, where a state has specific jurisdiction, they must also ensure several fairness factors that look to the defendant's interests, the state's interests, and the plaintiff's interests. One of the defendant's interests will be convenience in a way that doesn't put the defendant at a substantial disadvantage. Here there is likely no substantial disadvantage to the defendant. Although she no longer lives in the State A, State A is currently the location of her child and the father of that child. There are no other facts to indicate that she cannot travel. Additionally, State A has an interest in providing a forum for its citizen, the father.

Therefore, in total, the jurisdiction likely did not violate the woman's due process rights by subjecting her to personal jurisdiction.

2. Subject Matter Jurisdiction

(a) Custody

Issue is whether the court had jurisdiction to enter a custody matter.

Under custody matters, a court will have jurisdiction in the location that the child currently calls home or has called home in the past 6 months while living with a parent. Here, the child only moved to the state to be with her father for three weeks before the father filed to gain sole custody. Here the child had lived with the mother in State B for her entire life and is home.

Therefore, the court likely does not have subject matter jurisdiction over the case.

(b) Require Child Support

The issue is whether the court will have subject matter jurisdiction to award child support.

Under child support agreements, a court will have jurisdiction to award child support if it has jurisdiction over one of the parties and is enforcing support based on a prior valid

child custody decision. Here, because the custody decision likely did not have proper subject matter jurisdiction, the court will not be able to rule on the child support if it comes from the same court that improperly rules on the child custody.

Therefore, the State A court cannot rule on child support.

ANSWER TO MEE 3

1. The State A Court's Exercise of Personal Jurisdiction Over The Woman Did Not Violate

Her Rights under the Due Process Clause

At issue is whether a state's exercise of personal jurisdiction pursuant to a paternity provision in a long arm statute violates the Fourteenth Amendment Due Process Clause. Personal jurisdiction must be authorized by statute and the U.S. Constitution, in particular the Due Process Clause of the Fourteenth Amendment. The relevant statutes, known as long-arm statutes, often list specific acts in the state, such as sexual intercourse in a paternity provision, giving rise to jurisdiction.

To comply with the aforementioned constitutional clause, the defendant must have "minimum contacts" with the forum state such that the exercise of jurisdiction would not offend traditional notions of fair play and substantial justice. Moreover, unless general jurisdiction is available because the defendant is "at home" in the forum state—a status satisfied if the state is the defendant's domicile—the court must have specific personal jurisdiction. For such jurisdiction to exist, the claim must arise from or relate to the defendant's contacts with the forum state.

Two key considerations for a finding of minimum contacts are (a) whether the defendant purposely availed him or herself of the protections and benefits of the forum state's laws and (b) the foreseeability of litigation in the forum state. For, any possible offensiveness of the traditional notions of fair play and substantial justice, one key issue is whether the defendant would be severely disadvantaged by litigating in the forum state.

Here, the exercise of specific personal jurisdiction at issue satisfies the due process clause. First, jurisdiction is authorized by statute because the woman's conduct in State A satisfies State A's long-arm statute. That statute authorizes jurisdiction over nonresidents if the nonresident "engaged in sexual intercourse" in the state, and the child "may have been conceived" through that intercourse. Here, the woman is certain that man is the

daughter's father owing to the fact that man was the only person with whom she had sexual intercourse while she lived in State A.

As for the due process question, the woman had minimum contacts with State A because the woman, while living there for a temporary job, dated a man with whom the woman is certain she had sexual intercourse. In so doing, the woman purposefully availed herself of the benefits and protections of State A's laws, and litigation in the state was foreseeable. Moreover, jurisdiction would not offend traditional notions of fair play and substantial justice because there is no indication that woman would be severely disadvantaged by litigating in State A.

Therefore, State A's exercise of personal jurisdiction did not violate her rights under the Due Process Clause.

2. (a) The Court Does Not Have Subject-Matter Jurisdiction To Award The Man Sole Custody of the Daughter.

At issue is whether a court has subject matter jurisdiction to award sole custody to one spouse living with a child in one state, while the other spouse remains in the child's home state. Subject-matter jurisdiction here is governed by the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA).

The UCCJEA provides for the award of custody orders by courts of the child's home state--the state in which the child has lived the six months leading up to the custody proceeding. Alternatively, a state can exercise jurisdiction if the child has left the child's home state within the last six months and the child is living in another state with a different parent, but the other parent remains in the child's home state. Whichever rule applies, that state has jurisdiction not only to issue initial custody orders but also exclusive jurisdiction to modify them.

Here, State A would not have subject matter jurisdiction to award sole custody of the daughter. In particular, State B would retain exclusive jurisdiction over the daughter's custody because daughter left State B within the last six months to live in State A with the daughter's father; the daughter used a bus ticket without her mother's permission to leave State B, and the man filed suit only three weeks after the daughter's arrival. Further, the woman remains in State B--where the daughter lived prior to hearing about her father during the conversation between the woman and her oldest friend.

Therefore, the State A court lacks subject-matter jurisdiction to award the man sole custody of the daughter.

2. (b) The Court Has Jurisdiction To Require The Woman To Pay Child Support.

At issue is the authority of a court to exercise subject-matter jurisdiction for a child support order when no prior orders have been issued. This question is largely governed by the Uniform Interstate Family Support Act (UIFSA), which authorizes jurisdiction for the court that initially issues a child support order. Such jurisdiction can be displaced only if another order is filed in a different state before an answer is filed in the initial proceeding, the filer objects to jurisdiction in the initial proceeding, and the other state is the child's home state.

Here, the man's court filing to obtain child support in State B was the first child support filing for daughter. In particular, after moving to State B woman did not even contact father--let alone file for child support. Therefore, a court in State A would have subject-matter jurisdiction over the contemplated child support order. The woman could displace this jurisdiction only by taking the steps outlined in the prior paragraph.

Therefore, the State A court has subject-matter jurisdiction to require that the woman pay child support for daughter.

ANSWER TO MEE 4

1. (a) The issue is whether the officer's entry into the house without a warrant to effectuate an arrest violated the man's 4th Amendment rights.

The 4th Amendment protects individuals against unreasonable searches and seizures. If evidence is obtained as a result of an unreasonable search or seizure, the evidence may be suppressed under the fruits of the poisonous tree doctrine. Generally, to effectuate an arrest an officer needs probable cause or an arrest warrant. To arrest someone in their home, unless there are exigent circumstances, you need a warrant. This is because individuals have an expectation of privacy in their home. A situation is an emergency if an officer is in hot pursuit of a fleeing felon, there is a high likelihood of evidence being destroyed, or if it's necessary in order to prevent harm or for safety purposes. While evidence seized from an unlawful arrest may be suppressed, the arrest itself will not prevent the prosecution of an individual if he is indicted on probable cause.

Here, the officer was patrolling when he heard a woman lying on the ground and girl point at someone who knocked the woman down and took her purse. The man was running away and was carrying a purse. As it appears that a robbery, which is a felony,

had been committed the officer had probable cause based on all of these factors combined to believe that this man was the culprit. Therefore, he was permitted to make his arrest.

Furthermore, there were exigent circumstances here as the man, a likely felon, was fleeing the scene of the crime and trying to evade arrest. The officer therefore was in hot pursuit of the man and was authorized to make a home arrest as this constituted an emergency that allows for a warrantless entry into the home. Thus, the seizure of the man was permissible under the 4th Amendment.

1. (b) The issue is whether the seizure of the purse is permissible under the plain view doctrine.

Generally, to seize evidence an officer must have a warrant. However, there are a few exceptions to these circumstances. If an officer has a legal basis to be on the premises, contraband or weapons are in plain view, and the officer reasonably believes that they are contraband or weapons, he may seize such evidence.

Here, under the plain view exception, the officer was permitted to seize the purse. As when he entered the house pursuant to hot pursuit, he had the legal right to be in the house. As the white purse was near the man's feet in plain view, which he had reason to believe was contraband, as it appeared to be the woman's purse that he had been carrying the whole time and the teenage girl claimed was the woman's purse. Therefore, he was permitted to confiscate the purse.

2. The issue is whether the identification was unnecessarily suggestive.

A defendant may claim that his fourth amendment right have been violated when a photo array or line up leads to a misleading identification. The Defendant must prove that the identification was the result of an unnecessarily suggestive process and that there is a substantial likelihood that it led to a misidentification. If it is unnecessarily suggestive, a defendant can claim that the prior identification as well as any future in court identification is tainted and thus cannot be presented to the jury.

Here, the woman asked whether the man handcuffed in the backseat of the car was the culprit. She noticed the man on her own accord. She stated that she thought it was the guy and it was dark but that she was pretty sure that was the guy. While seeing the man in the back of the car likely made her see that man as the suspect, the officers had no role in facilitating these statements. He did not ask her to identify the man nor question whether the man in the car had committed the crime. Furthermore, there is not a substantial likelihood that this led to a misidentification as this was the man that the girl directed the officer to follow. Thus, the defendant cannot likely succeed on this claim as there is no evidence that it (1) was unnecessarily suggestive or (2) that there is a substantial likelihood that it led to a misidentification.

ANSWER TO MEE 4

1. Warrantless seizure of the Man and Warrantless seizure of the purse in the man's home

The exclusionary rule provides that evidence obtained in violation of defendant's constitutional rights should be suppressed. Under the Fourth Amendment which applies to state court through the 14th Amendment, first, a person is protected from unlawful arrest from a governmental official unless there is a valid warrant or exceptions applies; second, a person's reasonable expectation of privacy is protected and shall not be intrude without a valid search warrant unless exceptions apply.

Seizure of the Man

Generally, probable cause is needed to conduct an arrest. Moreover, to perform a lawful arrest at one's home, a valid arrest warrant is needed and should be duly executed by the officer. However, an emergency situation like "hot pursuit" may grant the officer the privilege to arrest without the warrant.

In this case, the officer is at scene of where the robbery, which is a felony, occurs and based on the girl's statement combining the officer's own observation, he has a probable cause to arrest the man. Though the man ran into his home which is a private area protected by constitutional law, the police is in "hot pursuit" of a then-happening crime thus his breaking into the home and follow-on arrest is justified. There is no Fourth Amendment violation in terms of the arrest of the man.

Seizure of the Purse

A person generally has reasonable expectation of privacy in his dwelling. To search and seizure evidence in one's home, a valid search warrant is needed in most cases. However, there are various exceptions support a warrantless search, for example, search incident to the arrest and evidence seized in plain view. For the "plain view" exception, the officer can lawfully seize any evidence that is in his plain view when his presence at that place is legal and the incriminating nature of the evidence is apparent.

Here, as mentioned above, the police's presence in the man's home to arrest is legal since the police was conducting "hot pursuit". The purse is on the floor which is in the plain view of the officer's eyesight. Also, pursuant to the girl's prior statement that "took her purse", the incriminating nature of the purse is immediate apparent. Therefore, the seizure of the purse falls into the "plain view" exception and does not violate the man's constitutional rights.

2. The girl's on-the-scene identification and in-court identification

On-the-scene identification

To claim the out-of-court identification violates the defendant's constitutional rights, there are two possible basis: (i) the identification is impermissible suggestive or (ii) the identification violates the defendant's right to counsel. However, an identification could be exceedingly suggestive if the police only shows one photo or one person and indicates the person is defendant. In addition, the Sixth Amendment right to counsel would not attach until the charge and defendant has no right to counsel in pre-charge identification.

Here, the girl's on-the-scene identification occurred shortly after the man's arrest the clearly prior to the formal charge. Thus, right to counsel does not exist at that stage. Moreover, although the man in handcuff seated in the squad car may be suggestive, the police did not state any extra suggestive words but the girl just made the identification based on her prior personal knowledge and recollection. The admission of the on-the-scene identification is unlikely violating the man's constitutional rights.

In-court identification

The in-court identification generally would not be suppressed as long as (i) the witness is identify based on personal knowledge, (ii) the identification is not tainted by unconstitutional out- of-court identification and (iii) the identification is reliable.

As analyzed above, the on-the-scene identification is not exceedingly suggestive. More importantly, the girl is an eye witness at the scene and has knowledge and recollection about the suspects which render her identification reliable. The defendant may claim the girl cannot clearly identify since the crime happened very fast at the time very dark, however, this is relating to the credibility issue to be decided by jury and the defendant has the right to impeach, these details will not bar the admissibility of the in-court identification and the in-court identification will not violate the man's constitutional rights.

ANSWER TO MEE 5

1. The issue is whether the state's anti-lapse statute or Clause 3 of the testator's will determines who takes the share of a beneficiary who predeceased the testator. Wills must comply with valid laws to which they are subject. Issues regarding a testator's will and estate are governed by the law of the state where the testator was domiciled at the time of death.

Here, State A law applies because the testator died a domiciliary of State A. The State A anti-lapse statute provides a rule for bequests, "unless the decedent's will provides otherwise." The will does differ from the statute. Clause 3 of the will provides that the heirs of the deceased beneficiary shall take the beneficiary's bequest. However, the anti-lapse statute provides that the deceased beneficiary's share passes to the deceased's issue, not heirs. While issue and heirs may be the same, the difference in the use of terms is a legally significant one. Because state law provides that a differing will provision controls, Clause 3 governs the bequest.

2. The issue is who is entitled to the testator's house. An heir has a specific legal meaning, referring to a person who would be entitled to take an intestate share from a testator upon their death. A beneficiary, on the other hand, is anyone to whom a gift has been devised under a will.

Under Clause 3 of the testator's will, Doris's heir should receive the house if Doris predeceases the testator. Because Doris has predeceased the testator, Doris's heir will take the house. Doris's heir is her nephew. The charity is a beneficiary under Doris's will, because she bequeathed her estate to it, but that does not make the charity an heir. Because the language of Clause 3 specifically refers to "heirs," Doris's nephew takes the house.

3. The issue is whether the residuary bequest to Bill lapses because of the survivorship requirement in Clause 2 of the testator's will. A gift that fails because a beneficiary has predeceased the testator is said to have lapsed. When language in a will is constructed, effort is given to interpret the will according to the testator's intent.

The survivorship requirement states that Bill gets half of the residuary estate only if he survives. If he does not survive, therefore, this gift should lapse. However, as stated above, Clause 3 provides an alternate disposition of the property if Bill does not survive.

This clause states that unless the will expressly provide otherwise, the heirs of the deceased beneficiary should take. Thus, the question is whether the survivorship requirement constitutes "expressly providing otherwise" and thus signifies a situation where neither Bill nor his issue should take. Including this express survivorship language can be seen as expressly providing that the anti-lapse clause should not kick in if Bill

does not survive. If it is interpreted this way, the gift should lapse because of the survivorship language. However, if Clause 3 is viewed as consistent with the conditional bequests to Alice and Bill, Clause 3 will control and the gift to Bill will not lapse.

4. The issue is who gets Bill's one-half share if the bequest to Bill lapses. When a gift lapses, it returns back to the testator's residuary estate. The testator's residuary estate is distributed according to a valid will, if there is one, or to the testator's heir according to the rules of intestate succession if there is no will or if the will does not control. Under intestate succession, the decedent's spouse, child, parent, or other closest living relative (if none of the first three are present) takes their property.

Here, half of the residuary estate will be distributed to Alice, pursuant to the valid will. If Bill's gift lapses, and the anti-lapse provision of the will does not kick in, the remaining one-half share will be distributed according to the rules of intestate succession. The testator's only living relative is the testator's sister, so she will be the testator's heir. Thus, if the gift to Bill lapses, his one-half share of the residuary estate will go to the testator's sister. Although Alice also survived the testator, the will specifically only grants her one half of the residuary estate, so she cannot take more than what she is given in the will.

5. The issue is who is entitled to Bill's one-half share if the bequest to Bill does not lapse. As explained above, Clause 3 controls the disposition of the one-half share if the gift to Bill does not lapse. Under this clause, the gift goes to Bill's heir. His daughter is his sole heir, so she inherits the one-half share. This result would also occur under the anti-lapse statute, since that would result in the gift going to "issue" and the daughter appears to be Bill's only issue since she is described as his sole heir.

ANSWER TO MEE 5

1. Whether the anti-lapse statute or Clause 3 of the will determines who takes the share of a beneficiary who predeceased testator

The issue is whether the State A anti-lapse statute overrides Clause 3 of the will, and whether Bill or Doris's heirs would take under either.

A testamentary gift in a will to a beneficiary who predeceases the testator is subject to lapse, unless if an anti-lapse statute applies. Typically, an anti-lapse statute provides that for a predeceased beneficiary of a testator, the beneficiary's heirs take the beneficiary's share under the will provided that the beneficiary is a relative of the testator. However, State A's anti-lapse statute is not restricted to predeceased beneficiaries who are related

to a testator; therefore, the anti-lapse Statute may apply to Bill and Doris, who are not relatives of testator. A will is governed by the law of the testator's domicile at the time of death.

State A's anti-lapse applies to any predeceased beneficiaries "Unless the decedent's will provides otherwise." Here, the testator's will has an express provision in Clause 3 that stipulates that the "heirs" of any of testator's beneficiaries will take under the will if any beneficiary predeceases testator. Consequently, Clause 3 of the will determines who takes the share of a beneficiary who predeceases the testator.

2. Entitlement to testator's house under Clause 3 of the will

The issue is whether the will should be construed to apply to "heirs" or to any beneficiary of the beneficiaries named in the will.

A will is interpreted according to the plain meaning of its language and is said to speak at the time of the testator's death. An "heir" in estate law is a term of art that refers to an individual who takes a decedent's property when a decedent dies intestate. A person who takes under a will is referred to as a "beneficiary."

Here, the language in Clause 3 of testator's will provides that the "heirs" of pre-deceased beneficiaries are to take bequests to the beneficiaries. The term "heirs" should be interpreted to mean intestate heirs, rather than to persons named in testator's beneficiaries' wills. Doris has one heir, her nephew, for the purposes of intestate succession. Consequently, in accordance with the plain language of the will, testator's house should pass to Doris' nephew, because he is her "heir."

3. Whether residuary bequest to Bill lapses because of express survivorship requirement in Clause 2 of the will

The issue is whether the failure of the survival condition in Clause 2 of the will fails as applied to Bill means that the residuary bequest to Bill lapses.

A will may contain conditional language that provides for alternative disposition of a testator's probate estate depending on the occurrence or nonoccurrence of a condition.

Here, Clause 2 expressly conditioned Bill's entitlement to a share in testator's residuary estate based on his survival of testator. Bill died prior to testator. The language of Clause 3 does not save his share under the will from lapse because the will in Clause 2 expressly provides a condition precedent of survival in order for Bill to take under the will. Additionally, the anti-lapse statute will not save Bill's share, because the testator's will provides otherwise through the express condition precedent.

In conclusion, the residuary bequest to Bill should lapse because of the express conditional language in the will.

4. Entitlement to Bill's one-half share if Bill's bequest lapses

The issue is whether Alice is entitled to the entirety of the residue or whether testator's sister, her sole heir, is entitled to an equal share of the residue.

A lapsed residual share of an estate passes that comprises a general bequest will generally become part of the residue and be distributed accordingly, under the principle of "no residue of a residue." However, a will may be interpreted according to the testator's intent at the time of the testator's death (the time when the will "speaks").

Here, under the doctrine of "no residue of a residue," Alice would take the entire residuary gift of \$250,000 if Bill's bequest lapses. However, the express language of the will seems to anticipate that Alice will only get half of the residue - an "equal share" of testator's residuary estate. Following this interpretation, Bill's lapsed residuary gift arguably passes into the intestate share of the estate. Under this scenario, the remaining half of the residuary estate would pass to testator's sister by intestacy.

5. Entitlement to Bill's one-half share if Bill's bequest does not lapse

The issue is who takes Bill's share of the residuary bequest if the bequest to Bill does not lapse.

An anti-lapse statute allows the "issue" of a deceased beneficiary to take the beneficiary's share of a testator's estate. "Issue" refers to lineal descendants of a person - that is, children, grandchildren, great-grandchildren, and so on.

Here, Bill died intestate with a daughter. His daughter may be considered "issue" for the purpose of State A's anti-lapse statute. If the anti-lapse statute applies, Bill's daughter will take Bill's half of the residuary bequest because she is Bill's issue.

Alternatively, if Clause 3 of the will governs, which it likely does, the result will be the same. Bill's daughter, as his "heir," will take his gifts under Testator's will according to Clause 3's requirements.

ANSWER TO MEE 6

1. The first issue is the matter of jurisdiction.

Federal courts are entities with limited subject-matter jurisdiction; they must have jurisdiction under one of a select number of fonts of jurisdictional authority or they are powerless to hear the case and must dismiss the matter. One such source of subject-matter jurisdiction, in which the court has power to hear claims arising under federal law. Another is diversity jurisdiction, which requires the plaintiff parties and defendant parties to have complete diversity of citizenship. A third source of jurisdictional authority is supplemental jurisdiction. To have supplemental jurisdiction, a court must generally have jurisdiction over one or more claims through federal or diversity jurisdiction, and the claim over which supplemental jurisdiction is sought must form part of the same constitutional case or controversy. Two or more claims arise out of the same case or controversy when they arise from a common nucleus of operative fact.

Here, it is undisputed that the court has federal question jurisdiction over the ADEA claim. The court also has supplemental jurisdiction over the defamation claim because, although it arises under state law and there is no diversity because the woman and attorney are both citizens of State A, the claim arises from the same nucleus of operative fact as the ADEA claim. The essential federal claim is a wrongful firing. The defamatory remarks made by the attorney are part and parcel of this same transaction because they formed the purported basis for the firing. Indeed, if the attorney was, in fact, firing the woman based on her age, then the defamatory remarks serve the purpose of concealing the discriminatory intent and therefore intimately relate to the age-discrimination claim. The pattern of disparaging remarks based on both age and alleged dishonesty constitute further links between the cases. Together, these facts make the claims part of the same nucleus of operative fact and justifying the exercise of supplemental jurisdiction. The attorney's motion to dismiss for lack of subject matter jurisdiction should therefore be denied.

2. The next issue is an *Erie* question. Should the district court apply state or federal law?

Under the Supreme Court's decision in *Erie*, a federal district court will generally apply state substantive law--for instance, in a negligence suit for a court sitting in diversity, state tort law will determine the elements of a negligence action. Courts can and do, however, apply federal procedural law. In an *Erie* analysis, the court first asks if there is a conflict between state and federal law. If not, obviously, there is no real conflict. If there is, the court then proceeds to ask whether there is a valid federal statute or regulation on point for the particular issue. If there is a valid federal rule, then under the Supremacy Clause the federal rule trumps.

Here, there is a clear conflict between state and federal law. State law, as is strictly enforced by state courts, require a pleading of the "particular words constituting defamation." Federal law, on the other hand, under the Federal Rules of Civil Procedure (FRCP) and the Supreme Court's cases in *Twombly* and *Iqbal*, requires only pleading sufficient to give notice to the defendant and raise the plaintiff's claims to the level of plausibility. Here, the woman has given significant detail, indicating that the attorney falsely said to others, *inter alia*, that the woman was a thief. This is sufficient under the FRCP to give notice and to achieve plausibility, as the factual contention that the man said falsely to others that the woman is a thief, if true, constitutes defamation which establishes an entitlement to relief. Here, the form of pleadings is subject to the FRCP, which are valid federal rules bearing the force of law under the Rules Enabling Act. Moreover, questions of the form of pleadings is a classically procedural matter for which federal courts will apply federal law. As such, the FRCP and federal rules of pleading apply. Because, under these rules, the woman's complaint is adequate, the court should not dismiss the claim for failure to comply with state pleading rules.

ANSWER TO MEE 6

1. Should the federal court grant the attorney's motion to dismiss the woman's defamation claim on the ground that the federal court lacks jurisdiction over that claim because it is based entirely on state law?

The federal court should deny the attorney's motion to dismiss the defamation claim on the ground that the court lacks jurisdiction. In order to have subject matter jurisdiction over a claim, the federal court must have either federal question jurisdiction or diversity jurisdiction. The defamation claim is based on state law, so there is no federal question. Also, both the woman and the attorney are both citizens of State A, so there cannot be complete diversity for diversity jurisdiction. However, in the absence of federal question or diversity jurisdiction, a court can exercise supplemental jurisdiction over claim. If the plaintiff properly asserts one claim (either under federal question or diversity jurisdiction), the court can exercise supplemental jurisdiction over another claim that arises out of the same common nucleus of operative fact, such that the plaintiff would be expected to try both cases together. If the claim arises out of the same transaction or occurrence as the original claim with jurisdiction, then this test is always met.

Here, the woman's ADEA claim is properly brought to the court under federal question jurisdiction. Thus, even though the court does not have federal question or diversity jurisdiction over the defamation claim, the court can invoke supplemental jurisdiction. The conduct underlying both claims arise out of the same common nucleus of facts. The

attorney criticized the woman's work and he made derogatory comments about her, her work, and her age to other paralegals and attorneys at the firm. The defamatory statement about the reason the woman was fired is not the same transaction or occurrence that gave rise to the ADEA claim, but it does arise from the same common nucleus of facts -the pattern of abuse and derogatory statements about the woman made by the attorney. Thus, the test for supplemental jurisdiction is met.

Further, the limitation on supplemental jurisdiction does not apply here. When a plaintiff seeks to exercise supplemental jurisdiction when the plaintiff is in federal court based on diversity, the court cannot exercise supplemental jurisdiction in a way that defeats complete diversity. This does not apply here because the woman's claim that got her into federal court is based on federal question jurisdiction, not diversity. Therefore, supplemental jurisdiction is proper, and the court should deny the attorney's motion to dismiss.

2. Should the federal court grant the attorney's motion to dismiss the woman's defamation claim on the ground that the woman did not allege the "particular words constituting defamation" as required by State A?

The federal court should deny the attorney's motion to dismiss the woman's defamation claim on the ground that the woman did not allege the "particular words constituting defamation" as required by State A. When a federal court is trying a state law claim, the issue of which law governs arises. The issue here is which law, federal law or State A's, governs the requirements for pleadings.

Under the Erie Doctrine, a federal court will apply federal procedural rules, and state substantive rules. When there is a federal law directly on point, such as a Federal Rule of Civil Procedure, then the court will apply the federal rule. If there is no federal law on point, the court must determine whether the issue is procedural or substantive. In determining this, the court considers whether the rule is outcome determinative.

Here, the attorney argues that the woman did not comply with State A's pleading rules that require "the particular words constituting defamation" to be included in the complaint. Under the federal rules of evidence, a well-pleaded complaint need only assert the basic facts underlying the claim, only in cases of fraud or misrepresentation must the plaintiff plead with specificity the conduct and/or words that give rise to the action. Here, the woman asserts that the attorney made comments to others "to the effect that the woman was dishonest and a thief" and that "such comments were false and defamatory." The woman also alleges the approximate dates of the comments and the identity of the persons to whom they were made. This would constitute a well-pleaded complaint under the federal rules. Because there is a federal rule directly on point, the federal rule will govern, and the woman's complaint was proper. Therefore, the court should deny the attorney's motion.

ANSWER TO MPT 1

Memorandum

From: Candidate

To: Hon. Joann Gordon

Date: July 27, 2021

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

1. Introduction

This memo analysis the plausibility of a fair use claim. Generally, under the US Copyright Act 17 U.S.C. §106 the owner of a copyright has the exclusive right to reproduce the copyrighted work. However, under §107 there is an affirmative defense for the fair use of a copyrighted work for purposes such as comment, news reporting, or teaching. *Brant v. Holt* (D. of F. 1998). Whether a use qualifies as a fair use depends on four factors, although the weighting of each factor is in the discretion of the court, (1) the purpose and character of the use (2) the nature of the copyrighted work (3) the amount and substantiality of the portion used in relation to the work as a whole (4) the effect of the use upon the potential market for and value of the copyright.

The work at issue in this case is a photo of the police leading Jim Barrows away from a political protest. The photo was taken by Naomi Winston who owns the copyright. The photo was used by Franklin T-shirts (hereafter Franklin) without paying Winston who sold the t-shirt at the fun fair to make a political point criticizing Barrows who was then running for mayor on a law and order platform. The question to be addressed is whether Franklin has a plausible fair use defense to this use. This memo applies the four fair use factors to the dispute in *Winston v. Franklin* one at a time.

2. The Purpose and Character of the Use

The first factor is the purpose and character of the use. The purpose and character of the use comprises many factors. First, considering purpose, use in political discourse will, absent other facts, weigh heavily in favor of fair use. *Brant*. In *Brant* the defendant used a popular song in a political campaign. The court found that this political use did not weigh heavily in favor of fair use because there are other uplifting songs available to make a similar political point. By contrast commercial use generally counts against fair

use. *Allen v. Rossi* (D. of F. 2015). However, in *Allen* the fact that the proceeds of the sale of a collage went to noncommercial educational purposes counted in favor of a fair use. The Supreme Court has noted that while commercial use does count against fair use commercial use does not mean that use cannot be fair *Campbell v. Acuff-Rose Music* (U.S. 1994).

Here Franklin could argue that unlike the song in *Brant* in this case there is only one photograph of the arrest of Barrow, so the use of the entire photo was necessary. Franklin could also argue that the purpose of the use was political. The t-shirt made a political statement by critiquing Barrow when he was running for office. This suggests that the photo should be protected as a political fair use. The owner of the t-shirt store was a critic of Barrow and he sold the t-shirt cheaply (for only \$4) because he was a critic of Barrow. Franklin could argue that any profit was secondary and that the primary purpose of the use was political.

Winston could argue that here the use was commercial, since the t-shirt was sold for profit. Unlike the collage in *Allen* the profits were not given to any charity. The proceeds were also substantial since 2,000 shirts sold for \$4 each. Winston could argue that any political use was secondary to profit since the shirt was sold commercially and was a sold commercial success.

Second, considering the character of the use, the transformation of the original aspect of the photo during the fair use is another crucial part of this analysis. *Allen*. The Supreme Court has held that while transformation is not absolutely necessary for fair use, such transformation lies "at the heart" of the fair use doctrine. The Supreme Court noted that the more the work is transformed the more likely it is to be fair use. *Campbell v. Acuff-Rose Music* (U.S. 1994). Simply reproducing the copyrighted work is not a sufficient transformation for fair use. *Rodgers v. Koons* (2d. Cir. 1992). In *Rodgers* the fact that simple reproduction of a photo into a sculpture was not fair use because it was not a sufficient transformation. By contrast, using a work alongside creative expression for a different purpose than the original owners to make a different point does count as sufficient transformation. *Allen*. See also, *Blanch v. Koons* (2d. Cir. 2002). In *Blanch* the use of a photo within a collage to make a political point constituted fair use. Similarly, in *Allen* the use of part of a photo within a collage to make a political point about environmentalism counted in favor of fair use.

Here Franklin could cite *Campbell* and argue that the photo was substantially transformed because like the collages in *Allen* and *Blanch* the t-shirt placed other elements (text) alongside and on-top of the photo. Franklin could also argue, citing the court in *Allen*, that by taking the photo and using it to make a political statement the t-shirt substantially transformed by using it for a different purpose. Franklin could argue that the original use in the newspaper and the book was only to document newsworthy and historical events. By contrast, the use in the t-shirt was to make a specific political point.

Winston could cite *Campbell* and argue that the photo was not substantially transformed because, like the photo turned into a sculpture in *Rodgers* the whole photo was simply taken and placed on a t-shirt. Winston could also argue that Franklin did not change the meaning of the photo because the photo was always political.

On balance, this factor favors finding fair use in this case. The fact that the photo was altered by giving it a new political message and putting words over and near it strongly suggests the kind of transformation that creates fair use. The political context here is also important because in this case the photo was needed for a political purpose. While the use was commercial, and this does count against fair use, on balance this factor overall favors finding fair use.

3. The Nature of the Copyrighted Work

The second factor is the nature of the copyrighted work. This factor is not usually given much weight, but can be significant. *Klavan v. Finch* (D of F 2017). Generally, the fair use of published work is preferred over unpublished work. *Brant; Klavan*. In addition, scientific or factual work is valued over creative and expressive work. *Brant*. A photograph is an inherently creative work, which generally counts against fair use. *Allen*. However, in some cases a photo can be "more informative than artistic." *Allen*. When considering the artistic value of a photo the court in *Allen* also considered whether substantial value has been paid for the artistic use of the photo, finding little artistic value where a photo had only been used once in 10 years. Finally, the court in *Klavan* noted that where the work used is the only video of a newsworthy event that counts in favor of fair use for reporting the news. This is supported by *Time v. Bernard Geis* (S.D.N.Y. 1968) in which the use of sketches made from the only video capturing the assassination of J.F.K. was considered fair use.

Franklin will argue that the photograph of Barrow is a published work, because it was published in the newspaper and also in a book. As noted in *Brant and Allen* this counts in favor of fair use. Franklin will also argue, citing *Allen*, that like the wildlife photo in *Allen* in this case the photo is more informative than artistic because it captured an actual historic event. Franklin could use the artistic value standard mentioned in *Allen* to argue that there is little artistic value since the photo has not been sold since 1995. Finally, Franklin could argue that this photo is like the video in *Klavan* because it is the only photo of an important newsworthy event, the arrest of Barrow, and that as a result there was no other way for Franklin to make the same point.

Winston could argue, citing *Allen*, that as a photograph the photo it should be considered artistic and creative work because as *Allen* noted photos are generally artistic. Winston could argue that use in a coffee table book counts in favor of artistic value because coffee table are often aesthetic in nature. Winston could point to the value test in *Allen* and argue that unlike the photo (which only sold once for \$100) in *Allen* the photo here as

actually been used twice, by the newspaper and the book, and sold for considerable profit each time. Finally, Winston can argue that unlike the video in *Klavan* in this case the photo is not being used to report the news. Winston can also argue that unlike the sketches in *Time* there has been no transforming of the video into sketches because the photo in this case was simply printed on the t-shirt.

In this case this factor favors finding fair use. On balance the photo seems to have been primarily informative rather than artistic. The fact that it was published also counts in favor of fair use.

4. The Amount and Substantiality of the Portion Used

The third factor is the amount and substantiality of the portion of the work used. Generally, using the entire work will count against fair use, unless the circumstances are such that using the entire work was necessary for a commentary. *Brant*. In *Allen* the fact that only part of a larger photo was used counted in favor of fair use. Here Winston could argue that the entire photo was used, counting against fair use. Franklin could reply that the use of the entire work was necessary for comment, as noted in *Brant*, because the whole photo was needed to show the arrest. On balance this factor is not particularly important either way in this case. The whole photo was used, but it would be difficult to make fair use of the photo without capturing the whole context of the arrest. This factor is not significant in this case.

5. The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

The fourth and final factor is the effect on the market value of the copyrighted work. In some cases, this is considered the most important factor. *Brant*. Courts will look to the past profitability of the work in considering the effect of a use on its value. For example, in *Allen* the fact that a photo was only sold once in 10 years for a "mere" \$100 suggested that a new use had little effect on the current value of the work. Courts will also look to whether the use of the work associates it with ideas that might decrease its value. In *Brant* the use of a popular song in a political campaign was considered to decrease the potential market value of the song on the theory that its use would become associated with a particular political position and would thereafter only be popular with the fans of that political position. By contrast in *Allen* the fact that a photo was unlikely to be identified suggested that there would be no decrease in value by association. Finally, in *Klavan* the court rejected the argument where a part of a video was played on the news there was a good argument that that increased the value of the video by "creating a market for it." The court in *Klavan* discredited that argument on the ground that it is up to the owner to determine what enhances the work's value.

Here Franklin could argue that there is unlikely to be any impact on the value of the photography, or that the use could actually increase the value of the photograph. Franklin

could point out that use of the photograph has not be sold commercially since 1995 (when the book was published). This shows that there was almost no market value left in the photograph. Franklin could even argue that by drawing attention to the photograph they have given new popularity to it and increased its value.

Winston could argue that there is a substantial value to the photograph given that it was sold twice for profit to the newspaper and in a book. Winston made \$500 for the sale to the newspaper and almost ten thousand dollars from the book (although the book admittedly included 72 other pictures). Winston could easily reply to the argument that the use of the photo increased its value by arguing that the photo was already popular given these sales. Winston could also argue that we should follow the *Klavan* court and not credit this argument. Winston could also reply, citing *Brant*, that the "potential" market value must be considered along with the actual market value.

Winston could further draw a comparison to *Brant* and argue that by using the photo in a political context Franklin has decreased its value by associating the photo with a particular political position. Winston could argue that unlike the photo in *Allen* the photo on the t-shirt will be easily recognizable because, unlike in *Allen*, the entire photo is used, and because there was only one photo taken of the Barrow arrest so the photo can only have been Winston's. Winston strengthen this argument by noting that almost all of the customers for the T-shirt were critics of Barrow and that the T-shirt made the photo a symbol of opposition to Barrow. One problem with this argument is that the photo has arguably been political from the beginning, since it was originally published in a newspaper covering the issue of free speech.

On balance this factor counts slightly in favor of fair use. Although we should follow *Klavan* in setting aside the argument that the use increased the value of the picture there is strong evidence that there was little commercial value left in the picture. The fact that the picture has not been sold strongly suggests that there is little value left. In this case the argument that association with the anti-Barrow campaign decreased the market for the picture carries little weight. Given the nature of the photo it had an inherently anti-Barrow slant. In fact, Barrow himself has disavowed the actions captured in this photo. Thus, on balance this factor favors fair use.

6. Conclusion

In conclusion the balance of the factors in this case favor fair use. In particular the transformative use of the photo for a political message counts strongly in favor of finding fair use. Therefore, we should be ready to grant summary judgment in favor of fair use depending on the arguments received.

ANSWER TO MPT 1

To: Hon. Joann Gordon

From: Examinee

Date: July 27, 2021

Re: *Winston v. Franklin*

Introduction

Dear Judge Gordon,

Please see below my analysis on the defendant's argument that the use of the plaintiff's photograph was fair use under the federal copyright statute, 17 U.S.C. Section 107. As shown, I have segmented my analysis into the four factors courts have considered when applying the statute.

Defendant's Argument

Despite Section 106 of the Copyright Act providing exclusive rights in copyrighted works to the owners, Section 107 of the Act carves out a limitation for those rights in the form of a *fair* use exception. Under Section 107, use of copyrighted work "for purposes such as criticism, comment, news reporting, teaching..., scholarship, or research, is not an infringement of copyright." In determining when such uses for such purposes are valid, the statute examines the four factors below.

Factor 1: The Purpose and Character of the Use

The first factor of the test requires an analysis of the purpose and character of the use, including whether it is "of a commercial nature or... for nonprofit educational purposes." *Brant*. Generally, political discourse has seen to be vital to the essence of democracy and weighs heavily in favor of fair use. *Id.* A commercial purpose by the defendant does not preclude a finding of fair use. *Klavan*. In determining whether the use constitutes fair use, the Supreme Court has held that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against the finding of a fair use." *Campbell*.

Generally, simply reproducing the copyrighted work is not the "transformation" that would justify a finding of fair use. *Allen*. However, using an element of a copyrighted work in combination with other creative expression with a different purpose than the copyright owners to make a different commentary transforms the use. *Id.*

The seminal case on the issue is *Allen v. Rossi*. There, the court found that by cutting out a portion of a photo of several animals to highlight the endangered species and reselling a book of such photos, the author had transformed the original photo to establish fair use. While the court mentioned the fact that the book's proceeds went toward nonprofit causes, it was not a major consideration by the court. Rather, the court relied heavily on the fact that photograph was materially altered by cutting out some of the animals and used for a different social commentary. The *Klavan* court also found that simply because a news agency used a video for a commercial purpose didn't preclude a finding of fair use, because the news story at issue was one of significant importance to the city members. Finally, while the *Brant* court concluded against a finding of a fair use for the defendant's use of a song at political rallies, they noted that the decision was partially because the song didn't make any specific comment on the political agenda.

Our current case deals with a political issue, as was the case in *Brant*. Specifically, the defendant took a photo from the plaintiff's Book and republished it to attack a mayoral candidate. While they both concern politics, the current case can be distinguished from *Brant* because the defendant modified the original photograph in its use, likely transforming it to the degree required to grant a fair use exception as the court did in *Time*. While the plaintiff might argue that this case differs from *Allen* in that the defendant used the picture in its entirety, the defendant can point to the fact that the words "Arrested and Convicted" being stamped all over the Photograph, along with the caption "BARROWS IS A HYPOCRITE", were sufficient to rise to the level of transformation required for a fair use exception.

The plaintiff may also argue that while the case was connected to politics, the true purpose of the use was commercial, since the defendant was selling the T-shirts. However, similar to the court's finding in *Klavan*, a commercial purpose does not preclude a finding of a fair use. Furthermore, the defendant was selling the T-shirts at cost, similar to how the defendant in *Allen* was donating proceeds to nonprofits. This indicates that the purpose of the defendant's use was political commentary, as the purchasers were supporters of Barrows' opponent. This differs from the original, purely photographic purposes of the author, evidenced by the fact that she published the photos to a newspaper and a book documenting the history of Franklin.

For these reasons, the factor cuts in favor of the defendant for fair use.

Factor 2: The Nature of the Copyrighted Work

Generally, courts have noted that this factor does not usually significantly figure in most fair use analyses. *Brant*. When it is used, most cases involve favoring the use of published works rather than unpublished works. Photographs, as intrinsically creative works, generally weigh against fair use. *Allen*. Visual records of newsworthy events that are the only records weigh in favor of the fair use exception.

The seminal case on the issue is Klavan. There, the court found that even though the work was unpublished, it still warranted a fair use exception for two reasons. First was the fact that it was a visual record of a newsworthy event, more vivid and revealing than a mere description. Second, it was the *only* visual record of the newsworthy event. The court in Allen also discussed the second factor, noting that the fact that the photo had only been used once in the 10 years since it was taken showed that its artistic merit was limited.

Similar to Klavan, the facts indicate that the photograph was the only pictorial record of Barrows' arrest, and that the picturization of a "sneering" Barrows is more vivid in picture than mere description. As shown by the facts, Barrows' arrest was a relevant topic to the Mayoral election, demonstrated by the questioning from a reporter for the *Record* and the publicity around the arrest leading to Barrows' defeat. Furthermore, the case here is of a published work, as the author licensed the photos to a newspaper and a book documenting the history of Franklin. This should have a lower standard to meet the fair use exception.

For these reasons, the factor cuts in favor of the defendant and for the fair use exception.

Factor 3: The Amount and Substantiality of the Portion Used

This factor requires analysis of both the quantitative (amount) and qualitative (substantiality) use of the work. Brant.

In Klavan, the court found that despite the broadcasting company taking a significant qualitative portion of the plaintiff's video, the fact that there were many other portions of the video of similar significance allowed for a neutral finding of fair use. Allen and Brant both noted that the portion of the song or photograph used was relevant to a finding of fair use. The Brant court noted that in circumstances where use of the entire work is necessary for a commentary or a news report, the entire use could nevertheless amount to fair use.

Here, the plaintiff will likely argue that the factor weighs against fair use because the defendant used the entire photograph. However, the entire photograph of Barrows being handcuffed and taken away is arguably necessary for the commentary on Barrows' character and unfit nature to be mayor.

Since both arguments are valid, this factor is neutral in terms of warranting fair use.

Factor 4: The Effect of Use upon Potential Market for or Value

The fourth factor is the effect of the use on the market for, or value of, the copyrighted work. *Brant*. A key purpose of copyright is to protect the economic interests of the owner. *Id.*

In *Brant*, the court found that using the song at political rallies, an inherently polarizing affair, could jeopardize the owner's future economic interest through the impact on her fans. The court also noted the statute spoke of *potential* market for value, not simply of actual harm. *K:t*. The *Allen* court noted that because the author hadn't made an additional sale of the photograph in the past 10 years, the use likely didn't affect the market for the photo. Finally, the *Klavan* court found that because there were still many remaining economic uses for the video, there wasn't enough of an effect to preclude a finding of fair use.

Here, the plaintiff made over \$20,000 from her use of the photograph from its inception in 1985 until 1995. When the Book went out of print in 1995 (eliminating any future possibility of royalties), the plaintiff still owned the copyright but did not have any remaining revenue sources from the Book. Over the next 25 years, the plaintiff did not earn any income from any use of the Photograph. The defendant will argue that these facts are similar to those in *Allen*, where the court found that the market value for the photo had not been affected because of a lack of use over the last decade. However, the plaintiff may argue that Barrows' mayoral run was a potential source of income for her that wasn't available over the past 25 years because of the specialized nature of the photograph (as it only concerned Barrows being arrested), and the defendant took away the plaintiff's ability to profit from the current election. While this may be a valid argument, there is no evidence the plaintiff tried to sell the photograph during the election herself. As such, there doesn't seem to be many remaining economic uses for the photograph. *Klavan*.

Based on these reasons, this factor cuts in favor of fair use.

Conclusion

Based on the above analysis, I believe defendant's use of plaintiff's photograph was fair use under the federal copyright statute, 17 U.S.C. Section 107. Specifically, *the purpose and character* of the use of the photograph, *the nature* of the copyrighted work and *the effect* of the use on the market for value all cut in favor of the defendant. As such, the motion for summary judgement should be **granted**.

ANSWER TO MPT 2

FAWCETT & BRIX LLP
425 Lexington Ave., Suite 100
Hayden, Franklin 33054

July 27, 2021

Dear Ms. Mendoza,

It was a pleasure speaking with you yesterday. We write to follow up on the two questions you brought up during our meeting. First, you asked whether the Board should uphold the ACC's denial of the Stewarts' application (the "Application") for a structure and a fence. Second, you asked whether, if the Board affirms the ACC's denial and the Stewarts sue the association, what outcome is likely and what potential remedies are available.

As to the first question: The Board should uphold the ACC's denial of the Stewart's application to build the Fence, but it should permit the Stewarts to build the Structure.

As to the second question: we would likely win on the Fence, but lose on the Structure, and we should be able to obtain at least declaratory relief on the Fence (if not injunctive and monetary relief under certain circumstances).

We discuss each question in further detail below.

A. Whether the ACC's Denial was Proper as to the Structure and Fence

The Stewarts' application proposed two new construction projects: (1) a structure located adjacent to their existing home (the "Structure"), and (2) an eight-foot-tall fence (the "Fence").

1. *The Structure likely does not violate the Canyon Gate Covenants, Conditions, and Restrictions (the "CCR").* The ACC's denial of the Stewart's proposal to build the Structure was likely in error, and we may want to concede on this point. The ACC denied the Structure under Section 5C of the CCR, which establishes that the "maximum allowable square footage of all outbuildings shall not exceed 100 square feet per acre of a homeowner's lot." Based on our conversation on July 26, we understand that the Stewarts live on a two-acre lot, which would make the maximum square footage of any outbuilding on their lot 200 square feet. We also understand that the Stewart's plans included a 600 square-foot proposal for the Structure, which would appear to exceed the CCR by 400 square feet.

Before we apply Section 5C of the CCR, however, we have to address a threshold question: whether the Structure is an “outbuilding.” The operative legal definition of “outbuilding” suggests that the Structure is likely *not* an outbuilding. Because Section 5C only constrains the square footage of “outbuildings,” if the proposed Structure is not an “outbuilding,” it would be much more difficult for us to argue that the Structure has to comply with the strictures of Section 5C. Black’s Law Dictionary provides that an “outbuilding” is a “*detached* building (such as a shed or garage) within the grounds of a main building,” and US Legal explains similarly that an “outbuilding” is a structure “*not connected* with the primary residence on a parcel or property.” The fact that the Stewarts’ proposed Structure is intended to be connected with their primary residence by a breezeway, coupled with the fact that the Stewarts want Estelle Stewart to live in the Structure, make it much less likely that the Structure is an “outbuilding” as contemplated by the CCR. Instead, the Structure is more likely to be considered either a “residence” or a modification to a residence, which is defined as a building “used for residential purposes or in which people reside, dwell, or make their homes.”

We might attempt to argue that the intent of the CCR was to keep residential units uniform, and that a separate structure connected only by a breezeway to the main house would still cause a large amount of heterogeneity across the different units in Canyon Gate by allowing multiple residences on each parcel of land, frustrating the purpose of the CCR.

We have some legal grounding for this argument: in *Foster v. Royal Oaks Property Owners Association* (Fr. Ct. App. 2017), the Franklin Court of Appeal found that covenants have to be “reasonably construed to give effect to their purposes and intent.” Moreover, the Franklin Supreme Court found in *Humphreys v. Oliver* (Fr. Sup. Ct. 2007) that this “reasonable-construction rule” actually “supersedes the common law rule of strict construction.” We would argue that the CCR makes clear that the Canyon Gate subdivision is intended to “embody super standards of single-family housing” (Section 1), and for that reason, “only one family residence may be erected, altered, placed, or permitted to remain on any lot” (Section 3).

While our argument is colorable, it still may be difficult for us to win on it. The Stewarts would likely argue that there is only one family residence—the house connected to the structure. They could also point to Section 403(b) of the Franklin Property Code, which creates an interpretative presumption against “prevent[ing] or restrict[ing] the use of property as a family home.” Both of these are strong arguments, given their documented intent to have Estella Stewart live in the Structure. *See a/so Powell v. Westside Homeowners Assoc. Inc.* (Fr. Ct. App. 2019) at 2 (restrictive covenants “cannot restrict or prevent the use of property as a family home”). In general, because the plain language of the CCR, reasonably interpreted by its ordinary meaning, suggests that the Structure is a modification of a single residence, rather than an additional outbuilding, the ACC should not have denied the building of the Structure on that basis.

Moreover, interpreted as a residence, the Structure does not appear to violate any other provision of the CCR. Although Section 3A provides that a residence “shall be set back at least 30 feet from the front street right-of-way,” the Structure would be set back 50 feet from the street. And, although Section 3A requires that the living area of a residence shall be a minimum of 2,800 square feet, and the Structure will only be 600 square feet, the Stewarts would have a strong argument that the Structure is merely an extension of their primary residence. We could make arguments to the contrary—i.e., that the breezeway is not sufficient to make the Structure an adjoinment rather than a separate building—but the reasonable-interpretation standard that the Franklin courts tend to apply will likely cut against us.

2. *The Fence likely violates the CCR.*

By contrast, the Stewarts’ proposal to build the Fence likely violates the CCR, and no variance is required here. The ACC denied the Fence under Section 7A of the CCR, which limits fences to a “maximum height of six feet,” and which states explicitly that “[n]o fence having a height greater than six feet shall be constructed or permitted to remain in the subdivision.” Because the Stewarts do not contest that the Fence will be eight feet tall, there is a facial violation of the CCR.

The Stewarts have only two potential (and related) arguments that the Fence should have been permitted, but neither of them is availing. First, as you mentioned, the Stewarts have argued that a variance should have been granted under Section 10 of the CCR to allow the Fence to be built. Section 10 permits variances “only for a compelling reason and only if the general purposes and intent of the covenants and design standards are substantially maintained.” The case law permits associations like yours to deny variances within their discretion, and presumes that denials are “proper” as long as the refusal is not “arbitrary, capricious, and/or discriminatory.” *Foster* at 3. Arbitrariness has been found only where defendant associations deny structures even though the deeds do not specifically prohibit those structures, or where those associations fail to do a reasonable investigation of the proposed structures. See, e.g., *Mims v. Highland Ranch Homeowners Association Inc.* (Fr. Ct. App. 2011) (finding of arbitrariness where association told homeowner that they would deny carport “no matter what,” and did not review the plans or contact the homeowner).

Our discussion did not suggest that the Canyon Gate association acted in any such way; as you mentioned, the ACC reviewed the application, took a call from Ms. Mendoza, and issued a written decision outlining the grounds for denial. It would be difficult for the Stewarts to suggest that the variance denial was improper under *Mims*. More fundamentally, it is unclear that the Stewarts have proffered a “compelling reason” for the variance, which is their threshold burden. We are, of course, sympathetic to the Stewart’s desire to keep their dog within an enclosed area, but there is no indication in the record so far that a conforming six-foot fence would not do the job.

The Stewarts may also attempt to suggest that the ACC and the Board waived their ability to enforce the fence provision in the CCR because there are several other non-conforming fences in the community. Specifically, they would contend that because there is lax enforcement of the fencing requirements, and because there are other fences that exceed the height requirement, this denial is improper. Under controlling case law, however, the Stewarts need to do more than simply state that there are other non-conforming uses; they bear the burden of showing that “the violations then existing were so extensive and material as to reasonably lead to the conclusion that the restrictions had been waived.” *Powell* at 2 (citing *Larimer Falls Comm. Assoc. v. Salazar* (Fr. Ct. App. 2005)). Specifically, if only between 1-10% of properties violate the rules at issue, there is insufficient evidence to find waiver.

Here, we understand from our conversation that although there are some fences that exist, they likely do not exceed 10% of the properties in the area. While it is optically sub-optimal that one of those fences are on a former ACC member’s property, the ACC has likely not waived its ability to enforce the covenant as long as that 10% threshold is not met. Please let us know if that is the case, so that we can further discuss this issue.

B. What Outcome is Likely in Court and What Potential Remedies Are Available

If the Stewarts sue the association, they would likely bring suit in Franklin State Court, and we would have the ability to defend that lawsuit pursuant to Section 404(a) of the Franklin Property Code. They likely have two options in the relief they seek: declaratory judgment or injunctive relief. They could seek a declaratory judgment stating either that the Structure and the Fence did not violate the CCR, or that the Board’s refusal to grant a variance as arbitrary, capricious, or discriminatory. They may also seek an injunction permitting them to build the two structures they proposed. Although Section 404 of the Franklin Property Code permits damages *to a property owners’ association* for an amount not to exceed \$200/day for each day of the violation, the statute does not appear to contemplate damages the other way around.

In return, we could file a counterclaim seeking injunctive relief to enforce the restrictive covenants contained in the deed restrictions, a declaratory judgment affirming our authority to enforce the restrictive covenants, and damages at a rate of \$200/day pursuant to Section 404 of the Franklin Property Code if the Stewarts end up building the structures anyway. To get those damages, we would not even need to show actual harm under the statute; as the court found in *Foster*, the “amount of damages that may be assessed under Section 404” is related only to the “number of days that the violation takes place, without any reference to the existence, nature, or extent of any type of injury or harm.” *Foster* at 4. However, there is no indication that the Stewarts have yet done so.

As for the outcome of the potential lawsuit: As discussed above, we would likely win that the Fence was not proper under the CCR, that a waiver was not justified by a compelling

reason, and that the Court should not find waiver appropriate here. *See supra* Section A.2. However, as to the Structure, the Court could potentially find that the “outbuilding” should be more reasonably interpreted to be a modification to an existing residence, and thus, under Franklin law and under the terms of the CCR itself, the Structure should have been permitted. *See supra* Section A.1.

C. Conclusion

As discussed above, we have a strong argument on the Fence which we believe should prevail in court should the Stewarts attempt to sue. However, we may recommend permitting the Stewarts to build the Structure—not only because the Stewarts have a reasonable chance of prevailing on that issue in court, but also to preserve our credibility to make a strong argument regarding the Fence. Should you have any other questions, please do not hesitate to give us a call to set up a meeting.

Sincerely,
Examinee

ANSWER TO MPT 2

July 28, 2021

Dear Association Board of Directors,

You asked our opinion about whether the Association's architectural control committee properly denied the Stewarts' application for a structure and a fence. Please review our findings below.

Whether board should uphold ACC's denial of Stewarts' application for a structure and a fence

Short answer: yes, the Board should uphold ACC's denial of Stewarts' application for a structure and a fence.

1. The structure

As you likely know, a restrictive covenant is a type of deed restriction used to protect homeowners against construction that could interfere with use and enjoyment of property or impair property values. See *Foster v. Royal Oaks*. It is essentially a contract between a

subdivision's property owners as a whole and individual lot owners. See *Coleman LLC v. Ruddock* (Fr. Sup. Ct. 1999). In interpreting a restrictive covenant, the court must determine the drafter's intent from the language, giving its words and phrases their commonly accepted meaning. See *id*; *Foster*. Under the Franklin Property Code, all restrictive covenants contained in deeds governing certain residential developments must be interpreted reasonably, to give effect to their purpose and intent. See *Fr. Prop. Code* § 403. This provision supersedes the rule of strict construction under the common law. See *Humphreys v. Oliver* (Fr. Sup. Ct. 2007); see also *Powell v. Westside Homeowners Assoc. Inc.* (Fr. Ct. App. 2019). All that means is that the court will be more flexible, looking to general intent, rather than strictly construing a covenant to the exclusion of its intended purpose. In *Foster v. Royal Oaks*, for instance, there were two different sections in the restrictive covenant, one of which prohibited fences nearer to the street than 25 feet; and the other which provided that no building or structure shall be located nearer to a side lot line than 5 feet. The court concluded that they could not erect a fence 10 feet from their side lot line despite this second provision, because it by its own terms only applied to the "extent not otherwise limited by these deed restrictions"-- the court found that the specific fence restriction was more on point and had to be applied.

The question in this case is whether the structure is characterized as a residential building or instead an addition to the family's residence. Under Section SC of the covenant, the maximum allowable footage of all outbuildings can't exceed 100 square feet per acre. See Covenant. The Stewarts own a 2-acre lot, which means that they can't have an outbuilding exceeding 200 square feet. What they want to construct is 600 square feet. This means that if their structure is categorized as an outbuilding, the covenant properly interpreted would prevent the construction of the structure. However, if the structure is seen as an addition to their pre-existing house, then it would not be an outbuilding and would not be required to comply with these limits.

To determine whether the structure is an outbuilding, we have to look to the language of the deed itself, interpreting it reasonably, to give effect to its purpose and intent, and giving its words and phrases their commonly accepted meaning. First, we have to consider the commonly accepted meaning of "outbuilding" to determine whether the square footage limit applies. An outbuilding is defined as a detached building, like a shed or garage, within the grounds of a main building. Black's Law Dictionary (11th ed. 2019). Alternatively, it's defined as a structure not connected with the primary residence, including a shed, garage, or barn. See www.definitions.us/egal.eom. A residential building, on the other hand, is a building used for residential purposes, in which people live, as opposed to buildings used for commercial purposes; it merely needs to be a place of abode, not necessarily one's usual place of abode. 20 Am. Jur. 2d *Covenants* § 179 (2018).

Now, let's look at the nature of the structure itself. It is constructed apart from the main building-- 12 feet to the right -- connected to the house by a breezeway whose roof would

extend from the edge of the structure's roof to the existing roof. The purpose of the structure is so that the resident, Ms. Stewart's 72-year-old mother can live with her. The structure will be 600 square feet, as mentioned above, and will contain a large living/sleeping area and a bathroom. The structure certainly does not sound like an outbuilding: it is not a shed or garage, but is instead planned to be lived in by Ms. Stewart's mother, and it is not "detached" from the main building, but is instead connected by a walkway and a roof. It has no commercial purpose, since Ms. Stewart seems unlikely to charge her mother rent. Therefore, it sounds much more like a residential building than an outbuilding, and cannot be required to comply to the square footage limits for outbuildings.

However, in considering the request for the structure, the homeowners' association might also consider raising Section 3B of the covenant, which says that only one family residence can be erected, altered, placed, or permitted to remain on any lot. So, if the structure is seen as a *separate* family residence, even if it was not an "outbuilding," then Section 38 might prevent its construction anyway. But the association must also be wary of the Franklin Property Code § 403, which stipulates that restrictive covenants cannot limit or prevent someone from using their property as a family home. See *Powell*; Fr. Prop. Code § 403. While the court found that requiring someone not to park their minivan in their front yard does not constitute such a limitation, see *Powell*, it might find that preventing someone from expanding their house to accommodate their mother *would* constitute an unlawful restriction.

Since the structure does not constitute an outbuilding, and given the Association's restrictions against limiting someone's use of their property as a family home, the Committee's denial of the structure plans was likely inappropriate. See *Mistover LLC v. Schmidt* (Fr. Sup. Ct. 1987).

All of that said. It is also true that when an association applies a restrictive covenant, the application is *presumed* to be lawful unless the court finds that the association acted in an arbitrary, capricious, or discriminatory manner. See *Cannon v. Bivens* (Fr. Sup Ct. 1998); see *a/so Foster*. This is true even if the restriction was recorded before the Franklin Property Code was enacted-- as it is here, since the Covenant is from 1985. See *Powell*. A resident who believes they have been subject to an improper application of a restrictive covenant bears the burden of proof by a preponderance of the evidence. See *Foster*. In non-lawyer speak, this just means that they have to prove that it is more likely than not that the application was arbitrary, capricious, or discriminatory.

In *Mims v. Highland Ranch Homeowners Association Inc.* (Fr. Ct. App. 2011), the court found that an association had acted unlawfully in denying an application to build a carport where the deed restrictions did not specifically prohibit them, an association member told the homeowner the plans would be denied no matter what, and the association didn't even review the plans or discuss them with the homeowner. In *Foster*,

on the other hand, the court found that the application was proper where the association had attempted to work out other fencing options with the homeowners, and where the homeowners had failed to provide any good reason for deviating from the covenant.

Here, even though the commission was likely wrong in its application of the law, the court will give it the benefit of the doubt, and only overturn its determination if it was arbitrary, capricious, or discriminatory. This is a high hurdle for the Stewarts to meet, and they likely cannot. We don't have all of the details of the Commission's process of arriving at its conclusion, but in their letter denying the Stewarts' requests, the Association suggested that they had reached the decision after careful consideration, review of the plans and specifications submitted, and a meeting at the Stewarts' house to inspect the proposals. *See Home Improvement Requests letter.*

2. The fence

The provision regarding the fence in the covenant is not difficult as an interpretive matter: Section 7A says straightforwardly that fences taller than 6 feet are not permitted, and the Stewarts are not contesting that their fence is a fence, or that it is 8 feet tall. The main question with the fence restriction is whether it has been waived. If the association is shown to have waived the restriction, then it will be harder for them to enforce it against the Stewarts.

To show that there has been such a waiver, the homeowner must show that the violations were "so extensive and material as to reasonably lead to the conclusion that the restrictions had been waived." *See Larimer Falls Comm. Assoc. v. Salazar* (Fr. Ct. App. 2005). This requires looking at how many violations there have been, what they've been, and how severe they've been. *See id.* When only 1% to 10% of properties have been found to violate a restrictive covenant, there has been insufficient evidence of waiver. Same in cases where there was insufficient evidence include those involving 10 out of 180 nonconforming fences, 2 out of 33 nonconforming access roads, and 15 of 150 nonconforming cars. *See Powell.* In *Powell*, there was insufficient evidence where the chair of the association testified that in the five preceding years, she'd seen no other nonconforming uses of the kind the plaintiff was committing, and plaintiff had provided no further evidence to support the waiver. *See Powell.*

In this case, the Stewarts are alleging that there have been a few homes with some types of fencing that have not complied with the restrictive covenant, and that they have gotten away with it because of lax enforcement of the covenant. *See File Memo from Ms. Fawcett.* Ms. Stewart points to one example in particular of a former Association member who built a nonconforming fence on his lot without prior approval while serving on the board. *See id.* However, these deviations are almost certainly insufficient to constitute a waiver. The Association Committee has never formally approved installation of fences that are over 6 feet tall or don't meet the requirements, *see id.*, and Ms. Stewart cannot

even provide an estimate of how many noncompliant fences there are in this lot of 45 single-family homes. Merely one example of noncompliance out of 45 will not be sufficient. In addition, the Stewarts have lived in the lot for 7 years, which gives further indication of how minimal the non-compliance has been, if she's only seen a handful of examples. Therefore, the Committee was probably correct to deny the plans for the fence.

However, the Stewarts will argue that they still should have been awarded a variance. Variances are to be granted only for a compelling reason and only if the general purpose and intent of the covenants and design standards are substantially maintained. *See* Covenant Section 10. The reason provided by the Stewarts for the higher fence is so that Ms. Stewart's mother's dog can roam the land without escaping or getting lost. However, this is likely not a compelling reason. Unless the dog is human-sized, a 6-foot-tall fence should certainly be able to perform just as well in this as an 8-foot-tall fence. The association was right to deny the variance.

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

Short answer: The Stewarts will likely lose, and the Association can countersue or get damages for the cost of enforcing the covenant, but damages will be limited if they do countersue.

A property owners' association is allowed to defend or intervene in litigation or an administrative proceeding that affects the enforcement of a restrictive covenant. *See* Fr. Prop. Code § 404(a). The association can both defend itself from the Stewarts's litigation and also countersue for damages.

Under Franklin Property Code § 404, damages for the violation of a restrictive covenant are assessed on the basis of the number of days that the violation takes place-- specifically, an amount not to exceed \$200 for each day of the violation-- without any calculation of the type of injury or harm caused. *See Foster v. Royal Oaks*. The damages are not intended to make up for harm or injury from the violation. *See id.* Since the Stewarts have not gone forth with their plans yet, but have merely had them denied, the violation has not occurred yet, which means that the Association will not be able to recover any damages under the Property Code from them.

However, the covenant provides an additional source of damages, permitting the Association to recover costs, fees, and expenses expended in enforcing any covenants against violating parties. *See* Section 2 (B). This means that the Association will be able to recover the expenses spent in defending themselves against this action.

Sincerely,
Applicant at Law