July 2021 Georgia Bar Examination Sample Answers

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Essay 1 — Sample Answer 1

(1) Brian's Causes of Action

Brian can bring a personal injury negligence claim and claims for property damage to his vehicle against both Donald and Ed's Furniture Group.

Negligence

A negligence claim requires a plaintiff to show duty, breach, causation, and damages. Here, Donald owed Brian the duty of a reasonably prudent person under the circumstances, where a reasonable person is one who exercises ordinary diligence. Donald breached that duty by driving over the speed limit and by rolling through the stop sign, both of which do not meet the standard of ordinary care in following traffic laws. Causation includes both but-for causation and proximate causation. Here, Brian can argue that both are met. There is but-for cause because he would not have gotten into the crash absent Donald's car being at that place at that moment due to running through the stop light. There is also proximate cause because Brian was a foreseeable plaintiff as another driver on the road and his getting into the crash with Donald was within the realm of reasonably foreseeable outcomes of the negligent conduct.

In addition, breaking these two traffic laws makes Donald negligent per se. Negligence per se applies when an actor violates a statute that is intended to prevent a particular kind of harm, and the plaintiff is in the class of people that the statute is meant to protect and suffers the kind of injury that the statute intends to avoid. Here, getting into a car crash where the other driver breaks the speed limit and fails to stop at a four-way stop meets the requirements of negligence per se.

In Georgia, drivers of cars that get into accidents are subject to a special duty based on placing others in peril - they are required to render "reasonable assistance" to those injured in a crash, which could include things like taking an injured person to the hospital or calling 911. Donald may have also breached this duty, but if he was so severely injured that he could not call for help - as evidenced by his later brain damage - then he would not be held responsible for breaching it.

Property Damage to Vehicle

Brian can bring separate causes of actions for damage to his person (like his concussion and leg injury) and damage to his vehicle. Georgia allows these causes of action to be brought separately if the plaintiff chooses, and a settlement or judgment in one case cannot be used as evidence in the other case.

Ed's Furniture Group Liability

Brian might also sue Ed's Furniture Group as a defendant in any of the above suits. Brian would have to prove that Ed's Furniture Group should be held responsible for Donald's conduct under a vicarious liability theory of respondeat superior. Respondeat superior applies to employer-employee-type relationships, not independent contractor type relationships. The key question for whether an actor will be classified as an employee rather than an independent contractor is the level of control over the means and methods of work that the hiring party has over the party doing the work. Here, factors that favor a finding of an employer/employee relationship include that Donald was wearing an Ed's T-shirt and that Ed's Furniture Group set the date of delivery. However, Donald used his own tools (in the form of the truck) and set his own time for the delivery. Donald also worked for multiple different companies that he made deliveries for, not just Ed's. Ultimately, it appears that Donald was an independent contract rather than an employee so Ed's Furniture Group likely would not be held responsible for his conduct.

If Donald were classified as an independent contractor, there is generally no liability for the party that hired the independent contractor (Ed's Furniture Group.) If Donald were classified as an employee, Ed's Furniture Group would be liable because the tort was committed within the scope of Donald's employment - he was hired to drive delivery vehicles and got into an accident while driving the vehicle to drop off the goods. This is directly within the line of his duties, so it would not be exempted as a "frolic" where an employee makes an unauthorized and substantial deviation from the scope of their duties.

Alternatively, Brian could possibly have a negligent hiring claim against Ed's Furniture Group if there was reason that Ed's Furniture Group should have known that Donald was not a reasonably safe driver -- for example, if he had a history of speeding tickets or a record of drinking on the job. We have no facts to support that here.

(2) Defenses to Brian's Causes of Action

For any cause of action brought against Ed's Furniture Group based on respondeat superior, all defenses that would be available to Donald are also available to Ed's Furniture Group.

Contributory Negligence

Georgia applies the affirmative defense of partial comparative fault, which means that a plaintiff is barred from recovery if they are 50% or more at fault for their injury. Here, it is possible that Brian was at least 50% at fault for the accident. He was driving drunk as an underaged person and he failed to stop at a stop sign. He was also driving 10 miles per hour under the speed limit, which can be a traffic risk in and of itself (although it was likely not the cause of this accident). Brian's drinking and driving and failing to stop suggests a large degree of fault could be attributed to Brian based on his risky, negligent conduct.

Assumption of Risk

Assumption of risk is also a defense to negligence. That includes implied assumption of risk, including when an individual proceeds with a course of conduct despite a known, specific risk or peril. Donald and Ed's Furniture Group could argue that there was assumption of the risk by driving drunk. Anyone who drinks and drives knows that there is a heightened risk of getting into a serious car accident. Brian drank four margaritas over the course of dinner before driving home, which means there would likely be a large amount of alcohol in his system.

(3) Brandy's Additional Causes of Actions

In addition to Brian's causes of actions, Brandy could sue Brian for negligence. She could argue negligence per se because Brian broke the law with regard to the stop sign and drinking under age, and as the passenger of a car who was injured in a crash she was both the kind of plaintiff that the statute meant to protect and suffered the kind of harm that the statute was designed to avoid. She could also argue an ordinary negligence claim based on his failure to stop. She could sue Brian, Donald, and Ed's Furniture Group as joint tortfeasor defendants.

An additional cause of action for Brandy would be against the Watering Hole. Brandy could sue the Watering Hole under Georgia's dram shop laws. In Georgia, a third party whose injuries are proximately caused by someone's being sold or furnished alcohol can sue the entity that provided that alcohol if the server willfully, knowingly, and unlawfully sold or furnished alcohol to an underage person whom the server knew would be driving soon. Here, the server at the Watering Hole did not ask either Brian or Brandy for their ID to check if they were of the legal drinking age, 21. The bartender asked them for their orders and brought them both four margaritas. The server unlawfully sold them the alcohol and should have known that they would soon be driving home after eating dinner, because that's what most people do when leaving a restaurant. Accordingly, Brandy could sue the bartender and the Watering Hole. The Watering Hole would be vicariously liable because the bartender is in a classic employee/employer relationship with the Watering Hole and serving alcohol was within the scope of their employment duties.

Defenses to Brandy's Additional Causes of Action

A defense to Brandy's cause of action could be assumption of the risk because she voluntarily got into the car with Brian despite knowing that he had consumed four margaritas. She could be found to have assumed the risk of being into a car crash based on the fact that she got into the car with an underage driver who had been drinking and allowed them to drive her home.

(4) Brandy's damages against all potential defendants

Types of Damages

Brandy suffered both personal injury, in the form of her brain injury, and economic injury, because she was not able to return to work. Each of these injuries can give rise to damages because they were caused by the accident.

Punitive damages are available in Georgia whenever a defendant's actions are willful misconduct, malicious, fraudulent, wanton, oppressive, or the general circumstances and evidence showed a total lack of care that the court can presume the defendant was consciously indifferent to the consequences of his actions. Here, none of the Defendants engaged in conduct that fit the criteria for punitive damages.

In Georgia, a tort victim can recover for lost wages. In order to prove the amount of lost wages, evidence must be presented to the jury that shows a reasonable certainty of what the lost wages would amount to. This might be difficult given that Brandy is only 20 and likely at the beginning of her career. Nevertheless, any lost wages or future medical expenses will be discounted at five percent in order to be brought to their present value. However, a factfinder can voluntarily change the percent discounted based on a showing of contrary evidence.

Apportionment

If Brandy files suit and is held not to be responsible for the accident, there will be several liability between all defendants. That means that each defendant will be responsible for the proportionate fault that they contributed. Defendants are not entitled to contribution. Each defendant will be responsible for whatever percent of her total damages that the factfinder attributes to their actions. This could be reduced by Brandy's portion of fault as well, so long as she is less than 50% responsible (in which case her suit would be barred).

If the court determines that the different defendants were joint tortfeasors whose fault is indivisible, then joint and several liability will still apply and Brandy can sue any joint tortfeasor for the entire amount of damages. This is most likely to be true between the Watering Hole and the Bartender, or possible Ed's Furniture Group and Donald (if he is found to be an employee).

Essay 1 — Sample Answer 2

(1) Brian's Causes of Action

Brian v. Bartender

Brian has a cause of action against the bartender for negligence. To establish a prima facie case of negligence, Brian will have to prove (1) duty (2) breach of duty (3) causation (actual and proximate) and (4) damages. Here, the bartender had a duty of a reasonably prudent person under the circumstances to serve and observe his customers age, level of intoxication, and other factors that could lead to their hurt. The bartender likely breached this duty in not asking Brian's age before serving him a bunch of alcohol and certainly by allowing Brian to drive a car afterward. It was reasonably foreseeable that Brian would be hurt from this ordeal. Causation is discussed further below with defenses.

Brian v. Watering Hole Bar & Grill

Brian could have a cause of action against Watering Hole for (a) negligent hiring or supervision or (b) for the bartender's own negligence under the respondeat superior (or imputed negligence) theory of liability. The elements for direct negligence are the same as mentioned above. The Watering Hole would have a duty to adequately hire, training and supervise its employee bartenders to check for IDs and make sure the customers who were intoxicated could get home uninjured after drinking. If Watering Hole breached that duty, they would be directly liable to Brian in negligence.

Under imputed negligence, the negligence of the bartender would be imputed to Watering Hole under respondeat superior because the bartender was acting within the scope of employment when the drinks were served. An employer would be vicariously liable for the tortious acts of its employees if those acts occur within the scope of employment. The bartender was acting in the scope of his employment as a bartender, therefore respondeat superior would apply. Causation/defenses of the employee could be used by Watering Hole, however, and are discussed below.

Brian v. Donald

Brian would have a cause of action in negligence against Donald as well. The elements are the same as above. The duty owed to Brian by Donald here, however, would be the reasonably prudent fellow-driver on the road. The duty was breached when Donald was traveling 20mph over the speed limit and ran the red light. This action actually caused Brian's injuries because it was what led to the car crash, and such result was reasonably foreseeable for proximate cause because when one drives faster than the speed limit and does not stop at red lights, it is foreseeable that other drivers would be injured.

Brian v. Ed's Furniture Group

Again, Brian would have a cause of action against Ed's Furniture Group for the acts of Donald, if Donald was Ed Furniture's employee at the time of the accident. Direct theories of employer negligence (hiring, training, and supervision) would apply and the doctrine of respondeat superior for imputed negligence. At issue here is whether Donald was an independent contractor or an employee during this employment.

In general, a principal will not be vicariously liable for tortious acts of an agent who is an independent contractor, unless (a) the independent contractor is engaged in inherently dangerous activities or (b) the duty is non-delegable. The factors for determining whether a person is an independent contractor or an employee for vicarious liability hinges on the right to control - if the principal has the right to control the agent, then it is likely an employer/employee relationship. If there is no right to control, then it is likely an independent contractor situation and respondeat superior does not apply. The factors include: (1) how the parties characterize their relationship (2) local custom on supervision (3) who owns the tools and facilities to perform the job (4) the length of employment, and (5) the basis of compensation.

Here, factors weigh in favor of Donald being an independent contractor: he was self-characterized as self-employed and his delivery times were up to his own control. Factors against Donald being an independent contractor are his wearing of Ed Furniture's t-shirt, his identifying himself as "Donald with Ed's Furniture" and the fact that Ed's told him to make sure the furniture was delivered that day. It's unknown who owned Donald's truck, how long he'd been working for Ed's, and his method of compensation. As of these facts, I'd say Donald will be considered an independent contractor (given his self-employment status) but other facts could alter this analysis.

(2) Defenses Against Claims

Bartender Defenses

Bartender's best defense is that his negligence did not actually cause Brian's injuries - that there was a supervening, intervening cause in Brian's injuries in Donald's reckless driving that was the true cause of Brian's injury. This argument would reduce Bartender's liability to Brian, but would probably not eliminate it. The jury would be tasked with apportioning the amount of the injury caused by Bartender and by Donald according to Georgia law which did away with joint and several liability.

Bartender could also argue that Brian was comparatively negligent in causing his injuries both in partaking in underage drinking, driving drunk, and reckless driving by not stopping at the stop sign. By drinking and driving under the influence, Bartender may also argue Brian assumed the risk of his own injuries. If a plaintiff is 50% or more at fault for his injuries in Georgia, then his recovery will be barred. Again, the jury will be tasked with apportioning fault and recovery will by made (or not made, if the 50% threshold of fault is met) accordingly.

Watering Hole Defenses

Watering Hole's Defenses mirror bartenders. For respondeat superior, it would assert the defenses outlined for Bartender above. For the direct negligence claims, it could challenge the breach of duty if it had in fact adequately hired and supervised bartender, but we need more facts.

Donald Defenses

Donald can assert a comparative negligence defense as well. Donald would say that it was not only his negligence in reckless driving that caused the injuries, but also Brian's negligence in drinking and driving and not stopping at the stop light. The standard of care that applies to comparative negligence is the same as for ordinary negligence - a reasonably prudent person under the circumstances. It was unreasonable for Brian to drive in this condition, so it seems very likely Donald's defense would reduce

his liability, if not eliminate it completely by hitting the 50% fault requirement. As mentioned, the jury will do this apportioning.

Ed's Furniture Group Defenses

Ed's main defense is that it should not be liable at all because Donald was not its employee, so it cannot be directly liable under negligent hiring/training/supervision nor under respondeat superior. The argument for and against Donald being an independent contractor is developed above and would apply here. Again, it's a close call, but it seems like Donald was not an employee so Ed would not be liable.

(3) Brandy's Claims

Brandy v. Brian

Brandy would have a claim of negligence against Brian for injuring her while driving drunk. The negligence elements would be the same as above.

Brian could assert that Donald was an intervening cause. Because both Brian and Donald were the causes here, but for causation would not be sufficient (because neither Donald or Brian's negligence would be the but for cause) but Brandy could use the merged cause/substantial factor test - where several causes bring about injury and any one would be sufficient to cause the injury, a defendant will be the cause in fact if he was a substantial factor in causing the injury. Both Brian and Donald were substantial factors in causing Brandy's injury here - Brian could have driven sober and/or stopped at the stop sign to prevent the injury and Donald could have driven the speed limit/stopped at the stop sign to prevent the injury.

Brian would also have an assumption of risk defense (Brandy knew that Brian was drunk when she got into the car) but not a spousal immunity because (a) they are not yet married and (b) it is waived in claims by one spouse against another.

Dram Shop Cause of Action against Watering Hole

Brandy could also claim vicarious liability against the Watering Hole under the Georgia Dram Shop Act. Dram shop acts create a cause of action in favor of a third party injured by an intoxicated person. Georgia's dramshop statute imposes a scienter requirement, but case law has established that actual knowledge is not required. If, in exercising reasonable care, someone selling alcohol to a minor should have known that the receipent was a minor and would be driving, then the seller would be deemed to have knowledge.

Here, liability would likely be imposed on Watering Hole because the bartender did not exercise reasonable care in selling alcohol to Brian and Brandy, two minors. The bartender should have known they were minors (by at the least asking them for identification). The bartender and establishment would also know that it is likely they would be driving after drinking. Thus, because Brandy (a third party) was injured by a driver who had been driving at a "dramshop" covered under the act, Brandy has a cause of action against the Watering Hole as well.

(4) Brandy's Damages

Brandy can get both general and special damages from this accident. General damages flow from the tortious act, such as pain and suffering and compensation for the hardship suffered. They will be granted based on the "enlightened conscience of a fair and impartial jury." This would include her pain from her brain injury and other suffering from the accident.

Special damages can also be pled and proved by Brandy (they are not presumed) and recovered - medical treatment and loss of income. Loss of income will be reduced to the present value and inflation taken into account. Georgia statute allows for different recovery between property and personal injury in motor vehicle accidents (which matters little here because it was Brian's car, not Brandy's).

Brandy may also get punitive damages if she can show by clear and convincing evidence that the defendants' actions were willful and wanton misconduct or for an entire want of care. Georgia would typically limit her recovery to a maximum of $250,000, but because there was alcohol involved in the injury, this cap can be lifted under an exception (as it would apply to Brian, certainly, but such lifting of the cap could maybe be used against bartender/Watering Hole).

Again, the damages will be determined and allocated among the different defendants based on the jury's determination of fault. Brandy's own assumption of risk will be taken into account. There is no joint and several liability in Georgia.

Essay 1 — Sample Answer 3

1. The issue what potential causes of actions Brian might assert under Georgia law against any potential defendant.

Negligence Against Donald

Brian might assert a negligence claim against Donald. To be liable for negligence, the defendant must have a duty, must have breached that duty, the breach must have caused the injuries, and the breach must have resulted in damages. A person owes a duty to all foreseeable persons who might be harmed as a result of a failure to follow a standard of reasonable care. Here, Donald had a duty to drive safely on the road because it is foreseeable that a failure to drive as a reasonable person would result in an injury to other drivers and passengers on the road. Donald also breached that duty by driving over the speed limit and by failing to stop at the stop sign. Causation has two components: actual causation and proximate causation. Actual causation is usually characterized as when the defendant's act was the but for cause of the injuries. When there are multiple tortfeasors, then courts use the substantial factor test. If the breach was a substantial factor in the injuries, then this test is satisfied. Here, there may be more than one cause (Brian's own negligence and/or the negligence of the bar), but Donald's negligence was at least a substantial factor in the harm, so this test is satisfied. Proximate causation is satisfied when the injury is foreseeable. Here, it is foreseeable for someone to be harmed by a defendant speeding and running through a stop sign. Finally, there are damages because Brian has suffered property damage and personal injuries. Accordingly, Brian can assert a negligence claim against Donald.

Brian could also base his negligence claim on negligence per se because Donald broke two laws by running through a stop sign and speeding. To constitute negligence per se, the statute must impose a specific duty for the protection of others, the defendant must violate the statute by failing to perform that duty, the plaintiff must be in the class of people intended to be protected by the statute, and the harm must be of the type the statute was intended to protect against. Here, the statutes impose specific duties to stop at stop signs and to follow the speed limit for the safety of other people on the road. Donald violates both statutes. Brian, as a fellow driver, was in the class of people intended to be protected. Finally, the harm is of the type the statute was intended to protect against because avoiding accidents is exactly why these statutes were enacted. Accordingly, Brian can bring his claim under negligence per se.

Negligence Against Ed's Furniture Group

Brian could assert a negligence claim against Ed's Furniture Group by claiming Ed's was vicariously liable for Donald's actions. Vicarious liability arises when someone works as an agent for another. Employees are agents while independent contractors are not. A person is an employee, despite being called an independent contractor, when the employer has the right to control the means and methods by which a person performs a task or achieves a result. Here, Donald was wearing an Ed's t-shirt and identified himself as part of the company. However, he also owned the truck he was driving, made deliveries for several companies, and was free to determine how/when he delivered the furniture to Ed's. Therefore, he was likely an independent contractor. As an independent contractor, his conduct then cannot be the basis for vicarious liability. If he was an employee, then Ed's could be found vicariously liable because the tortious conduct was within the scope of employment. However, he was an independent contractor, so Ed's is not liable.

Brian could also assert a negligence claim against Ed's Furniture Group based on negligent hiring of Donald. However, there are not enough facts to determine whether Ed's was negligent in that manner.

Negligence and Dram Shop Liability Against Watering Hole Hotel Bar and Grill

In Georgia, one who serves alcohol may be liable to a third person for injuries if the server willfully, knowingly, and unlawfully sold or furnished alcohol to an underage person whom the server knew would be driving soon or knowingly sold or furnished alcohol to a person who was noticeably intoxicated knowing that the person would be driving soon. The sale of alcohol must be the proximate cause of the plaintiff's injuries or damage. Here, the first prong of this law does not apply because the bartender did not know Brian was underage. Similarly, the facts do not indicate that Brian was noticeably intoxicated. The bartender might have suspected they would drive home after dinner, but she might not have known because perhaps they could have walked or taken a taxi. Accordingly the bartender likely won't be liable under this law.

Brian could assert a negligence claim against Watering Hotel Bar & Grill for serving him alcohol as an underage minor. The elements of negligence are discussed above. Brian could proceed under a negligence per se theory. There is a law that prohibits selling alcohol to underage persons. To constitute negligence per se, the statute must impose a specific duty for the protection of others, the defendant must violate the statute by failing to perform that duty, the plaintiff must be in the class of people intended to be protected by the statute, and the harm must be of the type the statute was intended to protect against. The law does impose a specific duty for the protection of others. The bartender did breach that duty by offering to sell a drink to Brian. The bartender also breached the duty by failing to ask their age or identification. She also sold them four drinks at one time. The person must be in the class of people intended to be protected. Brian is someone who is meant to be protected by the statute. These laws are enacted to ensure young people's brains fully develop before having alcohol. The harm must be of a kind meant to be protected by the law. The laws are meant to keep young people from drinking and hurting themselves or others. Here, that is exactly the type of harm. Additionally, even proceeding under regular negligence and not negligence per se, the bartender had a duty to ask for their age or identification. She breached that duty by failing to do so. The failure was a substantial factor in causing the harm, so there was actual causation. There was also proximate causation because it is foreseeable that someone who is underage would drive after being served alcohol and cause an accident. Finally, there are damages because Brian was injured. Accordingly Brian could assert a negligence claim against Watering Hole.

2. The issue is what defenses these potential defendants might have.

Donald's Defenses

Donald should argue that Brian was more than 50% at fault for the accident. Georgia law provides for partial comparative fault. A plaintiff cannot recover if he is 50% or more at fault for her injury. Donald should argue that Brian was more than 50% at fault because he also blew through a stop sign and he was driving intoxicated as he had drunk four margaritas. If Donald prevails in this argument, then Brian will be unable to recover at all.

Ed's Defenses

Ed should argue that Donald is an independent contractor, not an employee. As discussed above, this argument will likely prevail, so Ed's will not be liable. Ed's can also argue that it exercised reasonable care in hiring Donald.

Watering Hole's Defenses

Watering Hole should argue that Brian voluntarily assumed the risk. In Georgia, voluntarily proceeding in the face of a known, specific peril will bar recovery if proceeding is unreasonable. Brian proceeded in the face of the known peril of driving drunk. This defense will likely succeed. Watering Hole should also argue that even if it was negligent, Brian was at least 50% negligent, and therefore, Watering Hole should not be liable because of comparative negligence. Brian drove drunk and blew threw a stop sign, so he likely is at least 50% negligent. This defense would also succeed.

3. The issue is whether Brandy has any additional causes of action and whether there are any defenses for those causes of action.

Brandy can assert a negligence claim against Brian. To be liable for negligence, the defendant must have a duty, must have breached that duty, the breach must have caused the injuries, and the breach must have resulted in damages. A person owes a duty to all foreseeable persons who might be harmed as a result of a failure to follow a standard of reasonable care. Here, Brian had a duty to Brandy as his passenger to drive in a reasonable manner. He breached that duty by speeding and driving through a stop sign. His breach also caused damages. As stated above, when there are multiple causes for harm, courts will use the substantial factor test. Here, Brian's harm was a substantial factor in causing the injury because if he had not been driving through the intersection without stopping, the accident likely would not have occurred. Her harm was also proximately caused by Brian because the harm was a foreseeable result of driving intoxicated without following the rules of the road. Brandy also suffered damages because she has a traumatic brain injury and will be unable to return to work as a result of her injuries. Accordingly, Brandy can assert a negligence claim against Brian.

She could also rely on the same negligence per se analysis above because Brian ran through a stop sign. He was also driving drunk which would also constitute negligence per se. To constitute negligence per se, the statute must impose a specific duty for the protection of others, the defendant must violate the statute by failing to perform that duty, the plaintiff must be in the class of people intended to be protected by the statute, and the harm must be of the type the statute was intended to protect against. Here, the statutes impose specific duties to stop at stop signs and to not drive while intoxicated, especially as an underage person. Brian violated both statutes. Brandy, as a passenger, was in the class of people intended to be protected. Finally, the harm is of the type the statute was intended to protect against because avoiding accidents is exactly why these statutes were enacted. Accordingly, Brandy can bring her claim under negligence per se.

Brian could argue that Brandy assumed the risk by getting into the car with him while knowing that he was intoxicated. Voluntarily proceeding in the face of a known, specific risk or peril will bar recovery if proceeding is unreasonable, unless there was willful or wanton conduct on the defendant's part. Here, Brandy voluntarily got in the car in the face of the known risk that Brian was drunk driving. Getting into the car was unreasonable. Accordingly, this defense might successfully bar recovery by Brandy.

4. The issue is what damages might be available against all potential defendants for Brandy.

In Georgia, when the plaintiff is not responsible for the injury and there is more than one defendant, the liability of the individual defendants is apportioned based on their proportionate fault. Liability is several, and defendants are not entitled to contribution. Brandy can seek general damages, including pain and suffering from her physical injury. These damages are presumed to flow from her physical injury. Mental pain and suffering is also available if a physical injury has caused the mental pain and suffering. Brandy has suffered a physical injury, so she can seek these damages as well. Brandy could also seek special damages. These damages need to be specifically pled and proved. Special damages include medical costs and lost wages. She will need to specifically prove her medical costs and the loss of her income. She could seek punitive damages as well, but punitive damages are only available when clear and convincing evidence shows that the defendant's conduct was malicious, fraudulent, willful/wanton, or raises a presumption of conscious indifference to the consequences of their actions. None of the defendants have likely acted in a manner that would justify an award of punitive damages.

Brandy could try to seek damages for loss of consortium. When a plaintiff's spouse is injured, the plaintiff may recover loss of consortium damages. However, Brian is her fiance, not her spouse, so she likely could not recover for a loss of consortium.

Essay 2 — Sample Answer 1

1. The issue is whether EFR's freedom of speech is protected under the First Amendment of the Constitution and whether the First Amendment's freedom of assembly can be used to protect the funeral process from EFR's protest.

The First Amendment of the Constitution prohibits Congress from establishing a religion or interfering with the free exercise of religion, abridging the freedoms of speech and press, or interfering with the right of assembly. These prohibitions are applicable to the states through the Fourteenth Amendment. However, these rights are not absolute, such as unprotected speech that involves fighting words, obscenity, defamation, fraudulent misrepresentation, and advocacy of imminent lawless behavior are not considered to be protected by the First Amendment.

Here, the extremist religious group EFR was loud, animated, and aggressive while screaming things such as "God Hates American Troops". Additionally, EFR damaged the church grounds as some of the members entered onto it during the funeral service. This activity by EFR likely constitutes fighting words as both of Hondo's parents served the country and the funeral was for a fallen marine. Several dozens of EFR members is a high amount of protestors screaming hateful speech. The funeral process has a right to assemble under the First Amendment without disruption. Therefore, EFR's speech is not protected under the First Amendment of the Constitution because it is likely considered unprotected speech.

2. The arguments for and against the Georgia Disruptive Conduct at Funerals or Memorial Services statute concerns the First Amendment Freedom of Speech Clause of the Constitution.

The best argument against upholding the Georgia statute is that the freedom of speech clause of the First Amendment restricts the government regulation of private speech. Further, speech and assembly regulations can generally be categorized as either content regulations or conduct regulations. The government has the power to regulate conduct associated with speech and assembly depending on what type of forum is involved. At issue, the forum of speech regulation is conduct at funerals or memorial services which are traditionally public forums. Designated public forum regulations must be content-neutral. Additionally, the statute cannot be overbroad, vague, or give unfettered discretion. The Georgia statute is constitutionally valid on its face because as it is content neutral. Content neutral regulations are subject to an intermediate level of scrutiny review. The statute will be valid if the government can show there is a significant governmental interest for enacting the statute and must leave open an alternative channel for communicating the information. Here, the statute lists out exactly what types of speech is prohibited so it is not unconstitutionally broad or vague. The purpose of the statute. It leaves open an alternative channel of communication by stating one hour prior to, during, or after the posted time of the funeral service, a person may communicate their message. It applies to all speech at funeral or memorial services in the state and leaves an open channel of communication at another time, place, and manner. Therefore, the Georgia Disruptive Conduct at Funerals or Memorial Services statute is likely constitutional as it relates to the First Amendment of the Constitution.

3. If members of the EFR were charged with a crime related to the damage sustained to the marker in the church graveyard it is not likely that the enhanced sentence will stand under the Georgia "Hate Crimes" statute.

Under the Georgia statute, a criminal defendant may have his sentenced enhanced if he intentionally selected any victim of group of victims or any property as the object of his offense because of the victims race, color, religion, national origin, sex, sexual orientation, gender, mental disability, or physical disability. Here, the EFR members are protesting based on occupation. They are an anti-military group and the signs they held stated "God Hates American Troops". They shouted that deaths of soldiers were God's retribution against the United States for its liberal social policies. Therefore, the members of the EFR are not likely to receive an enhanced sentence under the Georgia "Hate Crimes" statute because military occupants are not a protected class in the statute.

Essay 2 — Sample Answer 2

(1) The EFR members could use the freedom of association and belief to support their right to protest as they did. To protect the funeral process from such protest, the Church could cite to the unprotected speech categories of inciting imminent lawless action and "fighting words."

The freedom of association (FOA) is not explicitly written in the Constitution, but it is clearly implied from the rights therein. Pursuant to this freedom, the government may neither prohibit politically unpopular groups nor unduly burden a person's right to belong to such groups. Further, the EFR members could assert their right to freedom of speech generally, by arguing that they were standing across the street from the church, and a sidewalk is a traditional public forum wherein individuals enjoy a freedom to engage in speech and speech-related activities at its maximum.

The Church could argue that their speech was unprotected both because it incited imminent lawless action and because it could be defined as fighting words. Speech can be burdened if it creates a clear and present danger of imminent lawless action, but it must be shown that imminent illegal conduct is likely and that the speaker intended to cause it. Here, the Church could show that because the group was loud and aggressive, and because they in fact engaged in damage to the Church (illegal trespass, presumably), their conduct was not only imminently illegal, it had already crossed the threshold into illegality. Further, the Church could argue that the language used by EFR constituted true threats. The Supreme Court has held that conduct such as cross-burning carried out with an intent to intimidate is not protected by the First Amendment, or if the language is otherwise personally abusive that is likely to incite immediate physical retaliation in an average person. Words that are merely annoying are not sufficient. Here, EFR shouted horrible profanities to the mourners of deceased veterans with what appeared to be an intend to intimidate them. In fact, the funeral was shut down because of their action, showing the intimidation was achieved. This is likely enough to constitute unprotected fighting words.

The church could also seek out an injunction against EFR in the event of future protests during funerals. The injunction would be content-based because it would be related to the anti-soldier language put forth by EFR, so in order to pass scrutiny, it must be necessary to achieve a compelling interest. The church could argue that such an injunction is necessary because of EFR's prior violent conduct, and that the interest is compelling because it is in honoring American veterans' contributions to our country's defense.

(2) This Georgia statute should be defined as a content-based regulation. The First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. It is presumptively unconstitutional to place burdens on speech because of its content except for certain categories of speech; content-based speech regulations are subject to strict scrutiny, meaning the government must show that the regulation is necessary to serve a compelling state interest and is narrowly tailored to that end.

In favor of a claim that the statute is constitutional, an argument can be made that the regulation is necessary because of the history of violent protestors at funeral services, that Georgia's interest is compelling because mourners are particularly sensitive and in need of a heightened level of protection, and that the statute is narrowly tailored because it describes with certainty the content that is prohibited

and the times and places within which the statute applies, which are clearly listed and do not go beyond what is necessary to achieve the interest promoted by the statute.

Against its constitutionality, one could argue that the statute is overbroad and thus invalid. If a regulation of speech punishes a substantial amount of protected speech in relation to its plainly legitimate sweep, the regulation is facially invalid. Here, the argument could be made that the language of "any visual images that convey fighting words"; "loud language"; "language that would interfere with a service,"; etc., include a large amount of protected speech that effectively outlaws all speech surrounding any funeral service. Further, one could argue that it is void for vagueness, meaning it fails to give reasonable notice of what is prohibited, and thus violates the due process clause. The argument of vagueness would be based on the statutory language such as "a public assembly", "directed to any person or property associated with the funeral," and "threatening language," as these do not sufficiently describe the type of speech-related conduct that is prohibited.

(3) If this statute applied to members of EFR charged with crimes for the damages in the graveyard, the prosecution would have to prove beyond a reasonable doubt that each member had the specific intent to target the gravesite based on any of the included protected classes. Because the group was protesting against veterans, not specific racial/religious/sexual/etc., groups, it is unlikely that the prosecution would be able to fulfill this burden of proof.

Essay 2 — Sample Answer 3

EFR Members Constitutional Arguments

First Amendment Free Speech

The EFR could first argue that their protest was constitutionally protected because they were exercising their free speech rights guaranteed under the 1st Amendment and applicable to the state through the 14th Amendment incorporation clause. They can argue that they were in a public space, the other side of the street from the church and they have greater freedoms in public areas such as that to express their speech. They can argue that under the constitution, they have a right to express their opinions about the military. Because this is a public forum, the sidewalk, the government can still place reasonable time, place, and manner restrictions on speech as long as it is content-neutral as to subject matter and viewpoint, narrowly tailored to serve a significant government interest, and leaves open alternative channels for communication. If the regulation is not content neutral then it is subject to strict scrutiny. Regulation of their protest will be discussed more in the discussion about the statute.

First Amendment Exercise of Religion

The EFR can also argue that restricting them from protesting is a violation of their first amendment right to free exercise of religion under the constitution and incorporated under the 14th amendment to apply to states. In this case, the EFR can argue that they are an extremist religious group exercising their religion by protesting and that to force them to stop would be impeding their ability to exercise their religion. The state is not allowed to judge their belief system but they can judge whether they are honestly believed. In this case, the church can argue that their right to exercise their religion and freedom of assembly were violated because they were not on private property and were exercising in accordance to their sincerely held beliefs.

Church's Arguments

The church can argue that when protesters stepped on their land and damaged some tombstones, that they crossed from being in a public forum to private property, where they would have less rights according to the constitution because it is private property. They can also argue that under the Freedom of Speech portion, that the words used here are fighting words, which are not protected by the First Amendment. They would have to be by their very nature likely to incite an immediate breach of the peace. They stated that God Hates American Troops in front of a church holding a funeral for a young soldier killed in combat. There is a strong argument that these will qualify as fighting words. There has to be a genuine likelihood that the words will incite imminent violence. There are many veterans and current military probably in attendance, including Jones' parents, so the likelihood of it inciting imminent violence is high.

Constitutionality of OCGA 16-11-34.2

The Disruptive Conduct at Funerals or Memorial Services statute will likely be upheld as constitutional, if challenged. As stated above, the statute is being enforced in this case by a state actor against protesters in a public forum. In order to be upheld, it has be to content-neutral, narrowly tailored to serve a significant government interest, and allow alternative channels for communication. In this case,

the statute is content neutral because the only specific words being prohibited are fighting words, which are not protected by the first amendment. The other prohibited actions are content neutral. Blocking access to the ceremonial site and conducting a public assembly are content neutral because the type of words said do not matter, anyone doing these actions will be in violation. It also does not matter what type of memorial service it is or where it is being held.

Then it also has to be narrowly tailored to a significant government interest. The state has an interest in protecting its citizens from interference when a loved one has died and they are trying to mourn. The statute is narrowly tailored because it sets specific limits to the area around the service that is to be protected and it is not an extreme amount of area. 500 feet is a reasonable amount of space. It also sets time limits to the hour before, during, and after the service, so people can still assembly or protest outside of that time and area. The area gives just enough space so that mourners cannot hear disturbing or disruptive words about their loved one while they are mourning.

This leads to the third factor which states that there needs to be alternative channels left open. Here, people who want to use fighting words or park near a service on the street or have a public assembly can still do so, just within the time and area constraints. This still leaves people public areas to do these activities during the time restriction outside of the zone and inside the areas outside of the time restriction.

It could be argued that this is too vague. It could be construed as vague because there is not an explanation of what could be construed as fighting words in images. It could be that they are relying on the definition determined by the country that they are words that would lead to imminent violence. Part 2 of the statute could be seen as overbroad because it prohibits uttering of loud, threatening, or abusive language that would tend to interfere with a funeral or memorial service. This does not just include fighting words, which are not constitutionally protected.. This is a content neutral provision but this leaves a lot of actions and words to be interpreted by the person enforcing the law. Loud is very subjective and so is abusive. People at funerals sometimes tell stories that are not very nice toward the dead, does this count as abusive? The argument that this is vague or overbroad is weak but could be argued.

Hate Crime Implications

Under the Hate Crimes statute, EFR would be arguing that, if they were arrested and charged with a crime, that they were intentionally selected due to their religion. They were protesting because of their religious beliefs and so can argue that if they are charged, they are being targeted because their religious beliefs involve anti-military sentiments and not because of the minor damage to the property. This will probably not apply because they were arrested for an actual crime of property damage and this is neutral to their beliefs and their protesting. Under the test above for statutes, the damage to property statute most likely passes the test for being content neutral and narrowly tailored. Unless they can show that this is not enforced for other groups of people, they probably do not have a claim.

Essay 3 — Sample Answer 1

1. Defenses to the breach of contract claim

John can first argue that there is no enforceable contract. For an agreement to be legally enforceable, there must be mutual assent between the parties involved and consideration. That is to say that there must be an offer, an acceptance, and a bargained-for-exchange. At issue here is whether Sally gave John any consideration for the statute.

At first glance, it appears that John merely made a gratuitous promise to give the statute to Sally based on sentimental feelings. Such a gratuitious promise is ordinarily unenforceable in court. However, Sally might argue that because the agreement was made to "resolve[] any controversy" as to the ownership of the statue, her consideration in this deal was to settle her legal claims against John regarding the statute. Such a good faith settlement of controversies is adequate consideration. Thus both parties have colorable arguments as to whether consideration existed for this contract, and thus whether a contract existed at all.

John might also argue that even if a contract existed, he only entered into the agreement because of Sally's fraudulent misrepresentation as to the statue's history. If a party induces another to enter into a contract by using a fraudulent misrepresentation, the contract is voidable if the victim justifiably relied on the misrepresentation. Here, if Sally knew of the true history of the statute and merely invented the sob story to convince John to give her the statute, John might be able to void the contract if he can show that his reliance on Sally's lie was justifiable. The reliance arguably was justifiable because the estate (and statue) ran in Sally's family, and one could reasonably expect Sally to know the estate and statue's history.

However, even if Sally did not knowingly misrepresent the statute's history, if the misrepresentation is deemed material to the agreement, the contract is voidable by John if John reasonably relied on the misrepresentation. A misrepresentation is material if (1) it would induce the counterparty to agree, or (2) the misrepresenter knos that for some special reason it is likely to induce the counterparty to agree, even if a reasonable person would not. Here, John likely has a good argument that even if Sally did not purposefully lie as to the statue's history, the inadvertent lie was at the very heart of the agreement--it is why John agreed to return the statute--and thus is material to the contract. Thus, John ought to be able to void the contract.

In the same vein, John might be able to claim that there existed a mutual mistake of fact. Contracts are voidable by either party if (1) the mistake concerns a basic assumption on which the contract is made, (2) the mistake has a material effect on the deal, and (3) the party did not assume the risk of the mistake. Here, the alleged familial history of the statute appears to be the most basic assumption on which the contract was made. Further, the mistake had a material mistake on the deal and John did not assume the risk of that mistake. Thus John also has a colorable claim that there was no contract because there was no mutual assent as to the deal's terms because the parties were both mistaken about what was being transferred.

Even if the court finds that there was a contract and John breached it, John might argue against the grant of specific performance because the statute is not unique. Specific performance in deals for

personal property are only granted if the property is of truly unique character. Here, a replica could be provided.

2. Fixture Arguments

The statue is almost certainly a fixture. A fixture is some piece of chattel property that has been so affixed to land that it has transformed from personal property to a part of the real estate. In Georgia, even if a piece of chattel property is not actually attached to the land, if it is intended to remain permanently in its place then it is deemed a fixture that passes with the real property. Here, it is very clear that the statute has played an integral role in the history of the estate and has become tied to it. That the estate was marketed with the statue as a centerpiece is evidence of this. Thus, when John purchased the property and the purchase agreement by its terms did not carve out the statue from the transaction, the statue passed to John as a fixture of the land.

3. Testimony

The Court should not allow John to testify regarding why he thought the statue was intended to be conveyed as part of the Southacre sale. This presents a parol evidence problem. When parties to a contract agree via a writing, with the intent that the writing serve as the final expression of their agreement, any other statements made regarding the agreement made prior to the agreement cannot be admitted to interpret the contract. Here, assuming that the lengthy land purchase contract contained a boilerplate integration clause as most contracts do, parol evidence cannot be introduced to contradict the plain meaning of the written agreement. Here, the written agreement by its terms provide that all of the fixtures run with the land except for the ones listed. The statue was not listed. Thus, no evidence of a contemporaneous understanding that the statue--a fixture--was not to be included, can be admitted.

The Court should also not allow Alice to testify as to her intent for the reasons stated above. However, the court might rule that Alice's testimony actually serves to determine if there was a valid contract, as opposed to what was agreed to in the contract itself. If the court makes such a ruling, Alice could attempt to prove unilateral mistake as to what property she was conveying to John. However, this defense would likely fail because in order to succeed in the defense John must have known or reasonably should have known of the mistake, neither of which are the case here.

4.

If the statue is deemed personal property, no additional evidence is needed to prove the gift of the statute from Alice to Sally. However, if the statue is deemed a fixture, Alice would have given an interest in land to Sally. While this would be a valid transfer as between the two parties:

(a) it would be unenforceable as it violates the writing requirement of the statute of frauds, and

(b) Sally would have had to have recorded her interest in the land in order to maintain title against subsequent bona fide purchasers for value of the statute without notice of her interest in the statue.

Here, even if Alice conveyed the fixture statue to Sally, she reconveyed it to John in the transfer of Southacre. John was a bona fide purchaser because he paid value and had no notice of Sally's interest at the time of the transfer. Because there is no evidence that Sally recorded her interest, and John presumably did record his interest in Southacre, John would win in Georgia due to its race-notice statute.

Essay 3 — Sample Answer 2

1. John may have a defense of mutual mistake as to existing facts. If both parties entering into a contract are mistaken about existing facts, the contract may be voidable by the adversely affected party if the mistake concerns a basic assumption on which the contract is made, the mistake has a material effect on the agreed-upon exchange, and the party seeking avoidance did not assume the risk. Here, the mistake (that the statute of Athena was based on Sally's grandmother Emily) concerns a basic assumption, as it encapsulates the reason Sally wants the statue. The true facts, that the statue predates Emily and dates back to the 1890s, enrich the history of the statue as it relates to the house and creates a firmer association between the house and statue. It also has a material effect on the agreed-upon exchange as it goes to the heart of the deal as expressed in John's written letter, and John did not assume the risk of this contract. However, if Sally really did know that the statue wasn't based on Emily, and knew or had reason to know that John believed the statue was based on Emily, the contract is voidable by John.

John could also argue that his promise to let Sally take the statue was illusory and that no consideration existed, as moral consideration is no consideration. Two elements are necessary to constitute consideration: there must be a bargained for exchange between the parties and that which is bargained for must be considered of legal value, constituting a benefit to the promisor or a detriment to the promisee. Here, John has promised to convey the statue to Sally within a year, but Sally has made no promises to him. If Sally had promised to pay money for the statue, or promised to find a comparable statue to replace the Athena statue, there would be consideration on both sides, but on these facts John's promise to convey the statue to Sally is illusory.

John could not assert the statute of frauds as a defense. The contract he made with Sally could not be accomplished within a year, as it could only be performed a year after his purchase of Southcare, and so it falls within the statute of frauds. However, John signed a writing setting forth the agreement, and so he cannot assert the statute of frauds as a defense.

2. John could argue that the statue is in fact a fixture. A fixture is a chattel that has been so affixed to land that it has ceased being personal property and has become part of the realty. Under Georgia law, even if a chattel is not actually attached to the land, anything that is intended to remain permanently in its place is a fixture, which constitutes part of the realty and passes with it. The annexor's intent controls, and the Southacre owners who placed the statue in the 1890s clearly intended for it to remain on the land for it to have stayed for over a century. The statue being such an iconic part of the property that every US President for the last 90 years has taken a picture with it contributes to a finding that the statue is inextricably tied to the property and was intended to remain there. Even though the statue is not cemented to its concrete pad, John reasonably believed that the statue was intended to remain permanently in place, given the size of the statue, mention of the statue in the marketing materials he received for the property, and long history with Southacre. Further, the schedule provided to John of fixtures and improvements that would be taken from the land did not include the Athena statue.

3. No, the court should not permit either party to testify if the real estate contract and deed was a complete integration (ie, the parties expressed their agreement in a writing with the intent that it embody the final expression of their bargain). The parol evidence rule will bar written or oral evidence made prior to the writing introduced to vary the terms of the writing. The parties likely intended the real estate contract and deed to be the final expression of the agreement. However, a party may introduce

parol evidence as proof of a mistake in reducing an agreement to writing or to prove mistake, so Alice may be able to testify about her intended gift to Sally if she made a mistake in not including the Athena statue in the schedule of fixtures and improvements that were meant to leave with the Smiths.

4. In order for Sally to have acquired the statue by gift, there must have been intent, acceptance, and delivery. Intent was present if Alice confirms the phone call as Sally represented it. Acceptance is presumed if the conveyance is beneficial to the grantee, as it is to Sally here. Delivery could be accomplished by something other than the statue meant to symbolize the gift, such as a deed or small replica. If the statue is considered to be real property, delivery could be accomplished by a notarized acknowledgement by the grantor and recordation, or anything else showing Alice's intent to deliver. If Alice had executed a deed to the statue but hadn't delivered it before she sold the property to John, no title passes.

If the statue is real property and Sally failed to record her interest, John may be able to argue that he is a bona fide purchaser without notice and thus his interest in the statue supersedes Sally's.

Essay 3 — Sample Answer 3

1. John may offer a defense under mutual mistake. Mutual mistake may be asserted as a defense to breach where both parties are mistaken about existing facts. The contract may be voidable by the party if 1) the mistake concerns a basic assumption, 2) the mistake has a material effect, and 3) the affected party did not assume the risk. Here, the agreement was based on John and Sally's understanding that the statute was modeled off her late grandmother, Emily, and given to Emily as a wedding gift. However, John recently discovered a painting of the house, years before Emily was married, and the statute was present in the garden. John was willing to part with the statue when he thought it held sentimental value to Sally, but the statue is also famous and valuable, given that every President since FDR has taken their photo beside it. The fact that the statue may not actually be modeled off of Emily has a material effect on the contract, and John did not assume the risk of priceless, historical statue without Sally's requisite sentimental value.

The contract is not subject to the statute of frauds because there is a signed writing setting out the essential terms - when and what to deliver.

John may also argue that there is not a contract. To be a valid contract, there must be offer, acceptance, and consideration. Offer and acceptance are here, but John could argue there is no consideration, because John is not getting anything in exchange for the statue. This argument will likely fail because John wrote the agreement was to "resolve all controversy" in regard to the conveyance. Giving up a claim is consideration

2. There are two issues. First, whether the statue is a fixture or improvement in Southacre, and second, whether Alice telling Sally "it’s yours" was a valid gift or transfer of personal property.

Under Georgia law, a fixture is a chattel that is intended to remain permanently in its place, and thereby constitutes part of the realty and passes with it. Here, the statue has been the centerpiece in the garden since approximately the 1930s. The characteristics of a statue in general and its position as a centerpiece suggest that this statue was intended to remain permanently in its place, and thereby it is now party of the realty and passes with it. Therefore, the statue of Athena is a fixture. An improvement is an addition that brings value to the real property. Here, the statue simply a wedding gift and was not intended to boost the value of Southacre, therefore, the statue is not an improvement.

The second issue, is whether the statue was personal property. In divided ownership cases, the chattel is owned and brought to the realty by someone other than the landowner. Accession describes the annexor's intent to make chattels a permanent part of the real estate. Here, this likely does not apply Alice is the landowner but the statue was already a fixture and passed with the realty into her possession. Because the statue is not personal property and has become part of the realty, it is not personal property, but rather it was realty that was conveyed to John.

3. At issue is whether additional evidence may be considered outside of the land contract. The parol evidence rule apples when parties to a contract express their agreement in a writing with the intent that it embody the final expression, thereby making the writing an integration. And other expression a made prior to and any contemporaneous oral statement made with the writing is inadmissible to vary the terms. Exceptions to the rule include:1)correcting a clerical error, 2) establishing a defense against

formation; 3) to interpret a vague or ambiguous term; 4) to add a partially integrated writing, or 5) to show a condition precedent to the existence of the contract. Here, the documents provided during the sale of Southacre stated that "all of the real estate, fixtures, and improvements to the property commonly known as Southacre" were part of the conveyance to John. There was also a separate list of certain items on a schedule that were not meant to be included as part of that conveyance. There is no evidence that this sales contract and deed was not intended to be he parties fully integrated writing, and no exception applies, therefore neither John nor Alice may provide testimony regarded their intent with the statue.

4. Under Georgia law, a gift is valid if both parties agree that there is a gift, and that there would have been delivery except for hardship. Under these facts, both Alice and Sally agree that Alice gave the statue to Sally as a gift and Sally was unable to get a mover right away, so she left the statue in her mother's possession for a reasonable time. Also, this phone occurred prior to the conveyance. If the factfinder determines that the statue is personal property, then this is a valid gift that Sally acquired before Alice conveyed Southacre to John.

If the factfinder determines the statue is a fixture, then this is not a valid gift to Sally. Under Georgia law, a valid gift of realty requires a deed and delivery. Here, there is no deed or a writing, and there was not delivery. Therefore, if the statue is a fixture, this is not a valid gift before the conveyance.

Essay 4 — Sample Answer 1

Memorandum

To: Mr. Brown

From: Examinee

Date: July 27, 2021

RE: Motion to disqualify

The following memorandum identifies and evaluates the conflicts of interest that might serve as a basis for the motion to disqualify.

1) The Representation of the Corporation

The issue here is whether the client is the corporation or its officers and agents. Under the Georgia Rules of Professional Conduct, when a lawyer represents an organization the client is the organization. When approached by an officer or agent regarding a personal legal matter, such as an employment agreement, the lawyer must warn and notify the officer that the lawyer represents the organization, not the officer.

Here, Ms. Lawyer was clearly in the employ of Development Company as outside general counsel. As a result, Development Co. was Ms. Lawyer's client, not any of Development Co.'s officers. Despite this, Ms. lawyer and CEO discussed CEO's interpretations of the employment agreement and Ms. Lawyer even stated she agreed with said interpretations. While Ms. Lawyer may say she was merely passive, Ms. Lawyer was obligated to inform and warn CEO that she was not his attorney and that she was, instead, the corporation's counsel. Therefore, Ms. lawyer breached her special duty Development Co. when she provided legal advice to CEO.

With the above said, an organization can consent to dual representation but it must be given by an appropriate officer or the shareholders of the organization, other than the individual being represented. Here, however, she only received consent from the CEO himself which does not meet the exception.

2) The Representation of a Current Client Adverse to a Former Client

The issue is whether Ms. Lawyer's current representation and former representation are substantially related. Under the Georgia Rules of Professional Conduct, a lawyer cannot represent a current client against a former client if the current representation and the former representation are "substantially related" unless the client consents after consultation. Matters are "substantially related" when the lawyer had full on involvement, and the decision in the first case will affect the outcome of the second case, or the lawyer learned confidential information from the former client that is relevant to the current case and can be used against the former client.

Here, here Ms. Lawyer did not necessarily have full on involvement in the contract negotiations as she merely agreed with CEO about particular terms. On the other hand, Ms. Lawyer became privy to CEO's personal interpretations of the employment agreement, and its provisions thereunder, which could

definitely be used against him in a dispute involving the same employment agreement. Therefore, these matters are substantially related and Ms. Lawyer has a conflict.

3) Imputed Disqualification

The issue here is whether Ms. lawyer's conflict will be imputed to the rest of the firm so as to disqualify Big Law from representation. Under the Georgia Rules of Professional Conduct, when one member of a law firm has a disqualifying conflict, that disqualification is generally imputed to all members of the law firm. Moreover, if a lawyer entering a firm has personal with respect to the conflict, then the conflict is imputed to all members of the firm.

Here, Ms. Lawyer not only has personal knowledge of the conflict, but she is the source of the conflict of interest. As a result, her conflict will be imputed to the rest of the firm, therefore disqualifying Big Law from representing Development Co. Under the ABA Model Rules, law firms are generally able to screen off conflicted lawyers in a firm with certain procedures and judicial oversight. In Georgia, however, this screening is only available for conflicts arising from prior government employment. That is not applicable here. Therefore, the entire firm will be disqualified as long as Ms. lawyer is employed at Big law.

Essay 4 — Sample Answer 2

To: Mr. Brown

From: Examinee

Date: July 27, 2021

Re: CEO v. Development Company

1. Representation of a corporation

Lawyers owe clients a basic duty of loyalty and independent professional judgment. Such duties may be compromised when there is a conflict of interest. A conflict may arise between the lawyer and the client, between current, prospective, and former clients, and between current clients and third parties.

A lawyer who is hired to represent a corporation generally owes her professional duties of loyalty and confidentiality to the corporation and not to the corporation's officers and directors. However, a lawyer may represent both the corporation and its director if no conflict exists. If an attorney is representing an organization and has dealings with one of its constituents, the lawyer must tell the individual whenever she knows or should know that the organization's interest and the individual's interests may be adverse.

Here, Ms. Lawyer gave CEO legal advice on his employment contract with NewInvestors during Ms. Lawyer's representation of Development Company. That conduct was likely in violation of the Georgia Professional Rules of Conduct, because Ms. Lawyer knows and should know that Development Company's interests in recapitalization and CEO's interests with NewInvestors may not align. Ms. Lawyer should have advised CEO regarding the potential conflict of interests at the time CEO asked for her advice on the employment contract.

2. Representation of a current client adverse to a former client

An attorney-client relationship is formed when the client reasonably believes the relationship to exist. The lawyer must reject representation if it violate the Georgia Rules of Professional Conduct. Even if there is no formal attorney-client relationship, a lawyer still owes the prospective client a duty of confidentiality. Attorney-client privilege applies to communication for the purposes of seeking legal advice, such as the communication between Ms. Lawyer and CEO regarding the terms of CEO's employment contract with NewInvestors. Ms. Lawyer owes CEO a duty of confidentiality regarding the communication about CEO's employment contract with NewInvestors, and attorney-client privilege applies to that communication.

A lawyer who previously represented a client in a matter cannot represent another person in the same or substantially related matter when that person's interests are materially adverse to the interests of the former client if the lawyer acquired material confidential information about that former client, unless the former client gives informed written consent. The former and current representations are considered the same matter when it is the identical subject, i.e., same transaction, same lawsuit, or the same document. A lawyer must not undertake representation directly adverse to a client without the client's consent. Even if the interests are not directly adverse, a lawyer may not represent a client if there

is significant risk that the representation will be materially limited by the lawyer's responsibilities to a current or former client, unless both affected clients five informed consent in writing.

A client can waive the imputed disqualification if the client gives informed written consent after 1) consultation with the lawyer, 2) receiving adequate written information about material risks, and alternatives to the representation, and 3) having been given an opportunity to consult with independent counsel.

Here, CEO will argue that Ms. Lawyer provided him with legal representation in negotiating his employment contract, which is a matter of the current litigation against Development Company and NewInvestors as co-defendants. Ms. Lawyer's current firm is representing Development Company, the party directly adverse to CEO in this substantially related matter. Even if there is no formal attorney-client relationship, a lawyer still owes the prospective client a duty of confidentiality. Ms. Lawyer therefore cannot disclose information she learned in consultation with CEO regarding his employment contract with NewInvestors. Because CEO moved to disqualify Big Law, it is unlikely that CEO will give written consent to waive the imputed disqualification.

3. Imputed disqualification of Big Law

Generally, if a lawyer at a firm is conflicted out with regards to a client, the conflict is imputed to the other attorneys of the entire firm. A lawyer whose former firm (and in this case, Ms. Lawyer herself as the sole practitioner) previously represented a client in a matter cannot represent another person in the same or substantially related matter when that person's interests are materially adverse to the interests of the former client if the lawyer acquired material confidential information about that former client, unless the former client gives informed written consent. A client can waive the imputed disqualification if the client gives informed written consent after 1) consultation with the lawyer, 2) receiving adequate written information about material risks, and alternatives to the representation, and 3) having been given an opportunity to consult with independent counsel.

Here, Ms. Lawyer previously provided CEO with legal advice in negotiating his employment with NewInvestors, which is a matter of the current litigation. Development Company is the party directly adverse to CEO in this matter regarding the termination of CEO's employment at Development Company. NewInvestors is the co-defendant in this litigation. Even if there is no formal attorney-client relationship, a lawyer still owes the prospective client a duty of confidentiality. Ms. Lawyer therefore cannot disclose information she learned in consultation with CEO regarding his employment contract with NewInvestors. There is likely a conflict of interests, and the conflict will be imputed to Big Law. Because CEO moved to disqualify Big Law, it is unlikely that CEO will give written consent to waive the imputed disqualification.

Essay 4 — Sample Answer 3

A lawyer must not represent a client if there is a significant risk that the representation of that client will be materially and adversely affected by the lawyer's responsibilities to another client, or to a third party, or by the lawyer's own interests unless the lawyer reasonably believes the representation will not be adversely affected, the representation is not prohibited by law or the RPC, the representation does not involve the assertion of a claim by one client against another client who is represented by the lawyer in the same or substantially related proceeding, and each affected client gives informed consent, confirmed in writing.

1. Representation of a corporation as the client

A lawyer employed or retained to represent an organization represents the organization through its duly authorized constituents. Here, Ms. Lawyer represented Development Company and not CEO. Although she worked with him directly in the recapitalization plan for Development Company, she did not represent him directly in the negotiation of CEO's employment contract. CEO directly negotiated the contract with the principals of NewInvestors and simply provided those terms to Ms. Lawyer for inclusion in his employment contract. Thus, Ms. lawyer only represented Development Company and not CEO.

Also, in dealing with an organization's directors or officers, a lawyer must explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing. Here, the facts don't necessarily show that CEO's interests were adverse to Development Company's. Nevertheless, it would be best practice for Ms. Lawyer to inform CEO that he was in no way her client and that she did not represent his interests.

2. Representation of a current client adverse to a former client

A lawyer who formerly represented a client in a matter may not thereafter represent another person in the same or substantially related matter if that person's interests are materially adverse to those of the former client, unless the former client gives informed consent, confirmed in writing. Also, a lawyer who has formerly represented a client in a matter may not thereafter use information relating to the representation to the disadvantage of the former client except as permitted or required by the RPC or when the information has become generally known, or reveal information relating to the representation except as permitted or required by the RPC. Here, Development Plan was the former client of Ms. Lawyer who now works for Big Law. Based on the facts, it seems as though there is not a conflict because Development Plan was the former client and not CEO. In that case, Mr. Brown would be representing the same client as Ms. Lawyer and there would not be a conflict.

If the court finds that Ms. Lawyer did in fact represent CEO (which is possible because a lawyer representing an organization may also represent any of its officers or directors subject to the conflict rules), then there would be a conflict of interest. A lawyer may represent a current client in an action against a former client except when your current client wants to sue your former client involving a matter or transaction in which you represented the former client or when during representation of the former client, you learned confidential information that is now relevant to the action by the current client. If the two matters are the same or substantially related, there is an irrebuttable presumption that such knowledge was acquired. CEO's argument here would be that Ms. lawyer represented him in the negotiation and execution of his employment contract with Development Company and therefore cannot

represent Development Company in this suit that directly may/would put at issue this same employment contract. If the court agrees that Ms. Lawyer actually did represent CEO in his employment contract with Development Company, then there would be a conflict of interest because she, through her firm, would be representing Development Company (her current and former client) against her former client, CEO. However, if the court finds that Ms. Lawyer did not represent CEO in his negotiation and execution of his employment contract, then there would be no conflict of interest as she, through her firm, would simply be representing a current client against someone who was never Ms. Lawyer's client.

3. Imputed disqualification of Big Law

When lawyers are associated in a firm, none of them may knowingly represent a client when any of them practicing alone would be prohibited from doing so by other RPC provisions relating to conflict of interest. The argument CEO would make here is that Ms. Lawyer represented him before, making him her former client, and that since he is her former client, she cannot now represent Development Company against him in this wrongful termination case because it is substantially related to her representation of him in the recapitalization representation where he negotiated the employment agreement at issue. He would argue that since Ms. Lawyer cannot represent Development Plan against him, no other attorney at Big Law firm can represent Development Company. This argument would depend on whether the court agrees that Ms. Lawyer represented CEO in his employment agreement. In some states, Big Law may be able to screen Ms. Lawyer (or use the Chinese wall) such that she is not involved in its representation of Development Company and does not share in any of the fees from that representation. However, this would likely not be enough to permit the firm to represent Development Company if the court finds that Ms. Lawyer represented CEO and her conflict is imputed onto Big Law.

MPT 1 — Sample Answer 1

TO: Hon. Joann Gordon

FROM: Examinee

DATE: July 27, 2021

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

INTRODUCTION

Jim Barrows, a student at Franklin State University, joined in a political demonstration in 1985 and was subsequently arrested for and convicted of disorderly conduct. The Plaintiff, Winston, took a picture of the police leading Barrows away from the demonstration in handcuffs, which was the only pictoral record of the arrest. During the 2020 mayoral campaign, the Defendant used the photograph on t-shirts with "Arrested & Convicted" stamped in red over it. It was captioned "BARROWS IS A HYPOCRITE!" Below is an analysis of the Plaintiff's fair use claim under 17 USC Section 107 resulting from the Defendant's use of the Plaintiff's photograph. The parties agree that, in the absence of finding fair use, the Defendant infringed on the Plaintiff's copyright.

ANALYSIS

17 USC Sections 106 and 107 govern the exclusive rights in copyrighted works and the limitations on those exclusive rights. One such limitation is known as "fair use" of the work, which establishes an affirmative defense to a claim of copyright infringement. Establishing a permissible fair use of a copyrighted work requires a four-factor analysis: (1) the purpose and character of the use, including whether such use is of a commercial nature or for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

It should be noted that criticism and comment are explicitly listed in the statute as a possible "fair use." Arguably, "criticism" or "comment" encompass the Defendant's actions in this case. However, the analysis cannot end here. The four factors of fair use must still be applied and analyzed in any fair use case. Klavan.

As you are aware, these factors are not applied mechanically. The Court has considerable discretion to consider the weight to give to each factor in reaching its conclusion. Below is my analysis of each of these four factors as applied to the case at hand.

(a) The Purpose and Character of the Use Likely Weighs In Favor of Fair Use, Because It Is a Comment on Political Discourse and Makes a Sufficiently Specific Comment on the Character of a Mayoral Candidate.

The first factor in the fair use analysis is the purpose and character of the use at issue. Notably, this portion of the analysis includes consideration of whether the use is of a commercial nature or for

nonprofit educational purposes. The courts, including the Supreme Court, have made "transformative use" of a work that takes only part of the work and uses it to make a comment on a social issue a touchstone of the fair use analysis. Such a transformative use is not absolutely necessary for a finding of fair use, but promoting science and the arts goes to the "heart" of the Copyright Act, and the more transformative a work is, the less the significance of other factors, like commercialism, may weigh against a finding of fair use. Campbell.

As stated in the Brant case, political discourse is vital to the essence of our democracy, and uses for that purposes should, absent other factors, weigh heavily in favor of fair use. Simply because a particular use is for profit does not mean the use cannot be deemed "fair." Campbell.

In Klavan, the news story at issue was one of significant importance to the populace of Franklin City--it showed something about the Speaker of the City Council that reflected on his character and temperament. In that case, despite the fact that the use was for profit, the court held that under these circumstances, this factor of the analysis weighed in favor of fair use. By contrast, the court in Brant found that the Defendant's use of the work was not used to make any specific comment on his political agenda, but instead was used as a reflection of a generalized feeling that all candidates espouse. As a result, the court held that this factor weighed against fair use.

In this case, the Defendant reprinted the photograph with the words "Arrested & Convicted" stamped in red over it. Below the photograph was the phrase, "BARROWS IS A HYPOCRITE!" The Defendant will likely argue that he simply used the photograph in combination with other creative expression, for the distinct purpose to make a different social commentary--transforming the use and placing it within the bounds of a "fair use." However, this argument is fairly weak. The Defendant's use of the work in this case is more closely analogized to the rule articulated in Rodgers, which states that simply reproducing the copyrighted work, even in another medium, is not the kind of "transformation" that would justify a finding of fair use. The Defendant's second, and more meritorious, argument will likely be that his use was similar to the use in the Klavan case, because it reflects on the character of a political figure. He will likely argue that, unlike Brant, his use is a sufficiently specific comment on his political agenda, and not simply a generalized feeling about the political atmosphere.

The Plaintiff, by contrast, will likely argue that the Defendant's use of the photograph was not sufficiently transformative or political in nature for this factor to weigh in favor of fair use. Instead, this case is more similar to Brant, because the shirts reflect a generalized feeling, instead of a specific comment on the political agenda.

Application of this factor in the current case likely weighs in favor of fair use. The Defendant's use of the photograph seems to communicate more than a generalized dislike for the political figure portrayed. Instead, it is more similar to a specific sentiment that the candidate is unfit to be the mayor, due to his past criminal history. While this use was for profit, that alone will not be sufficient for this factor to weigh against fair use. As a result, this factor of the analysis likely weighs in favor of fair use.

(b) The Nature of the Copyrighted Work Likely Weighs In Favor of Fair Use, Because It Is the Only Visual Record of a Significant Newsworthy Event.

This factor does not figure in most fair use analyses. Klavan. The nature of the photograph at issue in this case is arguably more informative than artistic, which weighs against fair use. Rossi. However, one

of the most frequent applications of this factor turns on whether or not the work has been published. Klavan. When a work is unpublished, the use is less likely to be deemed a "fair use," based upon the fact that the creator and copyright owner should have the right to first divulge the work to the public in the manner she desires. Klavan. However, it is explicitly stated in Section 107 that "The fact a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all [] factors."

In Klavan, the court held that this factor weighed in favor of fair use because: (1) it was a visual record of a significant newsworthy event, and (2) it is the only visual record of the significant newsworthy event.

In this case, the Plaintiff's photograph is the only visual depiction of the arrest, which was arguably a significant newsworthy event. Additionally, the work has been published twice in the past, which the Plaintiff was compensated for. Because the work at issue in this case has been published and is the only visual record of this significant newsworthy event, this factor will likely weigh in favor of fair use.

(c) The Amount and Substantiality of the Portion Used Weight Against a Finding of Fair Use, Because the Entire Work was Used, With Little to No Modification.

This portion of the analysis focuses on the amount of the work that was actually used, as well as the substantiality of the use has taken to the "heart" of the work. *Rossi*.

Analysis of this factor is fairly straightforward in this case. Like the *Brant* case, the entire work was used, without modification. The Defendant will likely argue that the stamp over the photograph is a sufficeint modification, but this argument is weak. This factor will likely against a finding of fair use.

(d) The Effect of the Use on the Potential Market for and Value of the Work Weighs in Favor of Fair Use, Because there Is Plenty of Market Space Left for Alternative Uses of the Work In the Future.

This portion of the analysis will hinge on whether or not the plaintiff will lose a potential market for the portion of the work used by the defendant.

In Klavan, the court held that this factor tilted in favor of fair use, because there were many uses of the potion of the video used that differed from the defendant's use and that could be licensed. Further, there was an untouched market for the entire video, and for other portions of it. The court gave no merit to the defendant's argument that his use had enhanced the value of the video by bringing public attention to it.

In Rossi, the court held that this factor weighed in favor of fair use as well, because the rights to the photograph at issue had only been sold once, for a mere $100, and no further sales were made in the following 10 years.

As copyright owner of the photograph at issue, the Plaintiff has previously granted a single-use license to the Riverside Record, allowing it to publish the photograph accompanying a story about the political demonstration. She received a fee of $500 for this use. Later, the Plaintiff licensed the photo and 72 other pictures she had created to the publisher of a coffee table book, which retailed for $40. She received a one-time license fee of $10,000, plus a 7% royalty for each copy sold. The Plaintiff will argue that this suggests a much more extensive use of her rights to the photograph than the Rossi case. However, the Defendant will likely counter that argument by stating that the Plaintiff has not received

any revenues from uses of the photograph since 1995. Additionally, the Defendant will argue that his use of the photograph on a t-shirt allows for plenty of continued market space for use of the photo, because it leaves open plenty of alternative uses.

The Defendant likely has the stronger argument in this case, and this factor will weigh in favor of fair use.

Based on the analysis above, the court will likely find that this was a valid fair use of the copyrighted work. While the third factor clearly weighs against this finding, this factor often is not considered particularly significant in the analysis. All other factors seem to weigh more heavily in favor of the conclusion that this use was fair, which will act an an affirmative defense to the claim of copyright infringement.

CONCLUSION

Overall, the Defendant's fair use claim will like be successful, and summary judgment should be granted. Three of the four factors in the fair use analysis weigh in favor of a finding of fair use, which will act as an affirmative defense to the Plaintiff's fair use claim. Please let me know if there is anything further I can do to assist you with this matter.

MPT 1 — Sample Answer 2

Chambers of the Hon. Joann Gordon
United States District Court for the District of Franklin|
120 N. Henry Street
Centralia, Franklin 33705

MEMORANDUM

TO: Hon. Joann Gordon
FROM: Examinee
DATE: July 27, 2021
RE: *Winston v. Franklin T-Shirts, Inc*., Case No. 21-CV-0530

As you know, Defendant Franklin T-Shirts ("FTS") will be making a motion for summary judgment in this case, arguing that its use of Plaintiff Naomi Winston's ("Winston") photograph of Jim Barrows's arrest (the "Photograph") was fair use under the federal copyright statute, 17 U.S.C. 107. You have tasked me with drafting a memorandum that analyzes the possible fair use claim. Below is my analysis and subsequent conclusion for the overall claim of fair use.

Fair use generally

Under 17 U.S.C. 106, "the owner of copyright . . . has the exclusive rights to do and to authorize" various different listed uses and reproductions of the copyrighted work. In relevant part, the copyright owner must authorize the reproduction of the copyrighted work in copies, the preparation of derivative works based upon the copyrighted work, the distribution of copies of the public work to the public by sale, and, in the case of pictorial or graphic works, the display of the copyrighted work publicly. 17 U.S.C. 106(1), (2), (3), (5).

In response to a claim of copyright infringement, however, a defendant may raise the affirmative defense of "fair use." Specifically, "[n]otwithstanding the provisions of section[]106 . . ., the fair use of a copyrighted work, including such use by reproduction in copies . . . or by any other means specified by that section, for purposes such as criticism[or] comment . . . is not an infringement of copyright." 17 U.S.C. 107. The determination of "whether the use made of a work in any particular case is a fair use" involves the consideration of four factors. According to *Brant*, this "requires a fact-specific analysis under four factors[.]" The application of those statutory factors, along with our Court's interpretation of the scheme, to the facts of this case is as follows.

Factor 1: The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes

This factor "requires an analysis of the purpose and character of the use, including whether it is 'of a commercial nature . . . or for nonprofit educational purposes.'" *Brant* (quoting 17 U.S.C. 107). In *Brant*, a political candidate used a song numerous times in campaign rallies and speeches without the permission of the song's copyright owner. The political candidate argued that the use of the song was fair use because it was for a political purpose. In his opinion, "political discourse is and should be encouraged in our society, and that his use of this particular song does so." *Id*. However, this Court said that this was

not the end of the inquiry. Because there were other songs that could have been used and because the song was used to create a "generalized feeling" rather than to make a specific comment about his political agenda, the factor cut slightly in favor of the copyright owner and against fair use.

Allen involved a photograph of a scene at a watering hole in Africa. The photo included several animals and was published in a book of photographs by many different photographers. Years later, a graphic artist took a copy of a copyrighted photo from the book that had published it, cut the picture of the rhinoceros, "and then included it in the collage with excerpts of 13 other photographs from various sources, all depicting endangered species of animals." *Id*. Though prints of the collage were sold for $450 each, the proceeds were sent "to benefit nonprofit organizations devoted to protecting endangered species." *Id*. The graphic artist that created the print said that the purpose was to draw attention to the plight of endangered species. Further, [b]y taking only a part of the Photo and using it to make a comment on a social issue, [the defendant] transformed the original aspect of the Photo." *Id*.

In *Klavan*, the sole bystander of an altercation involving a politician took a 14-minute-long video of the event. She copyrighted the video and then offered the local television station to air it for $5,000. The station then played an eight-second excerpt without paying her and without her permission. This Court noted that the commercial aspect of the use (the station ran for profit) was not dispositive. The Court found that the political, newsworthy elements of the video were important, particularly because it reflected the character and temperament of the councilman, so the factor weighed in favor of fair use.

Our Court them cited to the Supreme Court in saying that transformative works, though not absolutely necessary for finding fair use, "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism[.]" *Campbell*. Though the prints were sold, a commercial use, the proceeds were going for noncommercial educational purposes, which is a use endorsed by the statute. "[U]sing an element of a copyrighted work in combination with other creative expression, for a different purpose than the copyright owner's and to make a different social commentary, changes - and transforms - the use and argues for fair use." *Id*. (citing *Blanch*). Because this Court found that this is what happened here, the factor weighed in favor of fair use.

Here, Winston will argue that the purpose of the use of their work was commercial and that, as in *Brant*, use for political discourse is not dispositive, and FTS could have used lots of other pictures of Barrows for the shirt. Further, as opposed to *Allen*, the entire work was used.

FTS will argue that though they profited off the t-shirt, it is still a newsworthy event and the purpose is to oppose the campaign. Further, the work is transformative because it contains red lettering. Instead of completely copying the use in its entirety, FTS transformed the work by offering political commentary on top of and below the Photograph.

Because FTS's arguments are stronger, and because the reproduction is transformative, this weighs in favor of finding fair use.

Factor 2: The nature of the copyrighted work

Allen stated that publication of the original work weighs in favor of fair use. Further, the fact that a photograph has been used or published "only once in the 10 years it was taken[]" leans towards fair use as well.

In *Klavan*, this factor was of great importance. Though the video was unpublished, which weighs against finding fair use, the Court found this factor weighed in favor of fair use because it was a visual record of a significant newsworthy event and, "more significantly, it is the only visual record of the significant event." *Id.*

Because the work was published and because Winston has not used the work for profit of otherwise in nearly 30 years, this will weigh in favor of fair use.

Factor 3: The amount and substantiality of the portion used in relation to the copyrighted work as a whole.

Brant informs us that "[t]he statute requires us to analyze both the quantitative ('amount') and qualitative ('substantiality') use of the work." In that case, our Court stated that, because "the entire work was used, repeatedly, and without modification[,]" the factor cut in favor against fair use. In *Allen*, by contrast, only a small portion of the photo was used, which weighed in favor of finding fair use.

Here, the t-shirt at issue modified the Photograph. FTS took a copy of the Photograph and reproduced it in its entirety, yes, but the words "Arrested & Convicted" were stamped in red over the photograph, and the caption "BARROWS IS A HYPOCRITE" was printed below the Photograph. The red letters over the Photograph itself is a great modification. Though the entire Photograph was used, *Brant* noted that "there are circumstances where use of the entire work can nevertheless amount to fair use[.]"

In sum, this factor weighs in favor of finding fair use.

Factor 4: The effect of the use upon the potential market for or value of the copyrighted work

Brant informs us that some cases stress that this factor "is of great importance[.]" Specifically, "[o]ne of the purposes of copyright is to protect the economic interests of the copyright owner." *Id*. In *Brant*, this Court found that this factor cut strongly against fair use because the copyright owner feared that the use of the song would make the song permanently identified with the political candidate and his views and erode its popularity with members of the public who did not agree with that candidate's views. Further, the plaintiff personally strongly opposed the candidate's views and was public about this fact. In effect, the plaintiff was worried her reputation with their fans would be undermined.

In *Allen*, by contrast, this Court saw "no substantial effect" on the defendant's use "on the actual or potential value of the copyrighted work." Specifically, the owner 'sold the rights to the Photo but once, for a mere $100, and has not made any further sale in 10 years." *Id*. "in addition, no one seeing the collage would[] . . . have the slightest notion that the picture of the rhinoceros came from *Allen*'s picture." Because the Court believed it would have no effect on the possible market for the use of the photo in the future, this factor cut in favor os fair use as well.

Here, Winston will argue that the Photograph will be entrenched in the political and commercial use of the t-shirt. As opposed to *Brant*, however, Winston has not publicly opposed Barrows's political opponent. Further, the Photograph is 35 years old and is likely not recognizable to the bare eye. Specifically, like in *Allen*, though the facts are not as strong (the entire Photograph was used here as

opposed to just a small excerpt), the Photograph is likely not recognizable as Winston's because the Photograph has not been used in years and the work has been transformed.

In sum, this factor also weighs in favor of finding fair use.

Conclusion on the fair use claim overall

As you mentioned, this Court has considerable discretion in weighing each factor in reaching its conclusion. However, because each factor at least partially weighs in favor of fair use, the Court should find for FTS in holding that the use of the Photograph was fair use under 17 U.S.C. 107.

MPT 1 — Sample Answer 3

MEMORANDUM

TO: Hon. Joann Gordon
FROM: Examinee
RE: Winston v. Franklin T-Shirts Inc., Case No. 21-CV-0530

I. Introduction

You have asked for my analysis on the possible fair use claim of Franklin T-Shirts Inc. (Franklin T-Shirts). Below is my analysis of the claim. In short, Franklin T-Shirts likely has a valid fair use defense under the federal copyright statute.

II. Applicable Law

Under Sec. 106 of the United States Copyright Act, the owner of a copyright has the exclusive right to do and to authorize the following: "(1) to reproduce the copyrighted work in copies and phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) . . . to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictoral, graphic, or sculptural works, including the individual images of a motion picture other audiovisual work, to display the copyrighted work publicly; and (6) . . . to perform the copyrighted work publicly by means of a digital audio transmission."

However, under Sec. 107 of the Act, there are limitations of these exclusive rights based on fair use. Fair use is an affirmative defense to a claim of copyright infringement. See *Brant v. Holt*. Under Section 107, "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research, is not an infringement of copyright." These uses are not dispositive, however, and a fact-specific analysis under the four factors must be used to determine if the use is excused. See *Brant v. Holt*.

Under Sec. 107, there are four factors that are considered in order to determine whether a use is fair use: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantially of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." Additionally, the fact that a work is unpublished does not itself bar a finding of fair use.

III. Analysis

Under Sec. 107, fair use is an affirmative defense to copyright infringement if being used for criticism, comment, news reporting, teaching, scholarship, or research. However, these factors are not dispositive, and the four-factor analysis must be conducted to determined if the use if fair use. See *Brant v. Holt*.

Here, Franklin T-Shirts will claim that their use was for criticism and comment. However, the four factors still need to be considered to determine whether there is fair use.

1. The purpose and character of the use

The first factor considered under Section 107 is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit education purposes." A use for a political purpose is not a commercial or nonprofit purpose. See *Brant v. Holt*. The purpose of political discourse should weigh heavily in favor of fair use absent other factors, if it is being used to make specific comment on a political agenda, and that particular work must be used to do so. *Id*. If it is not a specific message and is general, then this cuts in favor the copyright owner. *Id*.

However, if part of a photo is used to make a comment on a social issue, this transforms the original aspect of the photo and is considered fair use as a "transformative work." See *Allen v. Rossi*. The more transformative the work, the less other factors will weigh against finding fair use. *Id.* Simply reproducing the work the work in another medium is not transformative, but instead treads on the owner's right to make derivative works. *Id.* But using an element of the work in combination with other creative expression for a different purpose than the copyright owner's and to make a different social commentary transforms the use into fair use. *Id.*

Here, Franklin T-Shirts is a purely commercial company, and they will likely argue that the shirts were sold for a purely commercial purpose. However, Franklin T-Shirts is also active in Riverside politics and was an active supporter of Barrows's mayoral opponent. They used Winston's photograph on a T-shirt with negative statements about Barrows, for the political purpose of hurting his campaign. A use for a political purpose is not a commercial or nonprofit purpose. See *Brant v. Holt*. All that being said, this photo is being used to make a specific message about Barrows and his political agenda, and this particular photo was necessary for this specific message because it was the only photo taken on that day. So, it was used for specific political discourse, cutting in favor of fair use. See *Id.*

Further, Franklin T-Shirts used the photo to make a comment on a social issue, Barrows's character and fit for mayor during a mayoral campaign. That was not the original purpose of the photo, for Winston only took it to document Barrows's arrest, long before he ever ran for mayor. This transforms the original purpose of the photo and makes this a transformative work. Franklin T-Shirts took the photo and combined it with other creative expressions, the comments on the shirts, and used it for a different purpose (social commentary) than Winston's purpose (documentation). This makes this a transformative work and cuts in favor of fair use.

2. The nature of the copyrighted work

The second factor considered under Sec. 107 is "the nature of the copyrighted work." Most cases see this factor as favoring the use of published work as opposed to unpublished works, and scientific or factual works as opposed to those that are creative and expressive. See *Brant v. Holt*. A photo's artistic merit is limited if it has not been used much in the past 10 years, weighing in favor of fair use. See *Allen v. Rossi*.

Here, the photo is a published work because it was published in the newspaper and in books. However, being a photograph, it is also a creative and expressive work, rather than scientific or factual. Further, Winston's artistic merit on the photo is limited because it has not been used since 1995, and she has not made any money off the photo since 1995. So, this cuts in favor of fair use as well.

3. The amount and substantiality of the portion used in relation to the copyrighted work

The third factor considered under Sec. 107 is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." The use of the entire amount, unmodified, generally cuts against fair use. See *Brant v. Holt*. However, if the entire work is necessary for a commentary or news report, it may still amount to fair use. *Id.*

Here, the entire photograph was used by Franklin T-Shirts on the shirt. The photo itself was unmodified, and they only added comments. This cuts in favor of the copyright holder.

However, Franklin T-Shirts will argue that the entire photo was necessary for a commentary on Barrows's character for his campaign. This will likely be a successful argument, since the entire photo is necessary to show Barrows's arrest and to make a comment on his hypocrisy, unlike the case in *Allen v. Rossi*, where a portion of a photo could be used without needing the entire photo. So, because the entire photo was needed for the commentary to be effective, this cuts in favor of fair use as well.

In the alternative, Franklin T-Shirts may also argue that it did only use a portion of the copyrighted work, rather than the full work. They used a singular photo from the Pictorial History Book, rather than the full 72 photos that Winston submitted to the book. This is a small portion compared to the full work of the book as a whole. If this argument is accepted, then this also cuts in favor of fair use.

4. The effect of the use upon the potential market for or value of the work

The last factor considered under Sec. 107 is "the effect of the use upon the potential market for or value of the copyrighted work." This factor cuts against fair use if the use of the work will make it permanently identified with the defendant and erode its popularity with the copyright holder. See *Brant v. Holt*. This includes harm to the potential market or value of the copyrighted work, not just actual harm. *Id*. If a photo has only been sold once in the past 10 years, and no one seeing the photo would have the notion that the photo came from the copyright holder, then there is no effect on any possible market for the copyright holder in the future. See *Brant v. Holt*.

Here, Winston will argue that the use of the photo and its large sales on the shirts will make the photo be permanently identified with Franklin T-Shirts, rather than with Winston. Winston will argue that the T-shirt sales will harm the current market for the photograph, as well as the future potential market, since it will only be associated with the shirts, even though she is the only one who captured a photo of the event. This cuts in favor of the copyright holder.

However, Winston's argument on this factor will likely fail. This photograph was only published in the newspaper and in the Pictorial History Book, which went out of print in 1995. Winston has not received any money from the photo since 1995. This means that Franklin T-Shirt's cannot possibly have an effect on Winston's current, actual market for the photograph, because it is not currently being used or sold. Further, it is not effecting her potential future use, because she also has no plans to use it in the future,

such as in *Brant v. Bolt*. No one seeing the photo currently would have any notion that the photo came from Winston. So, this factor also cuts in favor of fair use.

IV. Conclusion

Based on the above factors, I believe that Franklin T-Shirts has a valid fair use claim.

First, the use on the T-shirts is a transformative work that is being used to comment on a specific social and political issue. This photo was also necessary for those comments, which all weighs in favor of fair use. Second, it is a published work with limited artistic merit, also weighing in favor of fair use. Next, while the entire photo was used, it was necessary for the political commentary, which weighs in favor of fair use. But if it instead is found that only a portion of the full 72-photo work was used from A Pictorial History, then this cuts in favor of fair use as well. Finally, there is no effect on Winston's current or potential market for the work, also weighing in favor of fair use.

Because all of these factors weigh in favor of fair use, Franklin T-Shirt's use of the photo is likely excused as fair use under the federal copyright statute.

MPT 2 — Sample Answer 1

To: Canyon Gate Property Owners Association

Re: Opinion Letter, Charles and Eleanor Stewart application denial

Dear Canyon Gate Property Owners Association:

This letter is regarding the denial of the application from Charles and Elenor Stewart to construct a new structure and fence on their property. As discussed below, this letter gives an opinion as to whether the ACC properly denied the Stewart's application and an analysis of the Stewart's remedies going forward if they take this matter to court.

(1) The first question is whether the board should uphold the ACC's denial of the Stewarts' application for a structure and a fence.

The Board should uphold the ACC's denial of the Stewarts' application for a new structure and fence.

Restrictive covenants are widely used to prevent homeowners from construction that could interfere with the neighbors use and enjoyment of their property or could impair property values. See *Foster v. Royal Oaks Property Owners Association*. In Construing a restrict covenant, a court must "ascertain the drafter's intent from the instrument's language, giving a restrictive covenant's words and phrases their commonly accepted meaning." *Coleman LLC v. Ruddock*.

At the outset, it is important to note that restrictive covenants in Franklin will be reasonably construed to give effect to their intended purpose and meaning. *Foster*. Here, the relevant determination rests on the Canyon Gate Code and the restrictive covenants therein reasonable meanings.

The Canyon Gate Code states that the living area, or air-conditioned space, of a residence shall be a minimum of 2,800 square feet. Here, the Stewart's home is already 3,000 square feet (we do not have facts as to the square footage of air-conditioned space) but in any event, an additional 600 square feet will exceed the minimum square footage limits. The proposed structure is 600 square feet and will be air conditioned, most likely, because it is a living and sleeping area with a bathroom.

Additionally, the Code restricts each lot to one family residence per lot. A residence is a building used for residential purposes in which people reside, dwell, and make their homes. The Stewarts have stated that the new structure would serve as Estelle's (Ms. Stewart's mother) home, as she seeks to move in with the Stewarts. Thus, the new structure arguably would be a second residence on the Stewart's lot—which would violate the code. Even if it was not considered a second residence, but instead an addition to the Stewart's current residence, this would still violate the square footage restrictions on living areas of residences, discussed above.

The Stewarts may argue that the new structure is an outbuilding, allowed under the Code if under 100 square feet per acre of a homeowner's lot. The definition of an outbuilding is a detached building within the grounds of a mail building; it is a structure not connected with the primary residence on a parcel of property. In this case, the Stewarts seek to build a new structure that will be connected to their home

by a walkway without walls. The proposed structure is, by definition, not a detached building because it will be connected to the Stewart's primary residence by a walkway.

Under the reasonable interpretations of the Code sections, the new structure is neither an outbuilding but an addition to the Stewart's residence which exceeds the square foot limitations in the restrictive covenant.

The Canyon Gate Code additionally limits fences to a maximum height of six feet. The Stewarts seek to install an eight foot fence, to prevent Estelle's dog from roaming the entire property or potentially getting out of the property. The ACC denied the construction of the fence because the proposed fence would be in excess of the Code's height limits. Giving the Code's restrictions their reasonable meanings would seem to support upholding the ACC's decision. However, because this restriction potentially has been waived (discussed more below), it is possible that a Court hearing this appeal would find in favor of the Stewarts on the issue of the fence.

Finally, the Canyon Gate Code allows for variances to the design standards where there is a compelling reason and only if the general purposes and intent of the covenants and design standards are substantially maintained. Here, the Stewarts

(2) The second question is, if the board affirms the ACC's denial and the Stewarts sue the Association, what outcome is likely and what potential remedies are available.

If the board affirms the ACC's denial and the Stewarts sue the Association, the Court would likely uphold the denial of the construction of the new structure but would likely overturn the denial of the construction of the fence. Potential remedies include a permanent induction against enforcement for the Stewarts, or in the alternative, damages for the Association.

If the Stewarts sue the Association, they would have the burden at a trial to establish by a preponderance of the evidence that the Association's denial of their request for variance of the structure and fence was arbitrary, capricious, or discriminatory. They would also have the burden to establish that the ACC's application of the deed restrictions with regard to the structure were misapplied. "An association's application of a properly interpreted restrictive covenant in a particular situation is presumed to be proper 'unless the court determines that the association acted in an arbitrary, capricious, or discriminatory manner." See *Foster* (citing *Cannon v. Bivens*).

(a) <u>The Structure</u>: The application of the provisions as to the structure were applied correctly, and will be upheld on appeal. As discussed, the structure is not an outbuilding according to common interpretation of that word. The structure is either an addition to the residence, in violation of the square foot requirements, or it is another residence in violation of the restriction against multiple residences per lot. Thus, the denial will be proper unless the court finds that ACC acted in an arbitrary, capricious, or discriminatory manner. There is no evidence of that here, as the ACC was simply denying the application for the structure because it exceeded 3000 square feet of residential space.

It is important to note that restrictive covenants cannot be used to prevent the use of property as a family home, see Fr. Prop. Code §403(a). However, in this case, the relevant code sections do not prevent the Stewarts from using their property as a family home. They do not even prevent the Stewarts from using their property for Estelle to move in with them. The restrictions only prevent the residences

from having a certain square footage, which the court would likely not find as a restriction on the use of the property as a family home. See *Powell v. Westside Homeowners Association Inc*.

(b) The Fence: However, a Franklin Court may find that the Board has waived its right to enforce the restrictions regarding the fence heights against the Stewarts. In order for the Stewarts to show that this provision has been waived, they must demonstrate that "the violations then existing were so extensive and material as to reasonably lead to the conclusion that the restrictions had been waived." Larimer Falls Comm. Assoc. v. Salazar. In this case, the Stewarts contend that other homes in the neighborhood have fences exceeding six feet, although we do not have an exact number.

The court will consider the number, nature, and severity of existing violations to determine waiver. See *Powell v. Westside Homeowners Association Inc.* The courts have found that evidence of other violations are insufficient to support a waiver of a condition where even 10% of properties have been in violation of a covenant. Id. However, in this case, a member of the ACC enacted a fence higher than six feet while serving on the ACC. This violation alone may serve to be so material as to reasonably lead to the conclusion that the restriction was waived because a reasonable person in the neighborhood may conclude that a condition was waived when a member of the association in charge of enforcement of conditions has broken the violation.

The Stewarts applied for a variance as to the application of the Code for their construction of the fence. The Code allows for variances where there are "compelling circumstances". The Stewarts have not offered compelling reasons why a fence, which will serve the purpose of keeping Estelle's dog contained to a certain portion of the yard, must exceed 6 feet. However, the denial of the variance may be improper here because, as discussed above, it could be considered arbitrary and capricious for the Board to enforce the restriction against the Stewarts where a one of their own members is in violation of this same provision.

(c) Remedies: The damages provided for by the Code are recovery from any violating party all costs, attorneys fees, and out-of-pocket expenses incurred in enforcement of any covenants. If the Stewarts take this matter to court, they could be liable for any attorneys fees and other costs incurred in meantime.

The Stewarts are entitled to defend the enforcement of the restrictive covenant against them. They may seek a permanent injunction requiring the Association to grant their variance for the fence, if the court finds that the Board has waived the right to enforce the restriction. The Association may be entitled to damages for violations of the covenants in an amount not exceeding $200 for each day of the violation.

The damages assessed are not related to any showing of harm or injury from the violation of the covenant. Rather, the damages are assessed by considering the number of days that the violation took place. See *Foster*. Because the Stewarts have not actually constructed the structure or the fence in this case, the damages for each day of a violation are not relevant. Rather, the Association could likely get damages from attorneys fees and other court costs required to defend the suit against the Stewarts.

MPT 2 — Sample Answer 2

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Dear Ms. Mendoza, Chair of the Canyon Gate Property Owners Association Board of Directors:

(1) You have asked whether the board should uphold the ACC's denial of the Stewarts' application for a structure and a fence. The Board should not uphold the denial of the structure, but should uphold the denial for the fence.

First, the Canyon Gate Covenants, Conditions, and Restrictions were adopted on April 12, 1985. The Stewarts have lived in Canyon Gate for approximately seven years, beginning around 2014. This, however, does not affect the validity of the restrictive covenants as applied to the Stewarts because Section 403(c) of the Franklin Property Code establishes that Section 403 applies to all restrictive covenants regardless of the date on which they were created.

Application of the Deed Restrictions to the Structure

Restrictive covenants are contracts between the property owners of a subdivision as a whole and the individual lot owners in the subdivision. *Foster v. Royal Oaks Property Owners Association* (Franklin Ct. App. 2017) Thus, restrictive covenants are subject to the general rules of contract interpretation. Id. In Franklin, restrictive covenants are reasonably construed and interpreted to give effect to their "purposes and intents." Franklin Property Code Section 403(a). When interpreting a restrictive covenant, a court will determine the drafter's intent from the text of the restrictive covenant, using the commonly accepted meanings of the words and phrases. *Foster v. Royal Oaks Property Owners Association* (Franklin Ct. App. 2017)

Section 1 of the Canyon Gate covenants makes clear that the purpose of the restrictive covenants is to establish a uniform plan for improvements to lots within the subdivision, to benefit each and every property owner in the subdivision. Thus, all covenants will be construed to give effect to this purpose: uniformity.

The Stewarts have applied for a Structure to be erected on their property. Section 3B of the covenants establishes that only one family residence may be placed on each lot. To be defined as a "residence," Section 3A requires a minimum of 2,800 square feet and to be set back at least 30 feet from the front street right of way. The Structure is planned to be 600 square feet, and is set back 50 feet from the street. Thus, it is too small to be defined as a residence by the covenants.

Section 5C establishes that for "outbuildings", buildings other than residences, the maximum square footage is 100 square feet per acre. Because the Stewarts live on two acres, this means the structure may not exceed 200 square feet. Because the Structure is planned to be 600 square feet, it violates Section 5C.

However, a restrictive covenant may not be construed to prevent or restrict the use of property as a family home. Franklin Property Code Section 403(b). Despite the fact that the Structure is too small to be a residence under Section 3A, a court still may find that the Structure is a residence. The Stewarts application made clear that the use of the Structure will be for Mrs. Stewart's mother to live in. The Structure will contain a large living/sleeping area and a bathroom. Further, the common meaning of "residential building" is one used for residential purposes where people will reside, dwell, or make their homes as compared to commercial purposes. The use of the Structure by Mrs. Stewart's mother is clearly residential purposes because it will be established as her place of abode.

Comparatively, the common meaning of outbuilding is a detached building not connected to the primary residence, such as a shed or garage. Here, the Structure will be connected to the existing home by a roof-covered walkway without walls. This is connected to the existing home, thus the requirement of Section 5A that there is only one family residence per lot may not even be violated here.

Because the purpose of the Structure is for residential purposes and it will be attached to the primary residence, a court will likely find that the denial of the Structure violates Franklin Property Code 403(b) because the denial prevents and restricts the use of the property as a family home. While the purpose of the Canyon Gate covenants is uniformity, a court will not allow the covenants to violate Section 403(b). However, the purpose of uniformity is not defeated because while the Structure is the first of its kind in Canyon Gate, it maintains the residential appearance of the neighborhood and upholds the residential purpose.

Variance for the Fence

Section 10 of the covenants establishes that variances will be granted only for a "compelling" reason and only if the general purposes and intent of the covenants is substantially maintained. As discussed above, the general purpose of the Canyon Gate covenants is uniformity. Thus, the Stewarts must demonstrate a compelling reason for the eight foot fence that will not defeat uniformity. While they can argue that the safety of the dog is a compelling reason, they will find a higher chance of success in arguing that the covenant has been waived by the ACC so there is no defeat of the purpose of uniformity.

Section 7A of the covenants establishes that fences are limited to a maximum height of six feet. Thus, the Stewarts' proposed eight foot fence is in violation of Section 7A. However, restrictive covenants can be waived by the Association. To demonstrate waiver, the Stewarts must prove that violations already exist in the neighborhood, and the violations are "so extensive and material as to reasonably lead to the conclusion that the restrictions had been waived." *Powell v. Westside Homeowners Association Inc*. (Franklin Ct. App. 2019) (quoting Larimer Falls v. Salazar). The number, nature, and severity of the existing violations are factors the court will consider. Id.

It is the responsibility of the Stewarts to bring forward the evidence of violations of the covenant in the neighborhood. In *Powell*, the homeowner did not provide any evidence to support his claim that others in the neighborhood violated the covenant at issue, while the ACC chair testified that in the five years leading up to the lawsuit she had not seen any other violations of the covenant in the neighborhood. Id. Thus, there was no waiver. Id.

Here, the ACC has never formally approved the installation of fences over six feet tall, which supports a finding of no waiver. However, there are nonconforming fences in Canyon Gate due to lax enforcement of the fencing requirements. This includes one former ACC member who built a nonconforming fence without approval while serving on the ACC. The Stewarts will likely need to identify the number of homes with non-conforming fences. If only 1% to 10% of the 45 homes in Canyon Gate violates the covenant, then this will be insufficient for Franklin Courts to find waiver. *Powell.* The Stewarts must demonstrate that over 10% of the homes violate the covenant to have a reasonable chance of establishing waiver.

(2) You have asked if the board affirms the ACC's denial and the Stewarts sue the Association, what outcome is likely and what potential remedies are available. The Stewarts will likely succeed in their claim that the structure does not violate the restrictive covenants, and the Stewarts will likely fail in their claim that the variance should be granted due to waiver because they have not provided sufficient facts.

The Stewarts may seek a declaratory judgment that their proposed structure does not violate the restrictive covenants. The Stewarts may also seek a declaratory judgment that the ACC's denial of a variance was arbitrary, capricious, and/or discriminatory.

The Association may defend in litigation affecting the enforcement of a restrictive covenant. Section 404(a). If the Association prevails, the court may assess civil damages for the violation of the restrictive covenant, not to exceed $200 for each day of the violation. Section 404(b). These civil damages do not require any type of injury or harm to be demonstrated by the Association, just the number of days the violation occurred without reference to any existence, nature, or type of injury. *Foster v. Royal Oaks*. If the Stewarts prevail in their declaratory judgment for the structure, they will be allowed to construct the structure.

ACC's application of a restrictive covenant, if properly interpreted, is presumed to be proper "unless the court determines that the association acted in an arbitrary, capricious, or discriminatory manner." *Foster v. Royal Oaks* (quoting *Cannon v. Bivens*). The burden is on the Stewarts to prove by a preponderance of the evidence that ACC's denial of the variance was arbitrary, capricious, or discriminatory.

For example, where an ACC member told the homeowner that his application would be denied "no matter what," the ACC did not review the application, and the ACC did not contact the homeowner to discuss the application, summary judgment was found in favor of the homeowner that the ACC acted in an arbitrary, capricious, or discriminatory manner. *Foster v. Royal Oaks* (discussing *Mims v. Highland Ranch Homeowners Ass'n Inc*., Franklin Ct. App. 2011).

Alternatively, in *Foster v. Royal Oaks* there was no finding that the ACC acted in an arbitrary, capricious, or discriminatory manner where the ACC attempted to resolve a conflict created by the homeowner in violation of the rules by discussing other fencing options. ACC was permitted to modify deed restrictions under "compelling circumstances," but the homeowners did not provide any justifications at all to necessitate the variance. Id.

Here, the ACC's denial letter to the Stewarts establishes that the application received careful consideration, review of the submitted plans and specifications, and an on-site meeting to inspect the

proposed location of the improvements. The letter also laid out the reasons for the denial in the letter, and indicated how to request a hearing before the Association Board of Directions to appeal either denial. Further, the Stewarts have not provided significant information for a court to determine that waiver of the covenant occurred, because that would require the Stewarts to show proof that more than 10% of houses in the neighborhood are in open violation of the covenant. While there is some evidence, as it appears right now it is insufficient. The facts clearly demonstrate that the denial of the variance was not arbitrary, capricious, or discriminatory but instead based on careful review and application of the covenants.

The potential outcome, then, hinges on whether the court finds that the ACC properly interpreted and applied the covenants. As discussed in the first question, the denial of the Structure will likely found to violate Franklin Property Code Section 403(b), thus the Stewarts would likely prevail in their suit for a declaratory judgment, which would allow them to construct the structure. The denial of the variance will not be found arbitrary, capricious, or discriminatory because the Stewarts failed to put forth facts supporting waiver of the covenant to necessitate a variance and failed to put forth facts of an unjust process by the ACC.

Please contact our office if you have any further questions, and we would be happy to discuss matters further with you.

Thank you,

MPT 2 — Sample Answer 3

TO: All attorneys
FROM: Examinee
DATE: January 6, 2020
RE: Canyon Gate Property Owners Association

OPINION LETTER

Restrictive covenants are a type of deed restriction commonly used in neighborhoods to protect homeowners against construction or use that could hinder their enjoyment of the land. According to Franklin's Property Code, a restrictive covenant is a condition or restriction that runs with the land and limits use of the land (401). These covenants should be read to give effect to their purpose and intent and should not be construed to restrict the use of property as a family home (403). A property owner's association can initiate, defend, or join proceedings affecting the enforcement of restrictive covenants or the use of property subject to a restrictive covenant, and a court can decide whether civil damages for a violation of the restrictive covenant is necessary, but the court cannot make a property owner pay more than $200 for each day of the violation (404).

Background Legal Principals

In *Foster v. Royal Oaks Property Owners Association*, the Association sued property owners to enforce the deed restrictions for their subdivision after the property owners erected a fence in violation of restrictive covenants. The Royal Oaks subdivision, is subject to deed restrictions that include certain boundary requirements governing the placement of structures (like fences) on each lot.The Royal Oaks Architectural Control Committee (ACC), is a three-member committee appointed by the Association and is made up of homeowners in the subdivision--they have the power to allow certain improvements on the lots and to enforce the restrictive covenants. The property owners in this case bought a lot of the subdivision and received approval from the ACC to build a house. The approved plans included a fence that inclosed the backyard. However, when the ACC went to check on improvements they noticed the fence was much closer to the street that the restrictive covenant allowed. They sent a letter to the property owners telling them about the violation and advising them to stop construction; however, the owners did not listen and finished construction of the fence. Afterward, the requested a variance to allow the noncompliant fence to remain. After failed discussions with the ACC, the brought a claim to enforce the restrictive covenant and impose damages. The property owners countered with a claim stating they were not in violation or (alternatively) that the ACC had been "arbitrary, capricious, and/or discriminatory in not granting their variance." After judgement was entered against them, the property owners appealed the action.

On appeal in *Foster*, the court first had to determine whether the Association properly applied the restrictive covenant. The court stated that restrictive covenants are a "contract between a subdivision's property owners as a whole and individual lot owners and are thus subject to general rules of contract construction." (quoting *Coleman LLC v. Ruddock*). In looking at a restrictive covenant, the court should ascertain the drafter's intent from the language and give the words their commonly accepted

meaning--In 1990, Franklin legislature amended the Property Code to prove that all restrictive covenants contained in deeds should be reasonably construed to give effect to their purpose and intent (403). The Franklin Supreme Court has held that this rule supplants the common law rule of strict construction (Humphreys v. Oliver). The Court in *Foster* held that the property owner's interpretation of a larger boundary lacked merit because the Section they attempting to avoid specifically stated that there should be a greater setback with any structures and the street. This was clear in the language of the deed and was not to be questioned by the court.

In *Foster*, the court emphasized that "an association's application of a properly interpreted restrictive covenant in a particular situation is presumed to be proper unless the court determines that the association acted in an arbitrary, capricious, or discriminatory manner." (quoting *Cannon v. Bivens*). Thus, the property owners have the burden to prove by a preponderance of the evidence that the Association acted in this manner. For example, in *Mims v. Highland Ranch Homeowners*, the court stated that an ACC members absolute denial of a homeowner's carport plans was arbitrary and capricious when the deed restrictions did not specifically prohibit carports. The ACC did not review the plans or even contact the owner to discuss them--it was an absolute denial. However, in *Foster*, the property owners deviated from the plans that had already been approved by the ACC, and the ACC attempted to work out different fencing options with them. Thus, the ACC did not act arbitrarily.

Finally, when there is a breach of a covenant, the court can assess and impose damages. The amount of damages is not related to any type of injury or harm but is instead related to the number of days that the violation takes place (*Foster*). Nothing in Section 404 indicates that damages are intended to compensate for actual harm done from the violation of the covenant. Thus, in *Foster*, the court did not abuse its discretion in awarding a large sum of damages ($20,000) because it properly applied the above-stated standard outlined in Section 404(b).

In *Powell v. Westside Homeowners Association Inc.*, the Franklin Court of Appeals affirmed a Homeowner's Association's (HOA) decision to uphold a restrictive covenant. In this case, property in the neighborhood is subject to deed restrictions which are enforced by the HOA Architectural Control Committee (ACC). the property owner owned a home in the neighborhood and began parking a minivan on his front lawn. The ACC notified him that parking a vehicle there violated the HOA restrictive covenants and the the vehicle should be removed in 10 days. The letter also stated that if the property owner disagreed, then he could contact the ACC and explain his position. He neither responded to the letter or moved the vehicle. The ACC then sent a second letter notifying him that they were prepared to file a suit against him and that he could request a hearing before the board in 30 days. The property owner also did not respond to this. The ACC then asked the court to enforce the covenant, and it did, and the court also assessed damages against the homeowner.

In *Powell*, on appeal, the property owner argued that he did not violate the restrictive covenant or in the alternative that even if it was a violation, the HOA waived its rights to enforce the restrictions because they allowed other homeowners to park their cars in their front yards. The court stated, like in *Foster*, that restrictive covenants are subject the the general rules of contract law and are to be reasonably construed to give effect to their purposes and intent (citing 403(a)). Although restrictive covenants cannot restrict or prevent the use of property as a family home, the restrictive covenant in question did not do

so. Instead, it simply required homeowners not to park their vehicles in the front yard. Note that this restriction was recorded in 1973 (before the enactment of the Franklin property Code), but 403 applies retroactively to create a presumption that the restriction is reasonable (see 403(c)). The property owner here clearly violated that covenant.

Additionally, to demonstrate a waiver of restrictive covenants, "a party must prove that the violations then existing were so extensive and material as to reasonably lead to the conclusion that the restrictions had been waived" (Larimer Falls). The number, nature, and severity of the existing violations are factors to consider when determining whether there has been a waiver. Franklin courts have found that 1-10% of properties in violation of the covenant is not enough to prove waiver. The property owner here did not produce any evidence other than his allegation that others were also breaking the rules. Thus, the covenant had not been waived.

1. Whether the board should uphold the ACC's denial of the Stewart's application for a structure and a fence

The Board should not uphold the denial of the Stewart's application for a structure, but might be able to uphold the denial for the fence.

Canyon Gate is a small, residential subdivision consisting of 45 single-family homes on lots that range from 1-5 acres. The Canyon Gate Property Owners Association (Association) has appointed an ACC to oversee approvals and enforcement of the Association's covenants, conditions, and restrictions. The Stewarts have lived in the neighborhood for about two years and recently submitted an application to the ACC (along with plans and specifications) seeking approval for two home improvements (1) construction of a new Structure to be located adjacent to their existing home and (2) installation of a eight-foot-tall fence to be erected behind this structure. The Structure would be about 12 feet to the right of their existing home and 50 feet back from the street. This was to be connected by a breezeway, and the purpose of the structure was to enable Mrs. Stewart's elderly mother to move in and live with the Stewarts. The purpose of the fence is to ensure her mother's dog does not roam off and get lost.

This kind of structure would be the first of its kind in the neighborhood and none of the lots contain any similar building (like a guest house). In the past, the ACC has approved the construction of sheds and barns that comply with the deed restrictions, and the ACC has never approved the installation of fences that are over 6 feet tall. However, a few homes in the community do have fences that do not comply with the restrictions--Mrs. Mendoza is not sure how many there are. But she says that this happens because the ACC has been pretty relaxed (one of the members built a nonconforming fence while serving on the board). Nonetheless, after review of the plans and an on-site meeting with the Stewarts, the ACC denied the request to build the structure and install the fence. In this denial, the ACC stated the structure violates section 5C of the Canyon Gate Covenants, and the fence violates section 7A. Following this denial, Ms. Mendoza received a call from the Stewarts stating that the ACC misapplied the deed restrictions and requesting a hearing.

Section 5C states that "the maximum allowable square footage of all outbuilding shall not exceed 100 square feet per acre of a homeowner's lot." Section 7A states that "fences are limited to a maximum

height of six feet. No fence having a height greater than sex feet shall be constructed or permitted to remain in the subdivision." Additionally, the common meaning of residential building is defined as "a building which is used for residential purposes or in which people reside, dwell, or make their homes, as distinguished from one which is used for commercial or business purposes... a building is a residence if it is a place of abode." Thus, it does not have to be one's usual place of abode. On the other hand, an outbuilding is "a detached building (such as a shed or garage) within the grounds of a main building."

In *Foster*, the court stated that restrictive covenants are subject to general application of contract principles. Thus, the words of the parties and their intentions should be given effect. Here, the language of 5C favors the Stewarts since the structure they are building constitutes a residential building. While the Stewarts are not planning to live there, their family member is planning to, and 403 specifically states that restrictions cannot restrict one's use of the family home. Additionally, the structure complies with the boundary in the covenants since it would be 50 feet back from the road. Thus, it is clear that this should be treated as a residential building instead of an outbuilding.

However, section 3A does state that the living area of a residence should be a minimum of 2,800 feet. The Stewart's current house in 3,000 and in violation of that, and it is not clear by the language whether this meant to include guests house or whether that would be viewed as a separate structure. Thus, this might be a way to deny the variance; however, section 5C is not a proper justification of the denial.

The fence clearly violates the restrictive covenant; however, the Stewarts will likely argue that there has been a waiver. In *Powell*, the court stated that to demonstrate a waiver of restrictive covenants, "a party must prove that the violations then existing were so extensive and material as to reasonably lead to the conclusion that the restrictions had been waived." In determining whether there has been a waiver, the court will consider the number, nature, and severity of the existing violations. Here, Ms. Fawcett was not sure about the number of people violating the restriction regarding fences; however, the fact that a member of the ACC is in violation of the restriction tends to favor that there has been a waiver. Nonetheless, if the Board finds that there are minimal fences in violation of the restriction, a court would likely hold that there has been no waiver (See *Powell*).

2. If the board affirms the ACC's denial and the Stewart's sue the Association, what outcome is likely and what potential remedies are available.

The Court will likely find that the denial of the structure was impermissible; however, whether the court finds a waiver has occurred regarding the fence will depend on the number of violations present in the community.

The Court will likely find that this was an impermissible interpretation of the restrictive covenants based on the plain meaning of the words referenced in Ms. Fawcett's letter. In finding this, the court will likely grant a permanent injunction preventing the ACC from stopping the construction of the structure on the Stewarts' lot. Additionally, if the court finds that the denial of the application was arbitrary and capricious (assuming the Stewarts can prove this by a preponderance of the evidence), they might be more inclined to find that there was also a waiver of the restriction in regard to the fence.

Additionally, the language of 403 does not limit damages to property owners subject to restrictive covenants; thus, the court might impose damages against the ACC for violating Sections 2A and 10 of the Restrictive Covenants when they failed to approve a structure that complied with the restrictive covenants. This is because having an elderly mother live near you to take care of her is likely compelling and the structure complies with the general purposes and intent of the covenants (Section 10 of the Restrictive Covenants). These damages would be calculated by how many days the violation occurred--aka, how many days the Stewarts were unable to begin construction of the structure and fence. Note also that actual damage done is irrelevant here since these damages are not meant to compensate. (403).

If this is the outcome, the Board can appeal the action, and the court of appeals will review the finding de novo (*Mistover LLC v. Schmidt*).