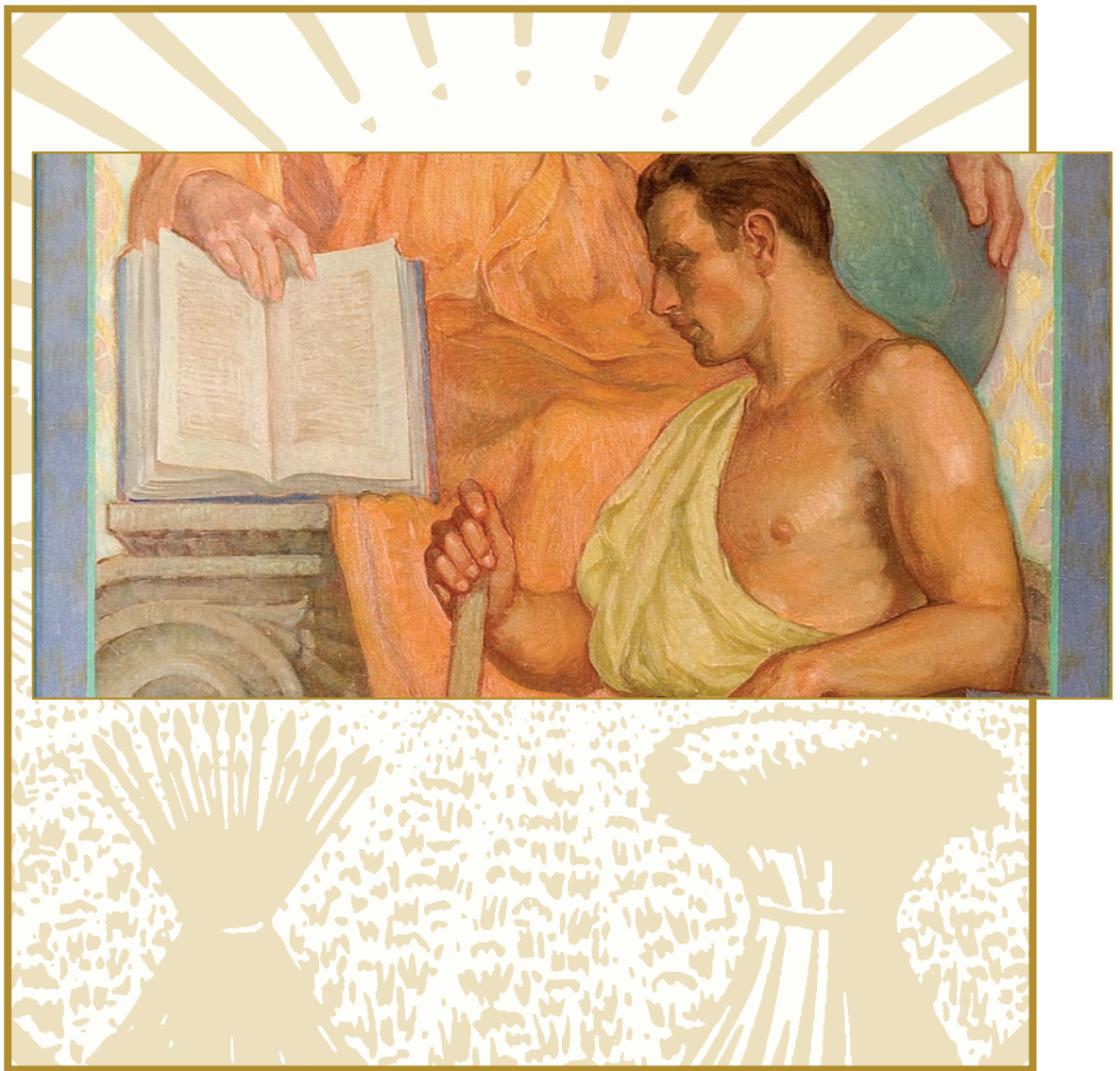
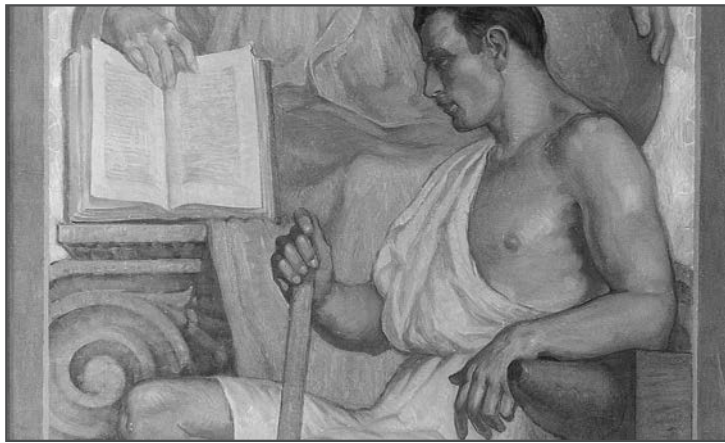




THE SUPREME COURT *of* OHIO

July 2017 Ohio Bar Examination
Essay Questions & Selected Answers
Multistate Performance Test Summaries
& Selected Answers





On the cover:

Detail from the Thomas J. Moyer Ohio Judicial Center Law Library Reading Room Mural 7, which depicts the availability of knowledge in printed books.

THE SUPREME COURT *of* OHIO

JULY 2017 OHIO BAR EXAMINATION

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers



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OHIO BAR EXAMINATION

JULY 2017 OHIO BAR EXAMINATION

Essay Questions and Selected Answers

MPT Summaries and Selected Answers

The July 2017 Ohio Bar Examination contained 12 essay questions, presented to the applicants in sets of two. Applicants were given one hour to answer both questions in a set. The length of each answer was restricted to the front and back of an answer sheet.

The exam also contained two Multistate Performance Test (MPT) items. These items were prepared by the National Conference of Bar Examiners (NCBE). Applicants were given 90 minutes to answer each MPT item.

The following pages contain the essay questions given during the July 2017 exam, along with the NCBE's summaries of the two MPT items given on the exam. This booklet also contains some actual applicant answers to the essay and MPT questions.

The essay and MPT answers published in this booklet merely illustrate above-average performance by their authors and, therefore, are not necessarily complete or correct in every respect. They were written by applicants who passed the exam and have consented to the publication of their answers. See Gov.Bar R. I(5)(C). The answers selected for publication were transcribed as written by the applicants. To facilitate review of the answers, the bar examiners may have made minor changes in spelling, punctuation, and grammar to some of the answers.

Copies of the complete July 2017 MPTs and their corresponding point sheets are available from the NCBE. Check the NCBE's website at ncbex.org for information about ordering.



QUESTION 1

Tenant rented an apartment in Anytown, Ohio, in a new, multi-unit apartment complex owned by Landlord. On a recent afternoon, Tenant started making soup on her stove, sat down on her couch in the adjoining living room, and fell asleep. While she slept, the pot boiled dry. Landlord had not yet installed smoke detectors in Tenant's apartment, and Tenant continued sleeping while the pot smoldered and burned. When Tenant woke up, the apartment was filled with smoke from the burning pot. Tenant quickly turned off the stove, removed the pot from the burner, and grabbed a fire extinguisher to put out the smoldering fire. Nevertheless, Tenant suffered physical injuries from inhaling smoke, and much of her personal property in the apartment sustained significant smoke damage.

Anytown has a local ordinance that provides: "A Landlord shall install and maintain operational smoke detectors in every bedroom and living room in each apartment in the building."

Recently, Mother and two-year-old Child, who lived a few blocks away, were taking a walk by Landlord's apartment complex. The complex had a swimming pool. At the time, no one was in the swimming pool or the area surrounding it. Child wandered away from Mother and pushed through a broken gate in the fence surrounding the pool. Child toddled toward some toys floating in the pool and fell in, making a loud splash. Child hit his head on the side of the pool and suffered other physical injuries by falling into the pool.

Mother heard the splash, realized that Child was missing, and believed that he had just fallen into the pool. She immediately ran to the scene, went through the broken gate, and jumped into the pool to save Child. Mother was able to pull Child from the pool before he drowned, but she sustained physical injuries in the process.

Tenant, Child (through his parents), and Mother each filed negligence actions against Landlord in an Ohio court. Did Landlord breach any common law and/or statutory tort duties owed to:

- 1. Tenant? Explain fully.**
- 2. Child? Explain fully.**
- 3. Mother? Explain fully.**

DO NOT discuss issues of causation, damages, or affirmative defenses.

- A
1. Landlord did breach statutory duties owed to Tenant. In a negligence action generally, a defendant owes a duty to all foreseeable victims to act as a reasonably prudent person under the circumstances so as to avoid unreasonable risks of danger. A duty and breach of duty can be shown through negligence per se. Negligence per se applies in Ohio when there is a specific and clear statutory requirement that the defendant fails to adhere to. In addition, the plaintiff must be the type of person that was meant to be protected by the statute and the injury must be within the class of risks that the statute was meant to prevent.

In this case, Tenant can show that Landlord breached his duty to tenant by proving negligence per se. First, Anytown's local ordinance provides a specific directive that landlords are required to install and maintain operational smoke detectors in every bedroom and living room in each apartment building. This is a specific directive and Landlord failed to install the required smoke detectors. In addition, Tenant was injured from inhaling smoke and much of Tenant's property sustained smoke damage. The ordinance requiring smoke detectors in apartment buildings was likely put in place in order to protect tenants such as Tenant and their property. Thus, Tenant and his property are within the class of things meant to be protected. Moreover, the ordinance was put in place so that smoke detectors would catch fires early, so that people and property in the building would not be harmed by the smoke or fire. Thus, the injury that occurred was also within the type of risk that the statute was meant to protect. As a result, Tenant can prove negligence per se and that Landlord breached his statutory duty to Tenant.

2. Landlord did breach a duty owed to Child. In negligence actions, the owner of premises owes a duty to different people based on their status. A trespasser is someone on the premises without the owner's permission. Generally, the owner of the premises owes no duty to an unknown trespasser and only a duty to warn of concealed and extremely dangerous artificial hazards to an anticipated or known trespasser. However, there is an exception for the attractive nuisance doctrine. Under the attractive nuisance doctrine, the owner of a premises owes a duty to act as a reasonably prudent person even to a trespasser when the trespasser is a child, the premises contain something that would tend to attract children, there are children in the area, the attractive thing is such that a child would not be able to fully comprehend the risks involved, and making the premises safe would be feasible and not overly costly.

Here, Landlord owed a duty to act as a reasonably prudent person in securing his premises to Child even though Child is a trespasser. Child is only two years old and, therefore, clearly a minor. In addition, a pool is something that is very attractive to most children to play and swim in. This is especially true when, as here, there are toys floating in the pool. In addition, Child lives only a few block away. Thus, there are children in the area of the attractive nuisance. Pools are also extremely dangerous to children who may not comprehend the dangers of drowning. Finally, making the premises safe would have been very feasible because it would merely have required Landlord to fix the gate around the pool so that children could not push through it. Thus, the pool was an attractive nuisance and Landlord owed a duty to act as a reasonably prudent person to child to secure his premises. Landlord breached this duty by failing to maintain his fence in good condition.

3. Landlord also breached his duty to Mother. In Ohio, under the attractive nuisance doctrine, Landlord owes the same duty of a reasonably prudent person to rescuers of children endangered on the defendant's premises.



QUESTION 2

For over 20 years, Dan was one of the most successful financial investors in Franklin County, Ohio. His clients included many of the County's wealthy families, including the Paulsons, who often boasted of the staggering returns they consistently received as a result of Dan's financial acumen. Over the years, Dan was appointed to several well-known charitable boards. He and his wife, (Wendy), were active in Franklin's philanthropic circles.

In 2008, federal investigators discovered that for over a decade Dan had been operating an elaborate Ponzi scheme providing his clients with false financial statements and false profit information. Wendy immediately filed for divorce, which was granted a year later.

Attorney Anne (Anne) represented Dan in the subsequent criminal case in which she negotiated a plea agreement where, in exchange for a full and truthful account of the extent of the fraud, Dan would serve a 15-year prison sentence. While negotiations with the government were underway, Dan told Anne confidentially about the existence of an offshore bank account that contained over \$5 million. He told Anne during these conversations that this account contained only profits that were earned years earlier when he was involved with another business. He asked Anne to keep a file of records regarding the account at her office for safe keeping. The facts regarding this account were not included in Dan's proffer statement to the government.

The Paulson family then brought a civil suit against Dan to recover their lost investments resulting from Dan's fraudulent scheme. Attorney Bill (Bill), on behalf of the Paulsons, issued a number of discovery requests asking for depositions and documents related to the fraud. Anne maintains that many of the requests are barred as privileged communications. At the hearing, the judge instructed Anne to identify all requests that she maintains are subject to some form of privilege and submit all requested documents for an in camera inspection with the court. As ordered, Anne submitted a privilege log that contains the following discovery requests:

1. Bill seeks to depose Anne regarding all communications between Anne and her client Dan (both oral and written) that were made when the plea agreement was negotiated with the government. Anne maintains that such communications are protected by privilege.
2. Bill requests that Anne produce any and all documents related to any financial holdings, personal or otherwise, related to Dan. Anne maintains that all the documents related to financial holdings, including those relating to the offshore account, are protected by privilege.
3. Bill seeks to depose Wendy, regarding what Dan may have told her or any independent knowledge of the nature and location of all Dan's assets. Anne maintains that such testimony is protected by privilege.
4. Bill has learned through his investigation that St. Francis, a local parish of which Dan is a member, benefited significantly from charitable contributions made by Dan's corporation prior to the discovery of the Ponzi scheme. Bill seeks to depose Father Murphy, Dan's parish priest, regarding all conversations that he had with Dan about contributions that were made to the parish by Dan's corporation. Anne maintains that such communications are protected by privilege.
5. When the criminal case was pending, Anne stated in her defense mitigation brief that Dan has suffered clinical depression and that he was under the care of Psychiatrist. Bill seeks to depose Psychiatrist about disclosures Dan may have made in counseling sessions about hidden assets. Anne maintains that such communications are protected by privilege.

Identify the privileges at issue in each of the discovery requests in Anne's privilege log. Identify and explain the requirements for each privilege and the policy objectives behind each privilege. Determine how the court should rule on each claim of privilege.

- A
1. The communications sought by Bill in discovery are subject to attorney/client privilege. Attorney/client privilege applies to confidential communications made to an attorney for purposes of legal representation. This privilege is absolute, and lasts through death. Further, attorney work product is subject to protection under attorney/client privilege. The underlying policy of this privilege is to promote truthful communications between an attorney and client, which is crucial to effective legal representation. The communications made in negotiating a plea agreement are protected under attorney client privilege. Those communications were made during the course of legal representation, and in confidence. Thus, the court should not force these communications to be revealed.
 2. The financial documents that Bill seeks are not likely protected under attorney/client privilege. Under the rule for attorney/client privilege previously stated, these documents are not likely to be considered confidential communications. While they were utilized in representation in the criminal trial, they are easily accessed business documents, and not confidential. Further, an exception to attorney client privilege exists where information is unprotected when it is provided to an attorney to promote future crimes or fraud. Documents regarding the offshore account may be in furtherance of future crimes/fraud. This is somewhat unclear, as the profits were alleged to be earned before the crime for which he was charged, but may suggest future criminal activity. This is a close call, but the court should allow discovery of these documents.
 3. The statements made to Wendy are subject to spousal privilege. In Ohio, spousal privilege is divided into two forms, spousal incapacity, and marital communications. Spousal incapacity allows a testifying spouse to decline to testify against their spouse in a criminal case. This privilege is only available when the spouses are currently married. The policy behind this is to promote healthy and truthful communications between spouses during the marriage. The privilege belongs to the witness spouse, and the defendant cannot prevent their testimony. Second, confidential communications made during the marriage are protected by privilege. This privilege belongs to both spouses, and protects all confidential communications made during the course of the marriage. There are exceptions to this privilege when the spouses are in a legal action against each other (divorce), or when a spouse is charged with injuring a minor child.
Here, the communications sought by Bill are protected as confidential communications during the marriage. Spousal incapacity is inapplicable, as this is a civil trial, and the parties are no longer married. However, Dan may prevent Wendy from disclosing any confidential communications that were relayed during the marriage. The court should not allow discovery of these communications.
 4. The communications made to Father Murphy are not protected by privilege. Clergy/parishioner privilege protects communications made in confidence to a member of clergy by a member of their church for the purposes of penance or confession. The underlying policy is to encourage religion as an outlet for penance. The statements made to Father Murphy were not for religious reasons, but rather regarding charitable contributions to the church. As such, these statements are not protected by privilege and should be allowed in discovery.
 5. The statements made to the psychiatrist are protected by privilege. Psychiatrist/patient privilege is much like attorney/client privilege. Confidential communications made during treatment for the purpose of treatment are protected. The policy encourages truthful communication for treatment. The statements Dan made were for the purpose of treating depression, and are undiscoverable.



QUESTION 3

Ace Investments, Inc. (Ace) is an Ohio corporation and is authorized to issue 400 voting shares, all of which have been lawfully and properly issued to 4 shareholders, namely James, Mark, Victor, and William, each of whom owns 100 shares. All 4 shareholders have been properly elected as the members of the Board of Directors and, in addition, they elected their accountant, George, as a director. The Board of Directors properly elected the following persons as its officers: James - President, Mark - Vice President, Victor - Secretary, and William - Treasurer.

James entered into a voting trust agreement with Victor that provided that, so long as James is living, Victor shall have the right to vote the shares owned by James, as well as his own shares.

Mark entered into a voting trust agreement with Big Bank (Bank) to secure a 25-year personal loan Mark has obtained from Bank. Bank's voting trust agreement provides that so long as Mark is indebted to Bank, it shall have the right to vote Mark's shares of Ace.

Victor has entered into an agreement with George, whereunder Victor agreed to vote as a director in the manner directed by George irrespective of Victor's personal position in matters.

Ace has not been providing regular financial statements for its shareholders because all of the shareholders generally knew what was occurring. Ten days before the next properly scheduled annual meeting of the shareholders, Victor made a written demand upon Ace for a copy of Ace's annual financial statement prior to or at the annual meeting. Within 3 days of the receipt of this request, Ace complied by delivering to Victor Ace's financial statement. The financial statement included only the following statement signed by the Bookkeeper: "The undersigned bookkeeper for Ace certifies that the foregoing financial statement is true."

Before the annual meeting, George made a written request to Ace to examine the books and records of Ace, including its accounting records, shareholder lists, and minutes of shareholders' meetings. George stated in the notice that the purpose of the request was to contact all shareholders and recommend that James be removed as President and that he be elected in his place. Ace refused to provide the information requested by George.

Three days before the annual meeting, James gave Victor, the Secretary, written notice that he was electing to have his shares cumulatively voted for election of directors. At the commencement of the annual meeting, Victor told all of the shareholders that he received James' notice, but stated that cumulative voting will not be permitted.

- 1. Is the voting trust agreement between James and Victor valid?**
- 2. Is the voting trust agreement between Mark and Bank valid?**
- 3. Is the agreement between Victor and George requiring Victor to vote as a director in accordance with the directions received from George valid?**
- 4. Was the financial statement provided to Victor by Ace sufficient and timely?**
- 5. Must Ace provide the records requested by George?**
- 6. Does James have the right to vote his stock cumulatively for election of directors?**
- 7. Are William's rights as a shareholder affected by any of the actions of the shareholders described herein?**

Explain each answer fully.

1 James-Victor Voting Trust

This voting trust is valid, but only for a period of 10 years, not for the stated period of James' life. Voting trusts are an instrument whereby the legal titles to shares held by two or more individual shareholders are transferred to a trust while the shareholders retain equitable title. The trustee of the voting trust is then required to vote the shares according to the terms of the trust agreement. Voting trusts may not last longer than 10 years. However, they may be renewed upon their expiration and contractual agreements for renewal may be permissible.

Here, the voting trust between James and Victor has a stated duration of James' life. This could exceed the statutorily permitted purpose and, for that reason, is likely invalid.

2 Mark-Bank Voting Agreement

This agreement is likely valid, although it may be beneficial to classify it as an irrevocable proxy rather than a voting trust due to the 25-year term of Mark's loan with Bank and the 10-year limit on voting trusts discussed above. Shares may be given as collateral for a loan, and the creditor may request the right to vote the share for the term of the loan. A shareholder may give a proxy to another entity, allowing the other to vote the shareholder's shares. A grant of a proxy is usually revocable, but may be irrevocable if the proxy statement is given to the secretary of the corporation, the irrevocable status of the proxy is indicated on the documents and the proxy is coupled with an interest.

Here, a proxy could be given to Bank that could be irrevocable for the term of the loan. This is due to the security interest Bank had taken in Mark's shares, which satisfies the coupled with an interest requirement for irrevocability. Alternatively, they may be able to create a contractual agreement requiring Mark to renew the voting trust on its expiration 10 years from its creation.

3 Director Voting Agreement - Invalid

Victor's agreement with George is invalid and cannot be enforced. Directors are required to exercise their judgment and discretion when serving as a director. A director may not abdicate this responsibility by entering into a voting agreement with respect to their position as a director. Thus, this agreement is invalid on its face.

4 Financial Statement

The financial statement provided was not sufficient, but was timely, unless there is some sort of close corporation agreement which was not mentioned which modified the typical statutory requirements. A corporation should provide regular financial statements to shareholders indicating the financial status of the corporation. Also, a shareholder may request such information and the corporate bookkeeper is required to provide this information. Here, there was only the statutory required statement that the information was accurate, but not information. Thus, the request was not sufficient. However, it was returned in 3 days so it likely was timely.

5 Right to Inspect Books

Ace did not need to provide the requested records. Under Ohio law, any shareholder may inspect the books for a corporation upon request which states a proper purpose. Here, George was not a shareholder. Because George was not a shareholder, he was not entitled to inspect the books.

6 Cumulative Voting

James may have the right to vote his shares cumulatively, depending on whether the corporation's articles have modified the default rule in Ohio. Under Ohio GCL, cumulative voting is the default for the voting of shares for directors. Thus, unless this has been modified in Ace's corporate article to straight voting, James' request for cumulatively voting may have been valid.

7 William's Shareholder's Rights

William may have a claim for a derivative suit based on the voting agreement Victor entered into, if Victor has taken actions not in the best interest of the corporation.



QUESTION 4

In January 2017, in Anytown, Ohio, Gene hired several contractors to remodel the second-story bathroom of his house. Gene hired Joe's Plumbing to replace all of the pipes, Scott's Electric to update the wiring, and ABC Flooring, Inc. to replace the floor. The remodeling was completed by the end of January, and Gene was excited to take his first hot shower in the newly remodeled bathroom. However, as Gene was showering, the water from the shower leaked, traveling through the flooring and into an electrical fixture on the first floor. The fixture shorted out and threw off sparks, resulting in a fire that destroyed most of the first-floor contents in Gene's home. Fortunately, Gene was able to escape the home with no injuries.

Gene timely filed a complaint in the Anytown Court of Common Pleas seeking reimbursement for the money Gene spent in repairing his home and replacing the contents lost in the fire. The complaint named as defendants: Joe's Plumbing, Scott's Electric, and A and B Flooring, Inc. The complaint alleged that each of the named defendants was negligent.

Within a month after the fire, the Anytown city fire investigator issued a report that found that the cause of the fire was the water running through the electrical fixture. The report found no fault with the wiring itself. During the course of discovery in the lawsuit, an expert retained by Joe's Plumbing determined that the cause of the leak was one or more holes in the pipes under the shower that were the result of the use of a nail gun by the party replacing the floor.

Because A and B Flooring provided Gene with a bid, but did not ultimately get the job, it timely filed an Answer, denied that it worked on the project, and filed a Motion for Judgment on the Pleadings.

Joe's Plumbing timely filed an Answer and, after the completion of the discovery in the case, timely filed a Motion for Summary Judgment. The Motion was supported by an affidavit of the expert who had found the holes in the pipes. Gene filed an opposition to the Motion, attaching his own affidavit stating that no nail guns had been used during the project.

Instead of filing an Answer, Scott's Electric filed a Motion to Dismiss for failure to state a claim upon which relief can be granted and attached the fire investigator's report. Gene did not file any response to this motion.

State the grounds that should be asserted, the standard the Court should use in ruling, and how the Court is likely to rule on the following:

- 1. A and B Flooring, Inc.'s Motion for Judgment on the Pleadings.**
- 2. Joe's Plumbing's Motion for Summary Judgment.**
- 3. Scott's Electric's Motion to Dismiss.**

Explain your answers fully.

1 A and B motion for Judgment on the Pleadings

This motion should be granted because A and B Flooring Inc. did not work on Gene's house. Under Ohio rule of civil procedure 12(c), a party may request that a court issue a judgment on the pleadings. This motion is very similar to a motion to dismiss for failure to state a claim. On such a motion, the court will consider the allegations of the complaint and the answer and taking the allegations of the complaint as true, the court will determine whether the plaintiff has stated a valid claim against the defendant.

Here, Gene has sued the wrong party. He presumably meant to file a claim against ABC Inc., but instead filed a claim against A and B. Given the fact that A and B did not work on Gene's home, Gene does not have a claim against A and B Inc. Thus, the motion for judgment on the pleadings should be granted.

2 Joe's Motion for Summary Judgment

Joe's motion for summary judgment likely should be granted. Under Rule 56 of the ORCP, a party may request summary judgment on an entire case or individual issues in a case. Such a motion must be made early enough before a trial date that it will not delay trial. Typically, a court will set a date for the filing of dispositive motions and parties must submit a MSJ before this date. A motion for summary judgment should be granted when there are no genuine issues of material fact remaining, and the moving party is entitled to judgment as a matter of law. When considering a motion for summary judgment the court will view all facts and inferences drawn from those facts in the light most favorable to the non-moving party. The party making a motion for summary judgment has the initial burden of showing there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. Once this burden is met, the burden then shifts to the non-moving party to show there are issues that remain to be determined by a fact finder and that a reasonable juror could find in their favor. When contesting a motion for summary judgment, a party may not rely on the allegations in their pleading, but must put forward affirmative evidence to contest the motion made by the moving party.

Here, Joe's filed a timely motion for summary judgment and has met their burden of showing there is no dispute concerning the material facts. This was done by attaching an expert report which stated that the damage of which Gene complains was caused by a nail gun that the flooring installer used, rather than by Joe's actions related to installing plumbing. Gene responded by filing a brief in opposition containing only an affidavit from himself. This likely will not be enough to rebut the evidence produced by Joe's expert, even when viewing the evidence in a light most favorable to Gene. This is because Gene is not producing affirmative evidence; he is merely denying the expert report with no factual support. Thus, Joe's motion for summary judgment likely should be granted.

3 Scott's Motion to Dismiss/MSJ

This motion should be granted. A motion to dismiss based on rule 12(b)(6) alleges the plaintiff's complaint does not state a claim on which relief can be granted. On this motion, the court considers only the allegations in the plaintiff's complaint. When a party making a motion to dismiss attaches outside evidence to their motion, the court will consider the motion to dismiss as a motion for summary judgment. (discussed above)

Here, Scott's filed what was nominally a motion to dismiss, but they attached evidence that was extrinsic to the plaintiff's complaint, meaning the motion will be considered as a motion for summary judgment. Thus, Gene had the opportunity to try and show there is a genuine issue of material fact. However, Gene did not file a responsive brief in opposition, meaning that Scott's nominal motion to dismiss/MSJ should be granted.



QUESTION 5

On a sunny afternoon in July 2017, police officer (Cop) was on routine patrol in Anytown, Ohio, when he observed a motor vehicle with dark tinted windows leave his county of jurisdiction and abruptly pull off the side of the road. Cop observed the vehicle stop and saw the driver and passenger exchange positions in the vehicle.

The new driver (Driver) turned the vehicle around and drove it back into Cop's jurisdiction. Cop noted that there was no license plate displayed on the front or back of the vehicle. Cop decided to execute a traffic stop of the vehicle and did so, but before the vehicle stopped, Cop observed shadows through the tinted glass of the vehicle making what he considered to be furtive movements. Cop approached the vehicle and noticed a piece of paper taped to the rear window, but was unable to read it due to the tint of the windows.

Cop asked Driver for his license, proof of insurance, and registration, which Driver immediately supplied and Cop determined to be valid. When Cop told Driver he was stopped for failure to display a license plate, Driver told him he had a valid temporary tag properly displayed in the rear window. Indeed, the piece of paper Cop had previously observed in the rear window was determined by Cop to be a valid temporary tag.

Cop continued to engage the occupants of the vehicle by asking Passenger for his name, date of birth, and social security number because Passenger was not wearing a seat belt. Cop believed that Passenger was nervous and hesitant before giving the requested information to Cop. According to Cop, Passenger kept fidgeting and looking around frantically. Cop then asked to search the vehicle, and Driver agreed to allow it. However, when Cop informed Driver that he did not have to agree to the search, Driver withdrew his consent.

Cop then told Driver he was going to get a police drug dog from his cruiser and conduct an open-air sniff search. Both of the occupants of the vehicle were asked to exit the vehicle before the sniff search began, just as back-up police officers arrived. Back-up officers also noticed Passenger was nervous and fidgety once he stepped out of the vehicle. The police dog alerted to drugs at the right passenger door. Cop then searched the vehicle while the back-up officers frisked Driver and Passenger for weapons. No drugs or weapons were found in the vehicle, but the back-up officers found a small baggie of crack cocaine in Passenger's front pants pocket. Passenger was arrested and charged with possession of cocaine.

Before trial, Passenger's attorney filed a motion to suppress the cocaine seized from Passenger's pocket.

1. **What arguments should Passenger make in his motion to suppress the cocaine?**
2. **What arguments should the State make in opposition to Passenger's motion?**
3. **How should the Judge decide this issue?**

Explain your answers fully.

The Fourth Amendment protects against unlawful searches and seizures of protected areas and interests by government actors.

1. Passenger should argue first that the entire course of events was tainted by the officer's bad faith and unreasonable suspicions about the Driver and Passenger switching seats just over the border, the mysterious piece of paper in the window, and the nervous Passenger. The alleged traffic stop was a fishing expedition, Passenger should argue, detaining the vehicle longer than necessary and acquiring more information than necessary in order to gain grounds for further search. Cop did not call for the dog as part of a routine traffic stop, but only after consent to search the vehicle was denied.

The crux of the Passenger's argument, however, should be the Terry frisk of the two occupants once the dog alerted to drugs in the car. Terry frisks are solely for weapons, and there is no reason to suspect a subject is armed and dangerous, as required for a Terry frisk, merely because there is reasonable suspicion of drugs in the car. The two are in no way connected, and the physical pat down of the two men was an egregious Fourth Amendment violation justifying the suppression of the fruits of the search.

2. State can argue that all of the searches were lawful. First, although the car did exit Cop's jurisdiction at first, it then returned to his jurisdiction, at which point he noticed that the car lacked a license plate. A police officer may always stop a car without a warrant for a problem reasonably related to the car's mobility, such as lack of a license plate or other safety concerns.

Further, Cop validly continued to detain the car when he noticed Passenger wasn't wearing a seatbelt – another valid safety issue related to the car's mobility. It is additionally lawful, during a traffic stop, to request the occupants of a car to exit the vehicle, and dog sniffs are also lawful provided they do not unreasonably prolong the stop.

Once the dog alerted to drugs in the vehicle, the officers had sufficient reasonable suspicion (specific and articulable facts, which here are the dog's alert – case law would indicate that refusal of consent and the nervous occupants are probably not appropriate reasons, however) to conduct a Terry stop, which allowed them to search the entire vehicle. Terry frisks are permissible where there is reason to believe the subjects are armed and dangerous, and the state should argue that there is sufficient reason to suspect weapons when drugs have been smelled in the vicinity, as the two often travel together and drug-dealing is a dangerous trade. A Terry frisk is for weapons only, but contraband may also be seized from the subject's person if it is identifiable by feel and without manipulation of the object. The state should argue that, to an experienced officer and in the context of the dog alerting to drugs, the cocaine was immediately identifiable to the officer by feel. This perhaps would not be the case if it were powder, because a small bag of powder could be anything, but crack cocaine is quite distinctive to the touch.

3. The court should rule for Passenger, and suppress the evidence. Certainly, reasonable suspicion of criminal activity developed during a lawful traffic stop due to traffic violations, of which dog sniffs are routine. Thus, the seizure of the car (deemed to begin as soon as the reasonable subject would feel not free to leave, which here was probably as soon as pulled over) was lawful. However, a dog's alert to drugs did not justify a Terry frisk, and even if it had, the seized contraband was probably not properly identifiable without manipulation. Where such a search is unlawful, its fruits are generally inadmissible. Passenger's arguments of Cop's bad faith and unreasonable suspicions are convincing.



QUESTION 6

Landlord owns an apartment complex in Anywhere, Ohio. Tenant leased an apartment (Unit) for a one-year term beginning May 1. Rent was \$1,000 a month with a security deposit of \$750. Tenant paid May's rent plus the security deposit and moved in on May 1.

On May 19, Landlord emailed Tenant about the installation of Wi-Fi, stating that a workman would enter Unit on May 22 to drill holes in the floor and ceiling of the guest bedroom. Tenant responded the morning of May 23, saying that he is out of town. Tenant asked Landlord to postpone the work until the following week because his sister would be using the guest bedroom. Landlord emailed a response, saying the workman had already entered Unit and started the work on the afternoon of May 19.

Upon his return on May 24, Tenant emailed Landlord and expressed his dismay that the workman had entered Unit in spite of his objection and had left construction debris that made the guest bedroom unlivable. Tenant stated in the email that he had previously complained about maintenance issues, that his only toilet still leaks after three failed repair attempts, and that the leak had caused mold, which worsened his existing lung condition. He requested in the email that Landlord provide an estimated completion date for the Wi-Fi installation, repair of the toilet leak and remediation of the mold, and cleaning of the Unit. Landlord did not respond.

On May 27, Tenant emailed the City of Anywhere Housing Department (City) complaining that: (1) Landlord entered Unit without proper notice, failed to clean up construction debris, and refused to provide a completion date; (2) Tenant's toilet leaks after three failed repair attempts, and the mold from the leak had worsened his lung condition; and (3) Landlord was not responsive in making requested repairs.

City inspected Unit and issued a code violation notice on June 1. City ordered Landlord to complete the Wi-Fi project, clean Tenant's apartment, repair the toilet, and remediate the mold. Landlord failed to comply with the City's order.

Fed up with Landlord's inaction, Tenant timely deposited the June rent of \$1,000 in rent escrow with the Clerk of the Municipal Court. Landlord contacted Tenant when he did not receive the June rent, and Tenant responded that the rent payment had been placed in escrow. Landlord sent Tenant an email demanding that he vacate Unit immediately.

Tenant moved out on June 30. He timely left his forwarding address with Landlord, instructing him to return the \$750 security deposit to Tenant. Except for the conditions caused by Landlord, Tenant left Unit in clean, undamaged condition.

After 45 days, Tenant received a letter from Landlord refusing to return the security deposit. Further, Landlord filed suit against Tenant seeking to recover \$1,000 from the rent deposited with the Clerk and to recover rent for the balance of the lease term.

- 1. Did Landlord breach any duties owed to Tenant before having the Wi-Fi installer enter Tenant's Unit on May 19?**
- 2. Did Landlord breach any duties owed to Tenant with regard to the condition of Unit?**
- 3. What remedy, if any, did Tenant have when Landlord told him to vacate Unit?**
- 4. Who has a right to the \$1,000 that Tenant deposited with the Clerk of Court?**
- 5. What remedy, if any, does Tenant have regarding the recovery of his security deposit?**
- 6. What arguments can Tenant make in opposition to Landlord's claim that Tenant owes rent for the balance of the lease term?**

Explain your answers fully

1. **NOTICE.** The landlord breached a duty of notice before entry. In Ohio, a landlord cannot enter or have workers enter a leased premise without reasonable notice to the tenant, which is typically construed as 24-hour notice. Here, Landlord gave email notice on May 19, which may not even be enough on its face. However, the workers actually entered on May 19th, so there was practically no notice to Tenant before the workers entered. This lack of notice would violate the duty Landlord had to give to Tenant.

2. **CONDITION OF UNIT.** The landlord breached the duties of implied warranty of habitability and the duty to provide quiet enjoyment. Under the warranty of habitability, the landlord must provide the tenant with the bare necessities for occupation. Typically, the apartment must be in extremely poor condition to breach this warranty, such as no heating, plumbing, or mold. Here, the apartment has plumbing issues, and the water issues are also causing health issues with the presence of mold. Such dire conditions breached the warranty of habitability.

The condition of the unit has also breached the duty to provide the tenant with the quiet enjoyment of the property. Under this duty, the landlord must give the tenant lawful access to the residence free from disturbance. Here, Landlord willfully created work-like conditions in the unit from the Wi-Fi workers that rendered the apartment unlivable. Tenant and his sister could not peacefully enjoy the residence with the debris.

3. **RETALIATION.** Tenant could seek damages for Landlord's request to vacate. A landlord may not retaliate against a tenant who exercised his legal right to report the landlord's conduct to the city. Here, Tenant wrote the city's housing department to let them know of Landlord's disturbing conduct and neglect. Additionally, Tenant had the legal right to place the money in escrow (see #4). Landlord's demand to vacate happened shortly after Tenant's reporting of him to the housing department. A court will likely construe the Landlord's demand as retaliation for the reporting. Such a retaliation is not permitted and is addressable with damages.

4. **RENT IN ESCROW.** Tenant will have to have a court determine who has a right to the money. When a landlord breaches the warranty of habitability, a tenant has the option to withhold rent and place future rent in escrow. Upon termination of the relationship, a court will determine damages and who has the right to the deposited money. Here, a judge will need to determine who gets the \$1,000. Because Tenant moved out on June 30, he likely used up some value of the \$1,000. A judge, however, will need to determine rent for the unit based on its condition for the month of June.

5. **DEPOSIT.** Tenant should receive his deposit. In Ohio, a security deposit should be returned to the tenant within 30 days minus any costs for damages, cleaning costs, or back rent. Here, tenant left the unit without any problems or damages that he caused. Landlord also exceeded the 30-day limit. Accordingly, Tenant should receive his full deposit back (assuming the court does not rule he holds back rent).

6. **CONSTRUCTIVE EVICTION.** Tenant should argue that he was constructively evicted by the condition of the unit. In Ohio, there is constructive eviction and the lease is terminated if a landlord breaches duties of upkeep that render the unit uninhabitable, the tenant notifies the landlord in writing of the conditions, requests repairs, the repairs are not made, and the tenant actually vacates. Here, Tenant notified via email that there were multiple problems, including the mold. Landlord failed to remedy these requests, and tenant ultimately moved out. The constructive eviction ended the lease and Tenant is not responsible for rent.

Further, Tenant could argue Landlord told Tenant to vacate the unit in June, which was a waiver of the lease.



QUESTION 7

Allison, an Ohio attorney, represents Jock, an All-American athlete currently enrolled in the local university in Small County, Ohio. Jock was arrested on suspicion of felonious assault when his ex-girlfriend, Darling, accused him of striking her and knocking her down, causing her two front teeth to loosen during an argument on the front porch of her sorority house. Jock claims Darling tripped while trying to strike him.

Assistant city prosecutor, Paul, charged Jock in municipal court with felonious assault. Allison suspected that Paul was eager to publicize the arrest and prosecution of a high-profile athlete as part of his election campaign to be the next Small County Prosecuting Attorney. Allison held a press conference on the steps of the courthouse. She told the press: "Any intelligent jury will find that Jock did not strike Darling. Jock is the victim of a witch hunt by an assistant city prosecutor who wants to become the Small County Prosecuting Attorney."

Meanwhile, Paul received a copy of the police report describing Jock's alleged criminal behavior. Paul became concerned that the report's description of Jock's actions seemed vague and not incriminating enough for a conviction. The next day, Paul contacted Officer and asked him to destroy the existing report and draft another that included more incriminating details of Jock's alleged criminal behavior.

Paul also interviewed the sorority's house mother, Mother, who witnessed the incident on the front porch involving Jock and Darling. Mother told Paul that Jock did not knock down Darling, who was severely inebriated when she fell. Paul told Mother to avoid contact with Allison and not to be in any rush to return to Small County from her imminent European vacation.

Paul has not been able to question Darling or obtain a detailed statement of her version of the events because she is on an extended trip abroad and will not be back in time for Jock's preliminary hearing. Confident that Jock is nevertheless guilty, Paul has decided to proceed with the preliminary hearing.

1. **What violation(s) of the Ohio Rules of Professional Conduct, if any, has Allison committed?**

Explain fully.

2. **What violation(s) of the Ohio Rules of Professional Conduct, if any, has Paul committed?**

Explain fully.

- A**
1. In Ohio, all attorneys are governed by the Ohio Rules of Professional Conduct (Rules). The Rules prohibit any attorney from making a statement that the attorney should know is likely to be publicly disseminated and has a substantial risk of materially prejudicing the case. A lawyer is only permitted to make a statement protecting their client in response to when another person has made a public statement that may materially affect their client and it is necessary to rebut the other statement.

Allison violated the Rules by making a public statement regarding Jock's criminal prosecution. Allison stated at a press conference that "any intelligent jury" will find that Jock is innocent and that Jock is the victim of a witch hunt by the county prosecutor. Because it was at a press conference, Allison clearly knew the statement was to be publicly disseminated. Further, Allison accused the prosecutor of misconduct and directly stated a jury should find her client innocent. Such statements are likely to affect a jury pool and likely to materially prejudice the case. In addition, it is not sufficient that Allison suspected Paul may publicize the arrest. Allison was only entitled to respond if Paul had actually made a prejudicial public statement.

Under the Rules, attorneys are also prohibited from criticizing a public official running for office when the attorney has knowledge of the falsity of the statement or should know of its falsity. Here, Allison likely did not have a sufficient basis to state that Paul was on a witch hunt and thus violated the Rules.

2. The Rules prohibit an attorney from committing any act of dishonesty or fraud and creating false evidence. An attorney can violate the Rules when they act through another person. Here, Paul clearly violated the Rules by telling Officer to destroy his original police report and to draft another that included more incriminating details. This was a fraudulent act and in direct violation of the Rules.

The Rules also require prosecutors to disclose any information that may tend to negate the guilt of the defendant. Paul violated this rule by not disclosing Mother's statements to Allison. Mother's statements directly negated Jock's guilt. Thus, Paul's failure to disclose the information violated the Rules.

The Rules also prohibit any attorney from unlawfully obstructing the opposing party's access to evidence and from encouraging or instructing a witness to leave the jurisdiction. Here, Paul told Mother to avoid contact with Allison. This was an improper instruction and violated the Rules because it obstructed Allison's access to critical evidence. Paul also instructed Mother not to be in any rush to return from her European vacation. This encouragement of Mother, who was a critical witness, to leave the jurisdiction and not to be in a rush to return also violated the Rules.

The Rules also prohibit a prosecutor from prosecuting any defendant when the prosecutor does not have probable cause to believe they have committed a crime. Probable cause means that there is a fair probability that the defendant has committed the crime. In this case, while Darling did accuse Jock of assault, all of the other evidence pointed to the fact that Jock was innocent. Mother saw the event and said that Jock did not hit Darling. The police report was vague and not very incriminating. In addition, Paul has not been able to question Darling further about her accusation. Despite all of the evidence of Jock's innocence, Paul has decided to go forward with the prosecution at the preliminary hearing. While it may be a close call, there likely is not probable cause that Jock committed Assault and Paul violated the Rules by continuing the prosecution without probable cause.



QUESTION 8

On January 1, Farmer entered into the following agreements:

1. In a valid written agreement, Farmer agreed to sell 40 acres of farm land to Buyer for \$100,000. In a separate provision of this written agreement, Farmer agreed to help Buyer plant his first crop in the spring of the same year. Buyer could extend the closing date of this first transaction, but only upon the tender of an “additional down payment.”
2. In a second valid written agreement, Farmer agreed to sell Buyer his tractor, which the contract specified “was to be in good working condition.” In addition to farming the land, Buyer desired to raise chickens.
3. In a third valid written agreement, Farmer agreed to sell Buyer all of his chickens for \$500, for the purposes of breeding and egg production.

The closings for all three transactions were to occur no later than 60 days from execution.

On January 15, Buyer learned that foxes had broken into the properly maintained chicken pen, killed all of the hens, and left only five roosters. On January 20, Buyer learned that, while it did work, the tractor needed a new transmission in order to plow some previously unplowed, rocky fields that Buyer wished to cultivate. On February 25, Buyer requested an additional 10 days beyond the stated closing date for the purchase of the land because his bank needed more time to assemble the paperwork.

1. **When Buyer found out that Farmer had no hens to purchase, he refused to buy the remaining roosters. Farmer sued Buyer for breach of contract. Is Farmer likely to prevail? Explain.**
2. **When Buyer found out that the tractor cannot plow, he refused to buy the tractor. Farmer sued Buyer for breach of contract. Is Farmer likely to prevail? Explain.**
3. **Upon Buyer’s request for additional time to close, Farmer demanded an additional, non-refundable down payment of \$25,000 to make sure the closing occurred. Buyer was unable to pay the additional down payment and Farmer refused to close on the sale after the expiration of the stated 60 days. Buyer sued Farmer for breach of contract. Is Buyer likely to prevail? Explain.**
4. **Assume for this scenario only, that on April 1, Farmer died. Upon learning that Farmer died, Buyer sued Farmer’s estate for breach of contract on the basis that Farmer is unable to fulfill his promise to help Buyer plant his first crop. Is Buyer likely to prevail? Explain.**

Assume all the necessary probate claim procedures have been satisfied.

1. Farmer is unlikely to prevail because the purpose of the contract has been *frustrated*. Under Ohio contract law, where parties enter into a contract for a specified purpose, and, by no fault of either party, that purpose is frustrated by a superseding law or occurrence, a party may be discharged from performing without being liable for breach. Here, Farmer and Buyer (B) entered into an agreement to sell chickens *for the purposes of breeding and egg production*. Since all the hens have been killed through no fault of either party - because the pen was properly maintained - no breeding can take place and no egg production can occur since male roosters do not produce eggs. Therefore, the purpose of the contract has been frustrated such that B is discharged from performing without being liable for breach and Farmer is unlikely to prevail.

2. Farmer is likely to prevail because Buyer's duty has not been discharged by any defense and Farmer has satisfied the condition in the contract. Under Ohio contract law, where a contract specifically states a condition such as the tractor must be in "good working condition," the words will be given their plain meaning. A reasonable person would assume this meant the tractor ran. Nothing in the facts indicates Farmer knew Buyer wanted to plow that land and knew the tractor would not be able to, so the defense of mistake of fact cannot be asserted.

The defense of impracticability can be asserted only when performance is nearly impossible. Here, Buyer's performance is to pay, which has not been made impracticable. Here, the contract merely required the tractor be in "good working condition." This was satisfied because the tractor did work as required under an application of the plain meaning of the words. The fact that it needed a new transmission to plow some rocky fields does not cause it to not be in "good working condition." B should have specified further in the contract that the tractor needed to be able to plow the rocky fields if he wanted to protect himself. Since no defense can be raised, Farmer is likely to prevail.

3. Buyer is likely to prevail because Farmer's demand for \$25,000 in response to Buyer's reasonable request for a 10-day extension was *unconscionable*. Under Ohio contract law, when time is not of the essence in the contract, performance must just be made within a reasonable time. Here, while the parties did specify closing was to occur no later than 60 days from execution, it did not say time was of the essence. Further, although the contract did provide that an "additional down payment" was required to extend, it is unreasonable and likely unconscionable to demand a quarter of the contract price for an extension not caused by Buyer's fault. A demand is unconscionable when it "shocks the conscience." Here, the fact that Buyer needed an extension because his bank needed more time to assemble paperwork is a reasonable excuse and a reasonable person would consider such a high demand by Farmer in response to be unconscionable. Therefore, Buyer is likely to prevail.

4. Buyer is unlikely to prevail so long as Farmer did not have unique or specialized skills which make performance of the contract now *impossible*. Under Ohio contract law, in a contract for services - i.e. helping plant crops - a party is not discharged under the defense of impossibility unless such person had such unique or specialized skills that no one else can perform the job. Here, nothing in the facts indicates Farmer is the only farmer who knows how to plant. Because of this, the estate may fulfill performance by finding another farmer to assist Buyer in planting the first crop. If they fail to do so, then they are in breach and without a proper defense because impossibility does not apply. Therefore, Buyer is unlikely to prevail on his breach claim because performance is not impossible and the estate may substitute a new person.



QUESTION 9

- Q
1. Acme Corporation (Acme) is an Ohio corporation that utilizes an electronic check-writing-machine. The machine was programmed to cause a check drawn on Drawee Bank to be issued to Supplier, a vendor to Acme. The address of Supplier was properly entered into the machine's computer. Susan, an Acme employee whose duties include entering such information into the computer, secretly changed the address of Supplier to her own address, and the check was subsequently issued and mailed to Susan's home. Susan indorsed the check in the name of "Supplier" and deposited it in Depository Bank, where she had also opened an account in the name of "Supplier." The check was honored by Depository Bank and then subsequently also honored by Drawee Bank. When Acme discovered what Susan had done, Acme properly sued both Depository Bank and Drawee Bank for paying the check in breach of their warranties.
 2. Mary wrote a check to Clair for \$10. The figure "10" and the word "ten" are typewritten in the appropriate spaces on the check, but a large blank space was left after both the figure "10" and the word "ten." Clair, using a computer with a slightly larger and visibly different font, typed in the word "thousand" after the word "ten," and then added a comma and three zeros after the figure "10." Drawee Bank paid Clair \$10,000 when the check was presented for payment and debited Mary's account in the same amount. Mary sued Drawee Bank for improperly paying an altered instrument, and Drawee Bank has asserted that it is not liable.
 3. Harry, an aluminum siding salesman, sold Kate new aluminum siding for her home. In doing so, he presented to her a promissory note for \$10,000, payable to Harry in equal monthly installments of \$1,000 per month over a ten (10) month period. Harry told Kate that the note was really just a receipt for the siding and that she was receiving the siding for free as a marketing promotion, as long as Harry could put a sign in her yard promoting his business. Kate believed Harry and signed the note. The note was fully assignable, and all rights to cancellation requirements of the Ohio Installment Sales Act were complied with. Three weeks later, after the siding was installed, Harry assigned Kate's note to Alumco, his aluminum supplier, to pay for aluminum purchased by Harry. Kate later learned that Harry "tricked" her and refused to make any payments on the note. Alumco sued Kate to enforce the note.

With respect to the following disputes, who should prevail:

1. **Acme v. Depository Bank and Drawee Bank? Explain fully.**
2. **Mary v. Drawee Bank? Explain fully.**
3. **Alumco v. Kate? Explain fully.**

Will Acme prevail against Depository Bank and Drawee Bank

No. Acme will not prevail against the banks because they have a defense known as the trusted employee rule. The rule is that a bank may defend against a payment made to an employee when employer gives an employee a duty to perform a certain business function and negligently does not supervise or have some procedure to check the employee, and the employee frequently presents a check to the bank for payment. Under the current set of facts, Acme gave Susan the duty of issuing checks to suppliers. Acme did not supervise or have a procedure to check on Susan. Susan is considered a trusted employee who defrauded her employer by secretly having checks mailed to her house and cashing them for herself. Under those facts, the banks have a defense against Acme for honoring the checks upon presentment. Acme will be able to hold Susan liable for the fraudulent checks if they bring a claim against her. In conclusion, Acme will not prevail against either bank because they have a trusted employee defense.

Will Mary prevail against Drawee Bank

No. Mary will not prevail against Drawee Bank because the bank has a defense of Drawer's negligence. The rule is that a bank has a defense if the Drawer negligently prepared the check and it was not apparent from the face of the check whether there was an alteration to the check. In the current situation, Mary was negligent in leaving empty space next to the words and next to the number on the check, leaving the space open for Clair to add the extra zeros and the word "thousands." Mary will try to defend against this by saying that the banks should have known of the alteration because the extra added numbers and words were in a different font and larger in size than what she had written on the check. Although a valid point, it is likely that Drawee Bank will prevail because of their defense of the drawer's negligence.

Will Alumco prevail against Kate

No. Although Alumco is a holder in due course, Kate has a real defense of fraud in the factum making her not liable on the promissory note. A holder in due course is a holder of a negotiable instrument, who gives value, with no alteration on its face, and without notice of any reason the note is not valid, i.e. that it has been dishonored or overdue. A holder in due course holds special rights compared to a regular buyer, which is that she takes free of personal defense such as lack of consideration, but is still subject to real defenses such as fraud in the factum, incompetence or infancy. Under the current set of facts, Alumco was a holder of a negotiable instrument when he receives the promissory note from Harry with ability to enforce. Further, he gave value and was unaware of any alterations or any notice that it was not valid. Thus, Alumco was a holder in due course which takes free of personal defenses. However, Kate has a real defense of fraud in the factum because Harry lied to her, getting her to sign the promissory note by telling her it was simply a receipt from the aluminum and that she was receiving the siding for free. In conclusion, although Alumco is a holder in course, he is subject to Kate's real defense of fraud in the factum, making her not liable on the note. Harry will be the only one liable.



QUESTION 10

The private litigants in the following situations have challenged the described government laws/policies of the State of Franklin in federal court on the grounds that the laws/policies violate their rights under the Equal Protection Clause of the United States Constitution.

1. The State of Franklin has experienced an increase in car accidents where the person at fault was 75 years old or older. Police reports indicate that the causes of the accidents were directly related to poor eyesight or other conditions related to the aging process. In response, the Franklin Legislature enacted a law that states:

A. An individual who turns 75 years old shall have his or her license revoked unless, within at least 3 months prior to that date, such individual has passed the State Driver's Exam. If the individual passes this test, he or she will be issued a driver's license for a term of two years.

B. An individual who obtains a license under Section A may renew that license for another two-year term by passing the State Driver's Exam within 3 months of the expiration of the two-year term. If the individual fails to do so, his or her license will be revoked.

Abe recently turned 75 and, unaware of the new law, had his license revoked. Abe sued the state.

2. A Franklin state law states that anyone who owes back taxes, owes fines to the state, or is delinquent on child support payments, may not vote in the state's elections. Bob, a divorced father with one child, has been out of work for more than a year. Bob is delinquent on his child support payments and, pursuant to the state law, was barred from voting in a recent election to choose members of the Franklin Legislature. Bob sued the state.

3. The Franklin State Department of Homeland Security Personnel Review Board recently revised its hiring criteria for all its employees. One of the revisions required that all employees be United States citizens. The Review Board defended the citizenship requirement as serving the state's interest in undivided loyalty in protecting and serving the general public.

Charles, a legal alien residing in Franklin, applied for a position as a Special Agent with the Franklin State Department of Homeland Security. Out of all the applicants, Charles was the most qualified for the position. Charles was not offered a position as a Special Agent based solely on the new citizenship requirement.

David, also a legal alien residing in Franklin, applied for a position as a maintenance worker with the Department of Homeland Security. Out of all the applicants, David was the most qualified for the position. David was not offered the position based solely on the new citizenship requirement.

Charles and David both sued the state.

4. As a way to recognize the personal sacrifice veterans make in order to serve their country in time of war, the State of Franklin passed a law giving all veterans who qualify for state civil service positions consideration for appointment ahead of any qualifying nonveterans. The statutory preference is available to any person who was honorably discharged from the United States Armed Forces after at least 90 days of active service, at least one day of which was during wartime.

Elaine has been employed by the State of Franklin for a number of years. During her employment, Elaine has taken and passed several open competitive civil service exams for better jobs. While Elaine has received some of the highest scores in the state, she has repeatedly been ranked below male veterans who received lower scores, and she did not get the jobs she sought. Frustrated, Elaine sued the state. During the trial, evidence was presented demonstrating that 95 percent of the veterans living in Franklin were male; less than five percent were female.

How should the federal court rule in each case? Explain your answers fully.

Under the Equal Protection Clause of the 14th Amendment, states are prohibited from taking certain action that discriminates against different people unless justified.

1. Unless the classification is based on a suspect class, then rational basis will apply to the law. Rational basis requires that the law be rationally related to a legitimate government interest. Franklin's new licensing law discriminates against people on the basis of age. A classification based on age is not a suspect class and, therefore, only rational basis scrutiny will apply. Franklin had discovered from police reports that there was an increase in car accidents where people over 75 were at fault and that the accident related directly to conditions related to the aging process. In order to increase safety on the roads, Franklin instituted the new law requiring people who were 75 to pass the driving test and to pass it again to renew in 2 years. Thus, Franklin's law is rationally related to the legitimate government purpose of public safety on the roads. Thus, although the law affected Abe because of his age, the law is valid and will be upheld.

2. A law that prevents certain people from exercising fundamental rights is subject to strict scrutiny. Strict scrutiny requires that the law be narrowly tailored, meaning it is the least restrictive means to achieve a compelling government interest. The right to vote is a fundamental right.

Because Franklin's law prevents those who are delinquent on certain payments from voting, it restricts a fundamental right and is, therefore, subject to strict scrutiny. Franklin may be able to show that getting people to pay back taxes, fines, and child support payments is a compelling government interest. However, restricting someone's right to vote is not narrowly tailored to achieving this interest. The right to vote has little relation to paying taxes or child support payments. Because the law is not narrowly tailored, the law will be struck down and Bob will win in his suit against the state.

3. Classifications based on legal alienage status by a state are subject to strict scrutiny, unless the law relates to democratic self-governance. If the law relates to democratic self-governance, then only rational basis scrutiny applies.

The Homeland Security requirement for US citizenship will likely be upheld as applied to Charles. A special agent with homeland security of a state is related to democratic self-governance, just like a police officer, because they help maintain safety and freedom in the state. The citizenship requirement that discriminates against Charles' alien status for special agent hiring is thus only subject to rational basis review. Maintaining loyalty in protecting and serving the public is a legitimate interest and it is rational to think that US citizens will be more loyal to the US and Franklin in serving the public. Thus, the denial of Charles was valid.

However, a maintenance job is not related to democratic self-governance in any way. Thus, the denial of David based on his alien status for a maintenance worker job is subject to strict scrutiny. The US citizenship requirement is not narrowly tailored to serve a compelling interest by denying maintenance jobs to legal aliens. Thus, David's rejection was not valid.

4. A law that discriminates on the basis of gender is subject to intermediate scrutiny, meaning it must be substantially related to an important government interest. In order to show discrimination in the law, there must be discriminatory intent and effect. The Franklin law is meant to recognize military service. Thus, the law giving hiring preferences to veterans does not have a discriminatory intent despite its effect on women. It will, therefore, likely be upheld under rational basis.



QUESTION 11

David, an Ohio resident, married Wendy in 1980. David created a valid Ohio Will in 1995 (1995 Will). At that time Hank and Dawn, a married couple, lived in a residential neighborhood in Anytown, Ohio. Both were HIV-positive, and they were packing to move so they could both participate in a new drug trial for HIV-positive patients. Unbeknownst to Hank, Dawn had long been attracted to their neighbor, Ned. Although Ned had already rejected her advances, on the day before they moved, Dawn left her house and ran next door to find Ned.

Dawn snuck into the house, where she encountered Ned's wife, Wanda, standing surprised in the living room. Dawn picked up a heavy candlestick and bashed Wanda over the head, knocking her unconscious. Ned watched the whole thing and screamed. Dawn then grabbed Ned's arm and pulled him to the bedroom, where she forced him to engage in oral sex with her while threatening him with the candlestick. Dawn then left Ned's house and returned to her house.

When Dawn arrived home, she found Hank sitting at the kitchen table with a gun in front of him. Hank said he had followed Dawn and watched everything that had happened at Ned's house through the window. Hank was furious that Dawn would betray him, and they argued for the next hour. In the heat of their argument, Hank grabbed the gun. At that same moment, the doorbell rang. Hank turned toward the front door and fired the gun until it was empty.

On the other side of the front door stood Officer Smith, who had been going from house to house to collect for the local police officers' memorial fund. Officer Smith was hit and died from the gunshots.

Dawn and Hank were both charged in the Anytown Court of Common Pleas.

Dawn is charged with rape, kidnapping, and felonious assault.

Hank is charged with aggravated murder, aggravated murder of a law enforcement officer, and voluntary manslaughter.

Identify the elements of each of the offenses that the State will be required to prove and explain whether:

- 1. Dawn should be found guilty of each offense charged against her.**
- 2. Hank should be found guilty of each offense charged against him.**

1. Dawn

1a. Rape: Under Ohio law, a defendant is guilty of rape if they engage in unconsented sexual intercourse with another, against his or her own will, and the defendant uses force or threat of force. Here, Dawn will be convicted of rape because she engaged in unconsented oral sex with Ned; against Ned's will because he was screaming and wanted nothing to do with Dawn; and Dawn used threat of force because she threatened to hit Ned with the candlestick. Thus, Dawn will be guilty of rape.

1b. Kidnapping:

Under Ohio law, a defendant is guilty of kidnapping if they use threats to physically move or confine another against his or her own will, while they are committing a rape. Here, Dawn will be convicted of kidnapping because she used the threat of force of the candlestick to physically move Ned to the bedroom by grabbing his arm and subsequently confining him in the room. Further, she subsequently raped Ned, as discussed above, while confining Ned to the room with the threat of force. Thus, Dawn will be guilty of kidnapping.

1c. Felonious Assault:

Under Ohio law, a defendant is guilty of felonious assault if they physically injure someone with a deadly weapon or seriously injure another. Further, a deadly weapon is broad and can be anything that can be used as a deadly weapon, not just a gun or knife. Here, Dawn will be guilty of felonious assault for hitting Wanda over the head with a candlestick, because in that moment of time she used it as a deadly weapon because a candlestick with a certain amount of force could cause death. Further, Dawn also inflicted serious injuries on Wanda because she knocked her unconscious from the force of the hit. Thus, Dawn is guilty of felonious assault.

2. Hank

2a. Aggravated Murder:

Under Ohio law, a defendant is guilty of aggravated murder if it was premeditated through prior calculation or design or they commit a murder while engaged in a certain felony. Here, Hank will not be convicted of aggravated murder for committing the killing of Smith while committing a felony because there is no evidence he was committing a felony. Further, there is no evidence that Hank planned to kill Dawn because, although he was sitting with a shotgun, this does not show a purposeful planned killing that could be transferred to Smith. Thus, Hank is not guilty of AM.

2b. Aggravated murder of law enforcement: Under Ohio law, a defendant is guilty of aggravated murder if they purposefully kill a police officer who is in uniform performing his duties, or out of uniform and the defendant knows the individual is a police officer. Here, Hank will not be guilty of aggravated murder because, although he killed Officer Smith, who was a cop, he did not kill Smith while he was performing his duties as a cop because he was simply going house to house to collect funds for the local police officers memorial fund. Further, Hank also did not purposefully kill Officer Smith with knowledge that he was a cop because the facts show that Hank just turned and shot the door, without knowing who was ringing the doorbell. Thus, not guilty of AM.

2c. Voluntary Manslaughter:

Under Ohio law, a defendant is guilty of voluntary manslaughter if they knowingly kill another human being through a fit of rage or heat of passion, such rage or heat of passion was caused by the victim, and a reasonable person would have used deadly force in the same or similar circumstances, for example a spouse catching another spouse in the act of cheating. Here, Hank will not be guilty of voluntary manslaughter because Hank was not in the heat of passion because he was arguing with his wife for over 1 hour, showing that he had time to cool down from the initial act of her having oral sex with Ned. However, even if he was in a fit of rage, the victim, Smith, was not the one who caused the fit of rage because Dawn was the one. Thus, Hank is not guilty of VM.



QUESTION 12

Matt has been a lifelong resident of Scioto County, Ohio. Matt utilized a legal website to create an instrument that he referred to as his “2005 Will.” The 2005 Will included the following provisions:

1. I give all vehicles I own at my death to my brother, Brad.
2. I give the sum of \$25,000 to my sister, Shauna.
3. I give my house on Oak Street to my sister, Shauna.
4. I give the rest and residue of my estate to Church.
5. All debts shall be paid from my residuary estate.
6. I name Shauna as my Executor.

Matt signed his 2005 Will on November 1, 2005, at the top of the first page, above all of the dispositive provisions. Matt had a neighbor sign as a witness next to Matt’s signature at the top of the first page.

In 2010, Matt married Faith. In 2011, Matt prepared a new Will (2011 Will), which provided as follows:

1. I wish to acknowledge and incorporate paragraphs 1, 2, 4, 5, and 6 of my 2005 Will, which I signed on November 1, 2005.
2. I revoke paragraph 3 of my 2005 Will. In place of paragraph 3, I give my house on Oak Street to my wife, Faith.
3. I incorporate and reaffirm all the other provisions of my 2005 Will.

Matt signed and dated the 2011 Will below the above-referenced provisions in the presence of two neighbors, both of whom were adults. The two neighbors then signed the 2011 Will under Matt’s signature as witnesses. Matt then stapled his 2005 Will to the 2011 Will and placed both documents in his desk.

Matt’s brother, Brad, passed away unexpectedly in early 2016. Brad was survived by his son, Sonny. After Brad’s death, Matt was involved in a serious automobile accident in July 2016 and was admitted to Hospital. Faith visited Matt in Hospital on one occasion in August 2016. Unbeknownst to Matt, Faith had already started an affair with an old boyfriend before Matt’s accident. Faith did not visit Matt again, and she filed a complaint for divorce in September 2016 while Matt was still in Hospital. A hearing on the divorce filing was scheduled for March 2017.

Matt’s condition began to deteriorate quickly. Matt requested two nurses to come to his room on the night of October 20, 2016. In the presence of the two nurses, Matt stated the following:

I declare this statement to be a change to my 2011 Will. I believe that my death is impending, and I revoke paragraph 2 in my 2011 Will, which gave my Oak Street house to my wife, Faith. In place of that provision, I give my Oak Street house to my sister, Shauna. All other provisions of my 2011 Will are reaffirmed.

Matt asked the nurses to transcribe his statement and asked them to sign the document as witnesses. One of the nurses transcribed Matt’s statement later that evening (2016 Statement), and both nurses signed it as witnesses. Matt passed away that night, and the nurses gave the 2016 Statement to Shauna.

At the time of Matt’s death, no legal separation agreement had been agreed upon in the divorce action. Faith never made an election to take against the 2011 Will, and Matt owned the following property:

1. The house on Oak Street valued at \$300,000.
2. A Ford truck.
3. \$150,000 in account at Bank.

Shauna has filed the 2011 Will with the attached 2005 Will and the 2016 Statement with the Probate Court. Shauna has been appointed Executor of Matt’s estate. Matt had incurred a \$40,000 debt to Hospital, due to his lengthy stay. Sonny, Faith, Shauna, Church, and Hospital are all asserting claims to Matt’s property. Hospital first submitted a written claim to Shauna seven months after Matt’s death.

1. Analyze and determine the validity and effect of:

- A. The 2005 Will.**
- B. The 2011 Will.**
- C. The 2016 Statement.**

2. Who is entitled to receive:

- A. The house? Explain fully.**
- B. The Ford truck? Explain fully.**
- C. The funds in Bank account? Explain fully.**

1. A. To validly execute a will in Ohio, the will must be in writing, signed by the testator at the end of the will, and signed by two witnesses who saw the testator sign or acknowledge his will in the conscious presence of the testator.

The 2005 Will was not validly executed and is, therefore, invalid. First, Matt signed the will on the top of the first page above all of the dispositive provisions. A signature by the testator above any dispositive provision invalidates the will. In addition, the will was only signed by one witness. Thus, the 2005 Will is not valid and has no effect because it did not meet both the signing or witnesses requirements.

However, it may have been incorporated by reference in the 2011 Will as analyzed below.

1. B. The 2011 Will is valid. The will was in writing, was signed by Matt below all of the dispositive provisions of the will, and witnessed by two adults who also signed the will next to Matt in his conscious presence. As a result, the 2011 Will is effective to control Matt's property at death.

In addition, the 2011 Will incorporated by reference certain provisions of the 2005 Will. Incorporation by reference occurs when another document is sufficiently identified in a will, there is an intent to incorporate the document, the document is referred to as being in existence, and the document actually exists as referenced.

The 2011 Will sufficiently describes the 2005 Will with clear intent for paragraphs 1, 2, 4, 5, and 6 to be incorporated into the new will. Thus, the 2011 Will incorporates the 2005 Will.

1. C. In Ohio, an oral will may be made by a testator who is near death, is made to two disinterested witnesses, the witnesses transcribe the will within 10 days, both witnesses sign the will, and submit the will for probate within 3 months of death. The testator must make the oral statement to the witnesses with the purpose of creating an oral will. However, an oral will cannot invalidate any prior written wills or control the distribution of real property.

Here, Matt's statement was likely a valid oral will because it was validly witnessed by two disinterested people, immediately transcribed and signed, and then submitted to probate. However, it will have no effect because it contradicts Matt's prior written wills and attempted to devise real property.

It is also not a valid written will because it was never signed by Matt.

2. A. The house will go to Faith. As described, the 2011 Will was validly executed and devises the house to Faith. Matt's attempted oral will giving the house to Shauna is not sufficient because it is invalid to distribute real property such as the house or contradict his written will. In addition, Ohio will invalidate any gift to a former spouse in a will upon divorce. However, Matt and Faith were still married and no legal separation agreement was in place at the time of Matt's death. Thus, the gift to Faith is still valid.

2. B. In Ohio, an antilapse statute will save gifts from lapsing into the residuary when (1) the gift is made to someone who is an issue of the testator's grandparent, a grandparent, or a stepchild and (2) the deceased beneficiary is survived by issue.

Here, Matt gifted all his vehicles in his will to Brad, who is Matt's brother. Thus, the relationship test is met. In addition, Brad was survived by his son, Sonny. As a result, the antilapse statute will apply to the gift of the vehicles and Brad will take the truck.

3. C. Hospital will take \$40,000 from the bank account. Hospital was owed the debt and debts were specifically to be paid from the residuary estate. Shauna will take \$25,000, due to the valid gift that was incorporated into the 2011 Will. The rest of the money will go to the residuary beneficiary, Church, who will take \$85,000.

MPT 1

Peek et al. v. Doris Stern and Allied Behavioral Health Services

The client, Rita Peek, is the named plaintiff in a federal class action brought pursuant to 42 U.S.C. § 1983. The complaint alleges that the defendants, who have contracted with the county to provide probation services, have discriminated against female probationers by failing to provide court-ordered counseling in a timely manner. Peek was convicted in Union County district court of a misdemeanor and sentenced to 10 months in jail, with the jail sentence stayed on the condition that she successfully complete 18 months of probation. The district court imposed certain conditions of probation, including receiving mental health counseling. At a recent case-management conference, the federal judge raised the issue of whether the defendants are state actors and requested simultaneous briefing on that sole issue. Examinees' task is to draft the argument section of the plaintiffs' brief, following office guidelines and persuading the court that under the relevant tests and approaches, the defendants are state actors and therefore subject to suit under 42 U.S.C. § 1983. The File contains the instructional memorandum, the firm's guidelines for drafting simultaneously filed persuasive briefs, the sentencing order, a memo to the file, and excerpts from the deposition transcript of one of Allied's employees. The Library contains the relevant Franklin statutes on probation and a case from the U.S. Court of Appeals.

Brief in Support of Plaintiffs' Position that Defendants Are Acting under Color of State Law

Body of the Argument

Overall, Allied Behavior Health Services is a state actor because it engages in an exclusive public function and because Union County exercises coercive and influential power over Allied. Generally, a 42 U.S.C. § 1983 provides a cause of action against persons acting under the color of state law who have violated a person's constitutional rights. *Lake Mega Lottery Group* (15th Cir. 2009) (Citing *Buckley v. City of Redding* (9th Cir. 1995)). A civil rights claim under § 1983 can only prevail if the plaintiff is making the claim against the state or a private actor engaging in state action. Courts will consider a range of circumstances when characterizing a private actor as a state actor. Specifically, there are two tests to determine whether the private actor is a state actor. First, state action exists where the private actor was engaged in a public function delegated by the state. *Id.* The public function must be one that is exclusively within the state's power. *Id.* Second, state action exists where the state exercises its coercive or influential power over the private actor or when there are pervasive entanglements between the private actor and the state. *Id.* Additionally, under either test, there is a requirement that there be a close nexus between the state and the challenged act. *Mega Lottery* (quoting *Brentwood*). The critical question in considering nexus is whether "the State is responsible for the specific conduct of which the plaintiff complains." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n* (2001). Here, this brief will show that Allied Behavioral Health Services can be construed as a state actor under both tests and the nexus requirement is sufficiently satisfied.

I. Allied Behavioral Health Services is a state actor because it engages in an exclusive public function analogous to operating a jail when it provides probation services to persons convicted of misdemeanors

Allied Behavioral Health Services engages in the exclusive state function of providing probational services to persons convicted of misdemeanors. State action exists where the state actor was engaged in a public function delegated by the state. One example in which the court found that a private actor engaged in an exclusive state function - and thus was a state actor - was *West v. Atkins*. In that case, a privately employed doctor was considered a state actor when he was employed in a state prison to provide medical care to those imprisoned. *West v. Atkins* (1988). Another example is *Camp v. Airport Festival*. In *Camp*, a private nonprofit entity became a state actor when it was empowered to direct public policy regarding arrests. There is no exclusive state function, and thus state action, by those who operate hospitals, privately owned public utilities, or schools, provide foster care, or operate a lottery. Providing medical services to inmates and directing police regarding arrests are both considered exclusive state functions.

Here, Behavioral Health Services provides another exclusive state function when it provides mental health counseling and other services to persons mandated to acquire such services by court order as a condition of probation. Probation is analogous to jail. Allied Health's services here are analogous to the services that the doctor in *West* provided. Probation is a restriction on a person's liberty because probationers have to comply with conditions and probation, they must meet with probation counselors each month, and they cannot leave the state. The restriction on liberty is less than the total deprivation of liberty that occurs when one is put in jail, but the similarities make probation and jail analogous. In *West*, the state was required to provide health services to inmates in a state prison. Here, under Franklin Criminal Code § 35-210, the state may impose probation instead of jail and must provide the services required to satisfy the probation. Therefore, like in *West*, in which the private doctor providing services at the public prison was found to be a state actor, Allied Health, which is a private actor, should be deemed to be a state actor when it provides probation services to the state.

II. Allied Behavior Health Services is a state actor because Union County exercises coercive and influential power over Allied in that Allied must act according to court order and the Franklin Criminal Code empowers the County Probation Officer to approve its annual plans.

Allied Behavior Health Services is a state actor because Union County exercises significant control over Allied's conduct as to the probationers. Generally, a private actor engages in state action when the state exercises its coercive or influential power over the private actors or when there are pervasive entanglements between the private actor and state. *Mega*. More specifically, a state can be held responsible for private action when it

A provides significant encouragement to the state action. *Id.* (quoting *Rendell-Baker v. Kohn*). The state must be so coercive that the private actor and the state are considered to be one in the same. *Id.* In *Rendell-Baker*, there was no state coercion, influence, or pervasive entanglement merely because the state regulates schools and when the state did not have any influence in the firing that led to the Civil Rights claim. Furthermore, the mere existence of a contract with the state does not constitute entanglement such as to constitute state action. The *Mega Lottery* case involved the state regulation of the operation of a lottery and a plaintiff's claim for wrongful discharge from the lottery. In *Mega*, there was no state action because the mere existence of a contract between the state and the lottery, permitting the *Mega* to operate the lottery with the profits reverting to the state, was not enough. The state did not involve itself in *Mega's* governance, did not endorse personnel policies, and did not involve itself in operations. Furthermore, the state had no influence over the hiring or firing of employees. Conversely, in the *Camp* case, involving private persons to control power over the police at an air show, there was extensive state entanglement because the city permitted the festival to use the airport grounds at no costs, the city's personnel were extensively involved in planning for the festival while on city time and at city expense, the city promoted the festival through its agency, and the city personnel controlled access during the air show.

Here, the involvement of the state is similar to the state involvement in *Camp* and unlike the lack of involvement in *Mega Lottery*. Here, there is pervasive government entanglement and oversight. The Franklin Criminal Code § 35-211 provides that the County Probation Officer has significant oversight over any private entity with whom the county contracts to provide probation services. The Probation Officer must approve a plan for services including oversight of those on probation, monthly meetings, drug and alcohol testing, and various counseling. Specifically, the County Probation Officer approves Allied Behavior Health Service's annual plan. Furthermore, Allied must follow court orders when it lays out the requirements for probation terms. Specifically, this means that if the court orders mental health counseling, Allied must facilitate that service for probationer. Additionally, all of Allied's funding for probation services comes from the state, and Allied must meet the requirements set out by state law. This is significant oversight and control over the decisions and actions of the private actor. This exceeds more than a mere contract.

The Defendants will argue that Allied's connections with the state are not enough to constitute state action, but these arguments are easily rebutted. The Defendants will argue that Allied's Board is made up of eleven members and only two of the eleven are public servants. However, even two of eleven is a significant number and influence the organizations decisions. Defendants also likely will argue that only forty percent of the organization's total funding is from the state. However, the important figure here is that one-hundred percent of the funding for probation services - the topic at issue here - are from the state. The Defendants also will argue that Allied has discretion in how to execute probation plans. Regardless of that discretion, Allied must comply with court orders regarding probation and must comply with state laws. Overall, the entanglement with the state and control from the state are so significant that Allied must be considered a state actor.

III. There is a nexus between the claim of Rita Peeks and plaintiffs because the state must approve of Allied's annual plans including plans for mental health counseling.

In order to satisfy either test for state action, a plaintiff must show that there is some nexus or connection between the state and the challenged action. In *Mega Lottery*, there was no nexus between the state contract allowing *Mega* to exist as a lottery and the discharge of the employee making the Civil Rights claim. The state has no influence over who *Mega* fired. Here, there is a nexus between the plaintiffs' claims and the state's relationship with Allied Behavioral Health. Peek and the other plaintiffs claim that they have experienced a delay in undergoing counseling and that the delay is a discrimination based on gender because men do not experience the same delay. This claim of discrimination is related to the state's control over Allied Behavioral Health because Franklin Criminal Code provides that the County Probation Officer must approve plans for service which includes plans for various counseling, such as mental health counseling. Specifically, the state approves Allied's annual plans regarding mental health counseling. The state is directly involved in the mental health plan, unlike in *Mega Lottery* where the state had no influence over who *Mega Lottery* fired. Therefore, the nexus requirement is satisfied.



MPT 2

In re Zimmer Farm

In this performance test, examinees work in the office of the Hartford County Attorney. The president of the county board has received complaints about activities at the farm owned by John Zimmer and his son Edward. The Zimmers raise apples and strawberries for sale but have also begun operating a bird sanctuary on the farm. Residents in the adjacent housing developments are complaining about the smells and noise from the birds and also object to the crowds and loud music at the four “bird festivals” that the Zimmers held on their farm in the past year. Examinees’ task is to prepare an objective memorandum analyzing whether the Hartford County zoning code can be applied to shut down the bird rescue operation and stop the festivals. As part of completing the task, examinees must also address whether the Franklin Right to Farm Act affects the county’s ability to enforce its zoning ordinance with respect to the Zimmers’ activities. The File contains the instructional memorandum, an email from a complaining resident, and the investigator’s report about the Zimmers. The Library contains an excerpt from the Hartford County Zoning Code, excerpts from the Franklin Agriculture Code that contain the Franklin Right to Farm Act, a Senate Committee report about the Act, and three appellate court cases, two from Franklin and one from Columbia.

To: Carl S. Burns

From: Examinee

Date: July 25, 2017

Re: Complaints about Zimmer Farm

The Zimmers' bird rescue operation is not permitted by the County Zoning Ordinance, although the festivals, in a limited fashion, are permitted and protected by FRFA.

1. Is the Zimmers' bird rescue permitted under the county zoning ordinance?

Under Hartford County's zoning ordinance, the Zimmers' bird rescue is not permitted. The Zimmers' farm is in an A-1 district, meaning that agricultural use is permitted along with activities incidental to agriculture, like processing, packaging, storage, transportation, distribution, sale, or agricultural accessory use intended to add value to agricultural products. 15 Zoning Code § 22(a). Agricultural use means activities conducted for the purpose of producing an income or livelihood from crops or forage, livestock, beehives, poultry, or nursery plants. § 22(b) (2). The Zimmers make no profit or livelihood off of their bird rescue operation. Edward Zimmer merely takes in wounded birds and rehabilitates them. He does not sell them or intend to sell them. The Zimmers may argue that ducks and geese are considered poultry under the ordinance. However, they are still lacking the income or livelihood element with respect to the bird rescue. Therefore, this is not an activity conducted for the purpose of producing income or a livelihood, it is more of a hobby, even though two of the six species he protects are listed as agricultural animals, ducks and geese.

2. Are the Zimmers' festivals permitted under the county zoning ordinance?

The Zimmers' festivals are only partially permitted under the zoning ordinance as agricultural accessories. An agricultural accessory can be a special event, provided there are three or fewer per year and directly related to the sale or marketing of one or more agricultural products. 15 Zoning Ordinance § 22(b) (3) (b). The Zimmers do promote the sale of their apples and strawberries during the festivals, which would be permitted. However, the activities relating to helping the wounded birds are not related to an agricultural product, as there is no profit motive or general agricultural purpose behind those activities. The Zimmers also hosted four such festivals last year, which is a violation of the maximum four events that are allowed to be held. Therefore, the festivals will be allowed if they center on the produce, apples and strawberries, that is actually produced on the farm and there are three or fewer festivals. However, the Zimmers may not hold any additional festivals, or make the festivals involve the bird rescue operation.

3. How does the FRFA affect the county's ability to enforce its zoning ordinance with respect to the bird rescue and the festivals?

The Franklin Right to Farm Act (FRFA) should not affect the county's ability to enforce its zoning ordinance with respect to the bird rescue, although it may partially affect the county's ability to stop the festivals. In Franklin, a farm or farm operation is not a public or private nuisance if the farm or farm operation existed before a change in the use of land that borders the farmland, if the use would not have been a nuisance before that change. 75 Franklin Code § 3 (a). Farm means land, plants, animals, buildings, structures, machinery, equipment, and other appurtenances used in the commercial production of farm products. § 2(a). Farm operation is the operation of a farm or an activity occurring on a farm in connection with the commercial production of farm products. § 2(b). In *Shelby Township*, the Franklin Court of Appeals held that this act does preempt ordinances that are in conflict it. Thus, ordinances that disallow the raising of chickens on a small plot of land would not be able to stop owners of land from raising and selling chickens on a small plot of land where they did so before the neighboring houses were built. *Shelby Township*.

A. Bird Rescue

This would be applicable to the current case if the residents of Country Manors and Orchard estates were trying to stop the production of apples and strawberries on the Zimmers' farm because that is a farm operation. The Zimmers grow apples and strawberries commercially, so that they may be sold locally. This

operation existed at the time the neighboring houses were built. The Zimmers had farmed their land since 1951. It is not clear when the houses were built, but it can be assumed that they were built after the farm began its apple and strawberry operation and we know they were built before the bird rescue began. Therefore, FRFA would undoubtedly protect those operations.

However, it is not applicable to the bird rescue because the bird rescue is not covered by FRFA. Expansions of a farming operation can be covered by FRFA implicitly. *Wilson*. For example, where a farm expanded from a 60 cow operation to a 200 cow operation, the expansion was protected despite the operation being much smaller at the time houses were built alongside the farm. *Id.* However, expansions are not automatically covered. Based on judicial custom and persuasive authority, a particular expansion of a farm operation must be viewed in light of the legislative intent behind FRFA to determine if the expansions are in fact protected. *See Koster*.

In its report on the adoption of FRFA, the Franklin Senate Committee on Agriculture state that FRFA was intended to protect those who farm for a living. It was meant to “conserve, protect, and encourage” the development of agricultural land for the commercial production of food and other agricultural products. Based on these statements, it is clear that FRFA is meant to protect commercial agriculture, or agriculture producing income to the farmer and a benefit to the public. The birds in the bird rescue are not present on the farm for an agricultural purpose. They are not slaughtered for meat, sold to others for that purpose, or even sold for any purpose. Nor are the birds necessary components to the production of the farm’s apples or strawberries. The Zimmers do sell bird-related souvenirs and have guests adopt birds by donating to their care, but this is not for commercial purposes. The souvenirs and donations are meant to keep the rescue running. Thus, this expanded use of the farm is not a farming operation covered by FRFA.

There was a similar decision in our neighboring jurisdiction that has a very similar Right to Farm Act that persuasively supports this conclusion. In *Koster*, where a farm began manufacturing wooden pallets for use in harvesting and transporting its peaches, the manufacturing was not protected by the Right to Farm Act, even though it was related to the producing and selling of the farm’s product. The court determined that this operation was not protected because the jurisdiction’s act did not consider wood products to be farm products and the wood was not produced on the farm, meaning it was not raised, grown, or bred on the property, which was required by the statute. *Koster*.

Here, the bird rescue is not commercial agriculture, as required by the FRFA statute, and is not even related to the actual commercial agriculture on the farm. Thus it is not protected by FRFA and the Zoning Ordinance may be used to terminate its operation.

B. Festivals

However, the festivals may be a protected expansion, if limited in the way described above. While the festivals were not held until after the bird rescue began, they do involve commercial agriculture and are protected changes. Again, as held in *Wilson*, the technological changes allowed for in FRFA implicitly also allow for changes in the operation itself, like expansions. Here, the public fascination with agritourism encouraged the Zimmers to start holding festivals on their farms centered on the production of apples, strawberries and the bird rescue. The apple and strawberry part of the festivals are clearly events that encourage the improvement of agricultural land for the commercial production of food and help the Zimmers earn a living. Thus, the festivals, without the bird rescue portion, are something the legislature intended to protect with FRFA and the County may not put a stop them.

The Zoning Ordinances limitation of 3 or fewer a year is not expressly in conflict with FRFA because it still allows the agricultural festivals to continue with reasonable restrictions. Therefore, it is not preempted and the County may limit the Zimmers in this way.

Conclusion

Therefore, while FRFA does not completely prevent the County from enforcing its Zoning Ordinance, it does affect the extent to which the County can control the festivals. Namely, the Zimmers may continue to hold three or fewer a year so long as they revolve around the apples and strawberries, and they are not for the bird rescue.



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