MPT 1
July 2021

Winston v. Franklin T-Shirts Inc. **(July 2021, MPT-1)**
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.

Memorandum

To: Hon. Joann Gordon

From: Examinee

Date: July 27, 2021

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

This memorandum concerns the upcoming motion for summary judgment to be made by Defendant Franklin T-Shirts, Inc. ("FTI") against Plaintiff Naomi Winston ("Winston"). Winston asserts infringement of her copyright in a 1985 photograph ("the Photo") of Jim Barrows ("Barrows"). FTI's motion will assert the copyright doctrine of fair use as a complete defense to the claim. As the parties have agreed to the relevant facts, this memorandum will apply the United States Copyright Act, 17 U.S.C. § 101 *et seq.* ("the Act"), to those stipulated facts and render a preliminary opinion on the outcome of the motion. When all facts and law are considered, it is likely FTI will prevail in its defense.

Under § 106 of the Act, copyright owners have the exclusive rights to reproduce, distribute, and prepare derivative works from their works. Here, Winston is the sole owner of copyright in the Photo and, as such, retains those exclusive rights and could, save for an applicable defense, exclude FTI from such uses of the Photo. FTI will assert the complete defense of fair use, which is incorporated into the Act in § 107. In order to determine the viability of a fair use defense, courts look to four factors enumerated in the statute: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use on the potential market or value of the work. None of these factors is solely dispositive and courts have broad discretion in their weighing of the factors. This memorandum address each factor in turn and concludes with an overall opinion of the viability of FTI's fair use defense.

Factor 1: Purpose and Character of Use

In considering the first factor--the purpose and character of the use--courts consider whether the use was commercial, nonprofit, or political in nature. *Brant v. Holt* (Franklin D.C. 1998). Additionally, courts examine whether the use was "transformative" of the original work. *Allen v. Rossi* (Franklin D.C. 2015). Here, because FTI's use was predominantly political and mildly transformative, this factor weights in FTI's favor.

Because FTI sold the shirts imprinted with the Photo, its use is undeniably commercial. Commercial uses of works generally weigh in favor of the copyright owner in fair use analyses, however, just because a use is commercial does not preclude a finding of fair use. *Campbell v. Acuff-Rose Music, Inc.* (1994); *see also Klavan v. Finch Broadcasting Co.* (Franklin D.C. 2017). Additionally, the degree to which FTI's use of the work is commercial is not significant. FTI did not profit from the sale of the shirts, selling them at

cost. This moderately commercial nature of the use should not overcome a finding of fair use. Further, FTI will likely succeed in an argument that while the use was somewhat commercial, it was predominantly political.

Political uses of works are given broader protections by the fair use defense than commercial ones. According to the Franklin District Court, "political discourse is vital to the essence of our democracy, and uses for that purpose should, absent other factors, weigh heavily in favor of fair use." *Brant v. Holt* (Franklin D.C. 1998). In *Brant*, the defendant used the plaintiff's song for his political rallies. The court ultimately determined that a fair use defense was not applicable, but nonetheless recognized that the political nature of the use weighed in favor of the defense and that weight was mitigated by the fact that many other songs could have been used. Here, due to political motivation, FTI sought to publicize Barrows's history of criminality in using the Photo. No other photographs captured the event and there is no information in the record that suggests Barrows was arrested at other times. As such, no other photograph could have been used to meet FTI's political goals.

Whether or not a use can be considered transformative is another consideration for courts in this factor of the fair use analysis. Transformative uses are found where the user has "transformed the original aspect" of the work, for example where a wildlife activist has used a photograph in a collage in order to raise awareness for endangered species. *Allen v. Rossi.* A finding of transformative use is not required for a viable fair use defense, but it heavily weighs in favor of such a finding. *Campbell v. Acuff-Rose Music.* Here, FTI's use of the Photo is not significantly transformative. The Photo was originally used as a documentation of an event and FTI's use of it is to highlight that event as documented. The addition of "BARROWS IS A HYPOCRITE!" on the shirts does move the needle somewhat, because FTI is not merely attempting to communicate that the arrest happened, but to highlight the disparity between Barrows's past conduct and his current political stance. As such, a finding of transformative use, however slight, would be appropriate here. However, it should not be afforded the significant weight that transformative use has received in other cases, for instance where a portion of a photograph was used in a collage to make a social comment on materialism. *Blanch v. Koons*.

Because FTI's use was predominantly political, that political dimension was not outweighed by the moderate commercialization of the shirts because they were sold at cost, and the use can be considered mildly transformative, this factor weighs in favor of FTI's fair use of the Photo.

Factor 2: Nature of Copyrighted Work

This factor is generally only of significant importance where an unpublished work has been used. *Brant v. Holt.* However, where the event was newsworthy, this factor can be material even where the work used was already published. *Klavan v. Finch Broadcasting.* In *Klavan*, the court found a video of an unpublished newsworthy event to be fair use because the plaintiff's documentation of the event was the only one in

existence. Here, the Photo is the only existing image of Barrows's arrest. Additionally, it had already been published for many years at the time of FTI's use. As such, this factor weighs in favor of FTI's fair use.

Factor 3: Amount and Substantiality of Work Used

The amount and substantiality of use is always important to a fair use analysis. In *Klavan*, the amount of the video used was "minimal," however the court still weighed that minimal use somewhat in favor of the plaintiff because the minimal portion of the video was "substantial" due to its content. The *Klavan* court went on to find for the defendant on this issue, though, because many other portions of the video had newsworthy purposes. Here, FTI used the whole Photo and, thus, its whole newsworthy substance. As such, this factor weighs in favor of Winston.

Factor 4: Effect of Use on Work's Market and Value

The final factor considered by courts is very important to the analysis because it has the ability to preserve copyright owners' economic interests in their works. In *Allen v. Rossi*, the plaintiff had already sold her work and had not made a subsequent sale in a decade. And, because the photograph would have been unrecognizable in the defendant's collage, it would not impact any future possible market for the photograph. Here, Winston has already licensed the photograph, once in 1985 and again in 1992. The 1992 license consisted of a book which has been out of print since 1995. Over 25 years has passed since Winston has received value for the Photo. As such, there is little effect of FTI's use on its value. If any potential market for the Photo exists, it would likely be in other documentary mediums similar to the 1992 book. The existence of a single run of political shirts would not preclude such a market. As such, this factor weighs heavily in favor of FTI.

Conclusion

The sole factor weighing in Winston's favor is the amount and substantiality of the use. This one factor is not dispositive and courts may find a fair use even where the entirety of the work was used. *Brant v. Holt*. Here, due to the significant weight of the other factors and the inability to accomplish FTI's political goals without using the whole Photo, a finding of fair use in favor of FTI is appropriate. Summary judgment should be granted.

MPT 2
July 2021

In re Canyon Gate Property Owners Association **(July 2021, MPT-2)**
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.

To: Canyon Gate Property Owners Association Board of Directors

From: Examinee

Date: July 27, 2021

Re: Board Review of Stewarts' Application

Dear Canyon Gate Property Owners Association Board of Directors:

I am writing this letter with my advice regarding whether you should uphold the ACC's denial of the Stewarts' application for a structure and fence. When a court reviews an association's denial of an application, they look to see whether the ACC properly interpreted the deed restriction, whether the restriction has been waived, and whether the ACC properly applied the restriction. I have analyzed each issue in detail below to make sure Canyon Gate complies with the appropriate rules. Additionally, I have analyzed what might happen if the Board affirms both denials and the Stewarts bring suit, including the potential outcome and available remedies.

1. Should the board uphold the ACC's denial of the Stewarts' application for a structure and fence?

I have divided this section into three distinct issues: (A) whether the ACC properly interpreted the deed restrictions, (B) whether the fence restriction has been waived, and (C) whether the ACC properly applied the fence restriction in denying the Stewarts' variance.

A. Issue: Whether the ACC properly construed the Canyon Gate Declaration of Covenants, Conditions, and Restrictions.

Short answer: While the ACC properly construed the fence restriction, its interpretation of the structure covenants was improper because the Stewarts' proposed structure is an addition to their residence, rather than an outbuilding.

A restrictive covenant is a type of deed restriction, which is used in neighborhoods to protect homeowners against construction that could interfere with the use and enjoyment of their property. Foster v. Royal Oaks Property Owners Association (Fr. Ct. App. 2017). These covenants are contracts and are subject to general contract interpretation principles. Powell v. Westside HOA (Franklin Ct. App. 2019). The Franklin Property Code, adopted in 1990, states that a "restrictive covenant shall be reasonably construed to give effect to its purposes and intent." § 403(a). These covenants cannot be construed in a way that prevents the use of a property as a family home. § 403(b). Canyon Gate adopted its CCRs in 1985, before this code was adopted. However, the Franklin Supreme Court has held that § 403 applies to all restrictive covenants. Humphreys v. Oliver (Fr. Sup. Ct. 2007). Additionally, § 403(c) states that the code applies to all restrictive covenants regardless of the date on which they were created.

(i) Structure

Section 5C of the CCRs states that "the maximum allowable square footage of all outbuildings shall not exceed 100 square feet per acre of a homeowner's lot." An outbuilding is a "detached building (such as a shed or garage) within the grounds of a main building." Blacks Law Dictionary. It is also defined as a structure "not connected with the primary residence of a parcel of property."

The Stewarts asked to build a structure that is 600 square feet and will contain a large living area and a bathroom. It would be located approximately 12 feet from the home and 50 feet back from the street. It would be connected to the home through a "breezeway" walkway. They would like to add this structure for Mrs. Stewart's mother to live in. The ACC improperly interpreted this structure as an "outbuilding" under Section 5C because it is connected to the primary residence and is not akin to a shed or garage. Instead, the structure is to be connected to the home through a walkway and is intended to be a living space. Therefore, Section 3A, rather than Section 5C is applicable.

Section 3A of the CCRs states that the "living area of a residence shall be a minimum of 2,800 square feet . . . and shall be set back at least 30 feet from the street." Section 3B requires that "only one family residence may be erected, altered, placed, or permitted to remain on any lot." A residential building is defined as a building used for residential purposes or in which people reside. A building is a residence if it is a place of abode. This structure is being added to the house, which is 3,000 feet. Additionally, this structure will be 50 feet back from the street. Thus, this structure meets the requirements of Section A.

The Franklin Property Code states that restrictive covenants shall be reasonably construed to give effect to its purposes and intent, and cannot restrict the use of a property as a family home. § 403. In Powell, the Franklin Court of Appeal held that a restriction prohibiting a homeowner from parking a van on his front yard did not affect the homeowner's ability to use his property as his home. A reasonable construction of Section 3 permits one family residence, of 2,800 square feet or more, which can be altered. The requested structure is intended to be used as an abode for Mrs. Stewart's mother. Since this structure will be attached to the existing home, a reasonable interpretation is that there will be one home, even with the addition. If the Board interprets and applies the restrictive covenant to prohibit the structure, it will restrict the property’s use as a family home, because Mrs. Stewart's elderly mother will not be able to reside there.

With respect to the structure, I recommend that the Board reverse the ACC's denial.

(ii) Fence

Section 7A of the CCRs states that "fences are limited to a maximum height of six feet."

The ACC interpreted this provision as prohibiting fences taller than six feet, including the Stewarts' eight-foot fence. This interpretation is clear from the plain language of the CCRs, so this interpretation is proper. However, there are issues of waiver and whether the application of this restriction was proper (see below).

B. Issue: Whether the HOA has waived the condition that fences not be over six feet.

Short Answer: It is unclear whether the HOA has waived the condition because the evidence is not clear how many nonconforming fences have been permitted.

An association might waive a restrictive covenant if it has allowed other properties to violate the covenant. The contesting party must show that "the violations then existing were so extensive and material as to reasonably lead to the conclusion that the restrictions has been waived." Larimer Falls v. Salazar (Fr. Ct. App. 2005). The Franklin courts have found there has been no waiver where 1 to 10% of properties violated a covenant. Powell v. Westside HOA (Fr. Ct. App. 2019).

Here, Ms. Mendoza has stated that a few homes in the community have some type of fencing that is noncompliant with the deed restrictions regarding fence height and color, but it is not clear how many nonconforming fences have been allowed. Although, one former ACC member build a nonconforming fence on his lot without approval while he was serving as an ACC member. Based on these limited facts, it is not clear whether there have been extensive violations of the fence requirement so as to constitute a waiver. I recommend that the Board do further investigation to determine how many nonconforming fences are on the property, and if these violations are less than 10% of the properties, then there is likely no waiver. In that case, the Board can uphold the denial of the fence.

C. Issue: Whether the ACC properly applied the deed restrictions and properly denied the Stewarts a variance on the fence height.

Short Answer: The ACC properly applied the deed restrictions in denying the variance for fence height.

An association's application of a restrictive covenant is presumed to be proper unless the court determines that the association acted in an arbitrary, capricious, and/or discriminatory manner. Cannon v. Bivens (Fr. Sup. Ct. 1998). In Mims v. Highland Ranch HOA (Fr. Ct. App. 2011), the court found that the association acted in an arbitrary, capricious, or discriminatory manner by denying a request to build a carport because a HOA member told the homeowner that carport plans would be denied "no matter what," even though there was no prohibition of carports in the deed restrictions. Additionally, the board did not even review the plans or discuss the dimensions with the applicants.

In Foster v. Royal Oaks Property Owners Association (Fr. Ct. App. 2017), the court found that the association did not act improperly in denying a variance for a noncompliant fence because the homeowners failed to provide any justification for a variance relaxing the 25-foot setback.

Here, the Section 10 CCRs provides that "variances to the design standard and development criteria shall be granted only for a compelling reason and only if the general purposes and intent of the covenants and design standards are substantially maintained." The Stewarts want to add a fence to their property to prevent Mrs. Stewart's mother's dog from roaming the property. However, the Stewarts have not provided any justification for why the fence needs to be eight feet tall to serve this purpose. Similar to the homeowner in Foster, the Stewarts have failed to provide a compelling justification for a variance. In contrast to the restrictions in Mims, Canyon Gates has an explicit prohibition on fence height. Therefore, the ACC properly denied the variance on fence height, and did not act in an arbitrary or capricious manner.

Thus, the Board should affirm the denial of the fence.

2. If the Board affirms the denial of the application and the Stewarts bring suit, what is the likely outcome and remedies?

Short Answer: The court will likely reverse the denial of the structure, but will affirm the denial of the fence and award the association damages and a permanent injunction prohibiting the Stewarts from erecting the nonconforming fence.

For the reasons stated above, if the Board denies both applications, a court will likely find the denial of the structure to be improper, as an application of the restrictive covenants would frustrate the use as a family home. However, the court will likely find the denial of the fence variance to be proper.

If a property owner violates a valid restrictive covenant, the court may award the association a permanent injunction requiring the homeowner to comply with the restrictive covenant. Franklin Property Code § 404 also provides that a court may award civil damages if a homeowner violates a restrictive covenant. The damages may not exceed $200 for each day of the violation. Damages under § 404 is related to the number of days that the violation takes place, and do not take into account any injury or harm. Foster.

If the Stewarts bring suit, the association can defend the action by stating that the restrictive covenant is valid and was validly applied. They can also counter for a preliminary injunction and damages (if the Stewarts erect the fence).

In conclusion, I recommend that the board affirm the denial of the fence variance, but reverse the denial of the structure application. Please contact me if you have any further questions.

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.

To establish a cause of action for negligence, a plaintiff must prove (1) that the defendant owed him a duty to conform his conduct to particular standard of care, (2) that the defendant's conduct fell below that standard of care, (3) that the defendant's conduct was both the direct and proximate cause of plaintiff's injuries, and (4) that the plaintiff was in fact injured. The specific duty owed can vary based on the circumstances, but the general duty of care is to act as a reasonably prudent would under the same or similar circumstances to avoid harm to all foreseeable plaintiffs.

1. Son's negligence.

The issue is whether Son acted reasonably in light of his age, intelligence, and physical ability.

The general standard of care noted above is adjusted slightly for children as well as for those with physical limitations. Children owe a duty to act with the same care a child of similar age, intelligence, and maturity would exercise under the same or similar circumstances. One exception is for children performing adult activities--in those circumstances, the child will be held the standard of care an adult must exercise. Further, a person with a physical disability has a duty to act as a reasonably prudent person with the same disability would act under the same or similar circumstances. The duty of care includes a duty to act reasonably prudently to protect oneself from injury.

Here, Son is a six-year-old child who is visually impaired. He had a duty to act as a visually impaired six-year-old of similar age, intelligence, and maturity would act under the same or similar circumstances to prevent harm to foreseeable plaintiffs. Whether he breached this duty is a question of fact for the jury. A jury may find that a reasonably prudent six-year-old could be charged with listening to his mother's instructions to "remain in her grasp," because six-year-olds are about kindergarten age and kindergarteners are taught to follow instructions. The same would be true for any child of that age, regardless of visual impairment. A jury could find that a visually impaired six-year-old would know that running in a crowded area without being able to see could cause him to trip and fall over an unseen condition. Thus, a jury could find that the son breached a duty to protect himself from injury by ignoring his mother's instructions and taking off running. He was the direct cause of his injuries because but-for his failure to follow his mother's instructions, he wouldn't have tripped on the cheesecake. He is the proximate cause of his own injuries because his injuries were a foreseeable consequence of running without being able to see. He was injured.

There are sufficient facts for a jury to find that Son acted negligently.

2. Big Box's negligence.

The issue is whether Big Box was negligent.

A business owes a duty of care to act reasonably to protect customers from injury from dangerous conditions. Because customers are invitees, the business has a duty to inspect and cure dangerous conditions it knows or should know of. In a slip-and-fall case, a jury will consider the length of time a hazard was there as well as whether anyone at the store knew or should have known of it.

Here, Big Box is a business and it owes its customers (including Son) a duty to protect from conditions it knows or should know of. Since it provided cheesecake in a self-serve manner, it is foreseeable that some of it could fall on the floor. Thus, Big Box owed a duty to make inspections periodically to see if anything slippery had fallen on the floor. While not dispositive as to breach, a store's own policies can be indicative of whether it fell below a standard of care. Here, the store had a policy of cleaning up known hazards but it did not fulfill its duty to inspect because there was no policy to that effect. The fact that the cheesecake was flattened and dirty and the case had last been filled several days prior to the incident suggests it had been there for a long period of time and possibly no employee had been in the vicinity since then to check whether the floor was clean and safe for customers. Though the store employee had not noticed the cheesecake on the floor when he walked by earlier, this does not indicate a thorough inspection occurred. Thus, Big Box breached its duty to Son. The failure to clean up the cheesecake was the direct cause of Son's injuries because he wouldn't have slipped if the floor had been cleaned. It was also the proximate cause of his injuries because a customer in a store slipping on cheesecake that was not cleaned up is a foreseeable consequence of failing to clean it up. Son was injured.

On these facts, a jury could find that Big Box acted negligently. Since Son was also negligent (see above), in a pure comparative fault jurisdiction, his recovery will be reduced in accordance with his negligence, but he can still recover.

3. Customer's liability.

The issue is whether the customer acted reasonably.

Generally, there is no affirmative duty to rescue someone in peril if you have not caused the peril. One who undertakes to rescue, however, assumes a duty to do so as a reasonably prudent person would. Here, Customer owed a duty to Son once he attempted to help Son stand after Son fell. A reasonably prudent person might grab someone's arm to help them get to their feet, but would probably do so gently to avoid further injury. Here, the facts state that Customer "negligently twisted" Son's arm, which suggests that he did so in a rougher manner than a reasonable person would employ under the same circumstances. He enhanced the injury, so he was both the direct and proximate cause of the exacerbated injury, but not the original.

Therefore, Customer may be liable for enhancing Son's injury.

4. Son's ability to recover from Big Box only.

The issue is whether a tort victim can recover entirely from one tortfeasor even though another tortfeasor contributed to the injury.

When two actors combine to cause injury, a tort victim can recover the full amount of injury damages from either of them under joint and several liability rules. The defendant who is recovered against can then turn around and seek contribution from the other responsible party.

Here, even if Customer was negligent and enhanced Son's injuries, Son's injuries were still a foreseeable result of Big Box's negligence because danger invites rescue. Therefore, Son can recover entirely from Big Box, and Big Box can turn around and seek contribution from Customer.

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 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.

I. Potential to Block Merger of Winery Inc.

The issue here is whether a shareholder or director can block a merger through a vote when they are outnumbered.

When a corporation wants to merge or change in any other fundamental way, they must first pass a resolution as a board, call a shareholders meeting, allow the shareholders to vote on the resolution, and then that determines whether or not they can merge or make this fundamental change. A fundamental change is one that is not accounted for in the articles of incorporation filed with the Secretary of State or in the bylaws of the corporation.

In this case, since the plan of Carlos and Diana is to have Winery Inc. merge into Organic Wines Corp, with the shares converted into shares of OWC, it is required that they go through the fundamental change procedures for the company. First they must pass a resolution as a board calling for the merger of the companies. Ethan here can express his opposition as a member of the board and can vote against the resolution. If Carlos, Diana, and Ethan are the only board members and the meeting has all three present, there is a quorum. Carlos and Diana would be able to pass their resolution by a majority even if Ethan votes against it.

Then Carlos and Diana would call a shareholders meeting by following the procedures to do so. Because Carlos, Diana, and Ethan are the only shareholders of the corporation and are equal shareholders, if they all attend it would establish a quorum. Even if Ethan decided not to attend, it would still be enough to establish a quorum. Then the shareholders would vote on the board of director's resolution and because one share equals one vote, Carlos and Diana would be able to succeed in passing the director's resolution to merge the companies. Ethan should still vote against the merger to receive a buy back of his stocks.

Therefore, Ethan cannot block the merger of WI into OWC by voting against it, either as a director or a stockholder.

II. Right to Demand Payment

The issue here is whether Ethan can demand a buyback of his stock for cash when WI merges into OWC.

In order for Ethan to have the right to demand the corporation pay him cash for his share of stocks, Ethan would need to vote against the merger. Once the vote has taken place and the merger has been approved, Ethan can demand to have his stocks repurchased by the corporation. The board of directors will determine what the fair market value is of the shares and will then issue a payment to Ethan in cash equivalent to how much the fair value of his shares is. If Ethan disputes this fair value assessment by the board, he may sue the board in court for the correct fair value of his shares.

Therefore, Ethan does have a right after voting against the merger to have the company purchase his shares back in cash for their fair market value.

III. Promoting Sustainable Practices at Expense of Shareholder Profits

The issue here is whether the laws of state A or B apply to the benefits corporation, Organic Wines Corp. and whether this is impacted by the merger of Winery Inc.

State A has adopted the MBCA which doesn't explicitly provide for benefit corporations. State A courts have held that domestic corporations must seek to maximize shareholder profits. In State B, they have also adopted the MBCA but they modified the corporate statute to provide for the formation of benefit corporations. Formation requires the articles of incorporation to indicate they opted to be a benefit corporation and they must state a social/environmental cause for their corporation to pursue.

Carlos and Diana will incorporate Organic Wines Corp. in State B and plan to include the social and environmental purpose of "promoting sustainable and organic vineyard, winery, and production practices." Thus under State B law, they have successfully created a benefit corporation that as a result is protected by State B law which insulates directors from liability for claims that they did not seek to maximize shareholder profits, but are consistent with the corporation's stated social or environmental purpose. Thus if State B law is applied in this State A case that Ethan files, he would be unable to sue OWC directors for promoting their social/environmental purpose to the detriment of shareholder profits.

Generally, a corporation is governed by the laws of the state where it is incorporated. The internal affairs doctrine allows a corporation to select the law that will govern disputes between shareholders and the corporation and other aspects of the corporation's internal affairs. A business is generally free to pick the place of incorporation and may operate in other states (though some may require a filing with the other state's secretary of state office to do so). Here, if Ethan becomes a shareholder of OWC, Ethan would be barred from suing the directors in State A for promoting sustainable and organic practices because the organization and its relationship with its shareholders (its internal affairs) would be governed by the place of incorporation and the laws of State B.

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.

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.

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.

I. State A's Long Arm Statute and its Personal Jurisdiction over Woman
The first issue is whether State A's court's exercise of personal jurisdiction over the woman violated her rights under the due process clause of the Fourteenth Amendment.

Personal jurisdiction is the court's authority to over the parties. Personal jurisdiction is established by a state's long arm statute. Long arm statutes must not violate the due process clause of the Fourteenth Amendment. There are five ways that a court may assert personal jurisdiction that does *not* violate the Fourteenth Amendment: (1) waiver, (2) consent, (3) business contacts, (4) residence, and (5) minimum contacts. Minimum contacts is found when the party has minimum contacts with the state, the claim arises out of the minimum contacts, and the court's jurisdiction over the party wouldn't offend substantial justice and fair play.

Here, State A's long arm statute asserts that the court 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 long arm statute establishes minimum contacts that the party may have in order for State A to assert jurisdiction. State A's long arm statute is in conformity with the minimum contacts test because (1) it asserts that the individual have minimum contacts in State A which would be the sexual intercourse in State A, (2) that the claim arises out of the minimum contacts which is the child custody or support action which arises due to the child whom was created as a result of the sexual intercourse in the state, and (3) it doesn't offend fair play or substantial justice because the state should have authority over cases in which a child is conceived. Here, the woman's due process rights under the Fourteenth Amendment are not violated because State A's long-arm statute contained a valid minimum contacts test.

Therefore, State A court's exercise of personal jurisdiction over the woman did not violate her rights under the due process clause of the Fourteenth Amendment.

II. State A's Subject Matter Jurisdiction

A. Custody

The issue is whether State A has subject matter jurisdiction to award the man sole custody of his daughter.

Under the UCCJEA, a court has subject matter jurisdiction to determine custody if it has home state jurisdiction, significant connection jurisdiction (if there is no home state jurisdiction), or default jurisdiction if neither of the above two exist. Home state jurisdiction exists when a child has been living within a state for at least six months (or since birth, if younger than six months) with a parent; or if not currently in the state, has lived within the state within the last six months and a parent continues to reside within the state. Significant connection jurisdiction exists when the child is not present within

the state, but a parent is and substantial evidence regarding custody exists within the state.

Under home state jurisdiction, State A would not be able to exercise subject-matter jurisdiction over this dispute. The daughter has only been present within State A for three weeks. On the other hand, she has lived in State B all of her life and her mother remains there. As a result, State B constitutes the child's home state.

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

B. Child Support

The issue is whether State A has subject-matter jurisdiction to require the woman to pay the man child support.

The rule is that a court that has jurisdiction over a child custody matter has continuous and exclusive jurisdiction over the matters pertaining to the child's custody and support.

Here, because State A lacks subject matter jurisdiction regarding custody, it will also lack subject matter jurisdiction regarding child support. It is likely that State B will have subject matter jurisdiction over the child custody matter and thus have continuous and exclusive jurisdiction over the matters pertaining to daughter's custody and support, including subject matter jurisdiction over child support matters.

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

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.

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.

1. The warrantless seizure of the man and warrantless seizure of the purse in the man's home did not violate the man's 4th Amendment rights.

The Fourth Amendment protects against unreasonable searches and seizures. It is incorporated to the states through the Fourteenth Amendment Due Process Clause. Generally, to be reasonable, a seizure of a person or a thing must be supported by probable cause, i.e., a fair probability that the thing or person seized is evidence of a crime and there must be a warrant. Searches must also be supported by probable cause. Entry of a home to arrest someone generally requires a warrant for their arrest. However, exceptions to the warrant requirement are made for exigent circumstances, which include hot pursuit of a fleeing suspect. Another exception to the warrant requirement is the plain view doctrine, which allows seizure of items that an officer sees in plain view while in a place he has a legitimate, lawful reason to be present and that he knows from plain sight are evidence of a crime.

Here, the officer had probable cause because the girl identified a man who had just stolen a purse and the officer observed the man running away with that purse. The officer did not have a warrant to arrest the man in his home, but the exception for exigent circumstances is applicable here because the officer was in hot pursuit of a fleeing suspect and the officer observed him run into the home. He was permitted to enter the home without a warrant on that basis and also had probable cause to seize the purse because there was a fair probability that it was evidence of the crime (the robbery) that had just occurred and the officer saw the same white purse in plain view at the man's feet. He saw it while he was in a place he had a legitimate, lawful reason to be because he was permitted to enter the home without a warrant under the exigent circumstances exception.

Therefore, the warrantless seizure of the man and warrantless seizure of the purse in the man's home did not violate the man's 4th Amendment rights.

2. Admitting the girl's on-the-scene identification or allowing her to identify him in court would not violate the man's constitutional due process rights.

The man's best argument that his constitutional rights under the Fifth Amendment were violated by the girl's on-scene identification would be that it was too suggestive since he was in the back of the squad car when she saw him and identified him to the officer. Courts have found that witness or victim identification of suspects while they are handcuffed and/or in a squad car is unnecessarily suggestive and therefore violates the presumption of innocence. This argument fails, however, because the officer's conduct was not suggestive in anyway - in fact, the officer did nothing but stand there when the girl returned and, unprompted by anything the officer did or said, immediately started talking to him and identifying the defendant. She could properly repeat this identification in court so long as no suggestive interactions occurred prior to her taking the witness stand.

Therefore, admitting the girl's on-the-scene identification or allowing her to identify him in court would not violate the man's constitutional due process rights.

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.

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.

1. The first issue is whether the state anti-lapse statute or Clause 3 of the testator's will determines who takes the share of a beneficiary who predeceased the testator. Since testator died a domiciliary of State A, State A's laws apply to the personal property of testator. State A's anti-lapse statute only saves gifts that have lapsed (beneficiary predeceased testator) if the beneficiary leaves issue (children) that survive the beneficiary. Testator's will provides that, unless there is provision expressly to the contrary, the heirs (not just issue) of the deceased beneficiary shall take. Since State A's anti-lapse statute explicitly states "unless the decedent's will provides otherwise" it creates a default rule that may be modified explicitly by the testator. Here, testator has explicitly modified the rule such that heirs of the deceased beneficiary can take. Therefore, Clause 3 will likely determine who takes the share of a beneficiary who predeceased the testator.

2. The second issue is who is entitled to the testator's house assuming that Clause 3 of the testator's will applies. Testator left the house to her friend Doris. However, Doris died three years ago, bequeathing her entire estate to a charity. Since Doris predeceased testator, the gift has lapsed and does not go to Doris. However, an anti-lapse statute or a condition in the will can save the gift from lapsing. Applying Clause 3 of the testator's will, since testator did not expressly provide otherwise in Clause 1, the heirs of the deceased beneficiary shall take the bequest. Here, since "had Doris died intestate, all her probate assets would have passed to her nephew, her sole heir," we know that Doris' nephew is her sole heir. Since the house would not pass through Doris' estate, it would not go to the charity. According to Clause 3, Doris' nephew would be entitled to the testator's house.

3. The third issue is whether the residuary bequest to Bill will lapse because of the express survivorship requirement in Clause 2 of the testator's will. Bill died three years ago, so he predeceased testator. The modern trend in wills is to effectuate the intent of the testator. Here, Clause 2's express language shows that testator intended to have Bill's share of the residuary estate lapse if he predeceased testator. Clause 2's language makes it so that Clause 3 would likely not apply ("my will does not expressly provide otherwise"). However, State A's anti-lapse statute could still apply. The statute also includes a "unless the decedent's will provides otherwise" clause, making it so that Clause 2 would likely be enforced, leading to a lapse as testator expressly intended.

4. The fourth issue is who would be entitled to Bill's one-half share if the bequest to Bill lapses. If a gift lapses, it generally passes through to the residuary estate. Since Clause 2 is distributing the residuary estate in equal shares, it would be divided in equal shares among the remaining takers. Here, that would be Alice, so Alice would likely take Bill's one-half share of the residuary estate if testator's bequest to Bill lapses.

5. The fifth issue is who would be entitled to Bill's one-half share if the bequest to Bill does not lapse. If the bequest to Bill does not lapse, it would be due to the anti-lapse statue. Clause 3 would not apply since Clause 2 has "expressly provide[d] otherwise." Under State A's anti-lapse statute, the bequest would go to the deceased beneficiary's

issue. Bill has a daughter who is his sole heir. Applying State A's anti-lapse statute, Bill's one-half share of testator's residuary estate would go to Bill's daughter.

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 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.

1. Motion to Dismiss for Lack of Subject Matter Jurisdiction.

The issue is whether the federal court has supplemental jurisdiction over the woman's defamation claim.

Rule: Federal Question Jurisdiction and Diversity Jurisdiction

A federal court can have subject matter jurisdiction over a case in one of two ways. It can have federal question jurisdiction where, as with the ADEA claim here, the claim arises under the laws of the United States. The federal court might also have diversity jurisdiction of the case is between domiciliaries of different states and the amount in controversy is over $75,000.

Rule: Subject Matter Jurisdiction

Once a court has subject matter jurisdiction over a case, it will have supplemental jurisdiction over any other claims arising from a common nucleus of operative fact. This is broader than the same transaction or occurrence standard for other motions. Rather, to analyze whether there is a common nucleus of operative fact courts will ask if much of the evidence will be the same and if the underlying occurrences are largely the same.

A court must have an independent grounds for jurisdiction over each claim.

Analysis

Here, it is undisputed that the court has federal question jurisdiction over the ADEA claim. However, the issue is whether the court has jurisdiction over the other claim for defamation. There is no federal question jurisdiction because defamation is a state law claim and therefore arises under the laws of the state. Furthermore, there is no diversity jurisdiction because the woman and the attorney are both citizens and domiciliaries of State A. Accordingly, for the court to have jurisdiction it must have supplemental jurisdiction.

It seems like the defamatory comments about the woman's work came after she was fired. Though the attorney was berating her work while she worked there and making offensive and derogatory comments, meanness alone is not sufficient to establish defamation. Rather, the defamatory statements are the ones the man made to explain her firing that the woman had "stolen valuable supplies from the firm and was neither honest nor trustworthy" as these reflect poorly on her character. Accordingly, they may not arise out of the same transaction or occurrence as her firing.

However, the common nucleus of operative fact standard is broader, and this probably meets that standard. Though the comments occurred later, they were made to explain the woman's firing. Presumably the comments are important to the case about whether or not the attorney violated the ADEA (as the reason for termination will be in issue).

Accordingly much of the evidence and the ongoing relationship is the same so there is a common nucleus of operative fact.

Therefore, because there is a common nucleus of operative fact between the defamation claim and the woman's ADEA claim, the court should deny the motion to dismiss because the federal court has supplemental jurisdiction over the claim.

2. Pleadings Standard: State vs. Federal

The issue is whether the court should apply the federal standard of review or the state standard of review on the motion to dismiss.

As a preliminary matter, the court does not have jurisdiction over the case because of diversity jurisdiction, so the *Erie* doctrine does not apply. Nonetheless, the analysis is quite similar.

Generally, federal courts hearing state law claims apply federal procedural rules and the underlying state law. In federal court, the standard of review on a motion to dismiss is the *Twombly/Iqbal* standard which asks if the pleading is plausible on its face. The *Twombly/Iqbal* court was interpreting the Federal Rules of Civil Procedure Rule 8 which sets the pleading standards in federal court. In State A, however, the state court pleading rules apply a higher standard of review for defamation. Pleading rules are not a matter of state law but rather are usually procedural rules set by state courts.

Here, the federal court should apply its own pleading standard, the *Twombly Iqbal* standard, because the pleading rules in State A court are not state law but rather are a state court procedural rule. Federal courts exercising federal question jurisdiction always apply their own procedural rules, so the federal rules apply.

Therefore, because pleadings standard is a matter of federal procedure, the federal court should apply its own pleading rules and deny the motion to dismiss.