October 2020 Bar Examination

ESSAY I

In October 2019, best friends Andy and Bobby decided they could make a substantial amount of money by investing in rental houses in the Atlanta metropolitan area. They had their eye on one particular property the cost of which was $150,000. They each had only $50,000 to contribute toward the purchase price and needed a third person to contribute to the purchase of the property. They approached Charlie, who agreed to join the effort and provide the remaining $50,000.

With money contributed by Bobby, Charlie and himself, Andy purchased the rental house for $150,000, placing title to the property under the name “ABC, LLC.” Andy signed the closing documents as the “managing member” of ABC, LLC.

A week or so after the closing, Andy reserved the name "ABC, LLC," a limited liability company, and filed Articles of Organization for ABC, LLC with the Georgia Secretary of State. Andy named himself agent for service of process and listed Bobby, Charlie and himself as the members of ABC, LLC. Andy did not believe an operating agreement for the LLC was needed, and thus none was adopted.

In the spring of 2020, Andy determined that improvements should be made to the rental house in order to make it more attractive to future tenants. Andy employed a contractor to renovate the kitchen and bathrooms, at a cost of $30,000. As managing member of the LLC, he assessed Bobby, Charlie and himself $10,000 each to pay for the renovations.

At this point, Charlie became unhappy with the direction the LLC was taking. He did not like having Andy make all of the decisions for the LLC; he refused to pay the $10,000 assessment for the renovations; and he demanded that he receive his original $50,000 investment back.

Charlie has come to your law firm asking for legal advice, requiring you to answer the following questions:

1. Under applicable Georgia law, was Andy authorized to take managerial actions on behalf ABC, LLC, such as signing the closing documents when the rental house was purchased and employing the contractor to renovate the house? If not Andy, who has the legal right to take such actions for the LLC? Please explain your answer.

2. Is it necessary, under Georgia law, for ABC, LLC to have adopted a written operating agreement in order to become a recognized limited liability company for state law purposes? Please explain your answer.

3. Under applicable Georgia law, is Charlie required to pay the $10,000 assessment for the renovation of the rental house? Please explain your answer.

4. Does Charlie have a legal right to withdraw from the LLC and have his original investment returned? Please explain your answer.

ESSAY II

Your firm has been engaged to represent Plaintiff, a resident of Gwinnett County, Georgia. Plaintiff was injured in a multi-vehicle collision that occurred on October 14, 2017 in DeKalb County, Georgia. At the time of the collision, Plaintiff was 16 years old. He turned 18 on July 25, 2019. Plaintiff was traveling northbound on I-85 when his vehicle was struck from behind by Donna, a resident of Cobb County, Georgia.

Within seconds of the initial collision, both vehicles were struck from behind by a vehicle pulling a horse trailer. The vehicle pulling the horse trailer was driven by Tim, owner of Dodge City Ranch, Inc. Just prior to the collision, Tim had delivered a purebred horse to a customer in Georgia. Dodge City Ranch was incorporated under the laws of the state of Delaware, with its registered agent and principal office address located in Dodge City, Kansas. It has no office or registered agent in the state of Georgia.

On October 10, 2019, your firm filed a complaint against Donna and Dodge City Ranch in the Superior Court of Cobb County, Georgia. The Cobb County Sheriff's Office made a service attempt on Donna, but she was not home. So, the sheriff's deputy served Donna's 15-year-old daughter, Katie. Katie's parents are divorced and have shared legal and physical custody of her.

In June 2020, you received supplemental interrogatory responses from Donna alleging that she suffered brake failure at the time of the collision. Just prior to the wreck, Donna had her rotors and brake pads replaced by Rowdy Rotors, a limited liability company organized under the laws of the state of Georgia with a principal office address and registered agent located in DeKalb County, Georgia.

Your managing partner has asked you to prepare a memo on the following issues applying Georgia law:

1. Was the service of process on Donna sufficient under the law? Please explain your answer fully.

2. Does the Superior Court of Cobb County, Georgia have personal jurisdiction over Dodge City Ranch? Please explain your answer fully.

3. Having received supplemental interrogatory responses from Donna in June 2020, can Plaintiff add Rowdy Rotors as a party defendant? If your answer is yes, please

explain why it can be added as a party defendant and by what procedure. If your answer is no, please explain why it cannot be added as a party defendant.

ESSAY III

Internet Sales Company ("ISC") has outgrown its software for managing a complex operation involving five fulfillment centers in which it keeps inventory and from which it pulls items for delivery ordered by its online customers. To solve this problem, Joe Smith, ISC's Vice President for Operations, contacted a company known for its warehouse management software products, Warehouse Solutions ("Solutions"). During a meeting with Tom Long, a Solutions sales engineer, Smith reviewed, in detail, the functions ISC wanted any new software to perform, as well as the other software programs used by ISC that any new warehouse software would need to support. Smith also provided a Statement of Work ("SOW") that listed the functions he had described, identified the suppliers of ISC's other software, specified that up to 2,500 ISC users would need access to the software, and requested technical support in implementing the new software and training users. The SOW also outlined the proposed implementation schedule. Long assured Smith its standard software product could handle any function listed in the SOW with virtually no need to customize it and would easily work with the other software ISC used.

After the meeting, Long emailed Smith a document titled "Implementation Proposal for Solutions Software." In the email, Long stated: "If this proposal is acceptable, ISC will pay Solutions 75% of the price within 10 business days of software delivery, with the balance of its price and the entire technical support fee due within ten business days of the 'go live' date. You should send me an ISC purchase order consistent with those terms and the proposal, and as soon as I receive it, we will make arrangements with you for delivering the software." The sole contents of the attached proposal, which made no reference to the SOW, were the following:

Deliverables and Price

(1) Solutions standard warehouse software accessible by up to 2500 users ……$550,000.00

(2) 300 hours of technical support for implementation, testing and training .....…… $60,000.00

Schedule

(1) Software delivery……..2/14/2020

(2) Implementation and trial test…..…….3/16/2020

(3) "Go live" company-wide……..…14 days after successful trial

Smith immediately sent a purchase order for the software and related implementation support, consistent with Long's proposal, to which he also attached the SOW. In a cover email, Smith asked that the new software be delivered as a downloadable application to Bob Collier, an IT technician who would manage user access to the new software. Neither the purchase order nor the attached SOW said anything about warranties or liability for damages.

On schedule, Collier received a communication from Long with instructions for downloading the software. When Collier started the download, he saw there was a lengthy "License" he was supposed to read and then click a box indicating he had agreed to its terms before he could proceed. He had seen things like that before, when he had downloaded applications for his cell phone, and he had always just checked the "accept" box so he could start downloading, as he also did for the new Solutions software. Within the License, which Collier did not read, in both bold face and substantially larger font size than the rest of the document, were disclaimers of all express and implied warranties, including any implied warranties of merchantability and fitness for a particular purpose; a limitation on the amount of recovery for any damages, whether direct or consequential, to the price paid for the license, together with an express preclusion of any claim for lost profits damages; and a "merger and integration clause" that said its terms superseded any prior communications, representations or warranties made in connection with the purchase of this software not expressly found in the License. When Collier reported to Long that he had successfully downloaded the new software, Collier never mentioned the License. Long authorized payment to Solutions in accordance with the payment schedule from Long's proposal that was included in ISC's purchase order. Only after Long made the payment to Solutions did Collier finally make Long aware that he had been required to click "accept" for the License before he had been able to download the new software.

All went well at the trial, when the new Solutions software was used to manage one of ISC's fulfillment centers. When all five centers came online on the "go live" date and the new software was interfaced with all of ISC's other software, however, the new software kept crashing, which made it impossible for ISC to send customers merchandise they had ordered and paid for online. ISC's phone system was overwhelmed with calls from irate customers, negative reviews began appearing everywhere about ISC's services, and despite 24/7 efforts by IT personnel at ISC and technical support from Solutions, no one could determine the reason the new software was not working or devise a fix. Ten days after the "go live" date, ISC re-deployed its old software, abandoned any further attempts to use the new Solutions software, and refused to make any further payment to Solutions, despite a payment demand.

ISC has asked you to evaluate the strengths and weaknesses of potential damages claims against Solutions. These include claims seeking return of the payment ISC made when it received the new software; $5.7 million of lost profits on sales that had to be cancelled when customers were unable to receive delivery when promised and orders not placed by customers who lost faith in ISC for approximately a 30-day period following the software malfunction; $250,000 in advertising costs to bring sales back to their normal level; and another $250,000 of expenses ISC incurred in overtime for IT staff trying to fix the new software and then re-install the old software.

Please answer the following questions based on the above information, applying Georgia law:

(1) What communications between ISC and Solutions are likely to be considered as part of their agreement? Is your answer any different, depending on whether Georgia's UCC Article 2 or general Georgia contract law principles govern the transaction? Explain your answers.

(2) Was there a sale of goods involved so that Article 2 of the UCC, as adopted in Georgia, governs the transaction between ISC and Solutions? Explain your answer.

(3) You anticipate Solutions will rely on the disclaimer of warranties and the merger and integration provisions in the License, as well as its limitation on damages that are recoverable. Assuming this transaction is governed by Georgia's UCC Article 2, what arguments could ISC make to avoid having these provisions affect its claims? Explain your answer.

(4) Assuming only general Georgia contract law principles apply to this transaction, what arguments could ISC make that Solutions breached a contract and ISC should recover the damages described above, even though Solutions delivered the software on the required date and provided the hours of technical support specified in its proposal and in ISC's purchase order? Explain your answer.

Multistate Performance Test Question

Klein v. State of Franklin

Read the directions beginning on the next page.
Do not break the seal until you are told to do so.

12-point version

National Conference of Bar Examiners

302 S. Bedford St., Madison, WI 53703
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Klein v. State of Franklin

FILE

LIBRARY

FILE

File 1:

Law Offices of Bunke & Huss
600 Center Street, Suite 210
Franklin City, Franklin 33113

MEMORANDUM

To: Examinee
From: George Bunke
Re: Janet Klein matter

Janet Klein met with me last week about a potential claim she has against the State of Franklin for the actions of Randall Small as a State employee, for injuries Ms. Klein suffered in a car accident at the Franklin State Fairgrounds on May 23, 2020, the Saturday of Memorial Day weekend. As you know, governmental entities and governmental employees typically cannot be sued because of sovereign (or governmental) immunity. In Franklin, the Franklin Tort Claims Act waives sovereign immunity in certain circumstances. The Franklin Tort Claims Act also provides specific notice requirements for bringing suit against a governmental entity. If the State did not receive notice within the required time frame, Ms. Klein cannot pursue a claim against the State or Mr. Small.

I would like you to prepare an objective memorandum to me analyzing two issues:

1. Is the State of Franklin protected from liability in this case by sovereign immunity?
2. Did the State of Franklin receive sufficient notice as required by the Franklin Tort Claims Act?

You should address both issues in your memorandum regardless of your conclusion as to each one. For each issue, be sure to explain your analysis, cite relevant legal authority, and state your conclusion. Do not include a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis.

Because Mr. Small is a State employee, the State of Franklin is vicariously liable for any negligence committed by Mr. Small in the scope of his employment. For purposes of your memorandum, assume that Mr. Small was negligent and acting within the scope of his employment and that if the State is found to have waived its immunity, his negligence will be imputed to the State.

File 2: **SENT BY CERTIFIED MAIL**

August 30, 2020

Janet Klein
512 Lake Ave.
Franklin City, FR 33105

Risk Management Division
State of Franklin Office Building
448 Central Ave.
Franklin City, FR 33113

To Whom It May Concern:

I am writing to give you official “notice” that I will be suing the State of Franklin for injuries I suffered in a three-car collision at the Franklin State Fairgrounds while exiting after the Hopps Rodeo. This tragic accident resulted from the State’s negligence. My car was simultaneously hit by two other cars—one car rear-ended mine and the other hit my passenger-side rear door. Because of the accident, I suffered a serious back injury and a broken wrist. My 2017 Toyota Corolla was damaged. I had to pay the $500 auto insurance deductible to have it repaired. I also missed three weeks of work due to my injuries. I am a physical therapist and could not provide full therapy services because of my back and broken wrist. I have not been able to engage in my usual activities—running errands, visiting with family, horseback riding, and participating in my kick-boxing classes—because of this incident. I have incurred $57,500 in expenses for my lost income, my medical expenses, and my auto insurance deductible. I demand to be compensated for these expenses and the pain that I suffered.

The Hopps Rodeo is the most well-attended event at the annual State Fair. This year it was on the Memorial Day weekend, making it especially popular. In fact, the rodeo was sold out! At the time of the accident, the fairgrounds had only ONE exit available. All the parking spots in the fairgrounds parking lot channeled onto a single dirt road that then funneled all the cars to this ONE exit. There should have been more lanes for traffic and more exits—especially for the rodeo. The State should have known that an accident like this was going to happen. Randall Small, the parking supervisor who runs that parking lot, is a real dingbat. Small and his employees should have opened at least one other exit after the rodeo. I attend the Hopps Rodeo every year, and the traffic after the rodeo is always total chaos. It was only a matter of time before something like this happened. Shame on you. The State is supposed to protect its citizens.

I will be hiring a lawyer soon. See you in court.

Sincerely,

Janet Klein

cc: Randall Small, Director of Parking Facilities

File 3: **STATE OF FRANKLIN TRAFFIC COLLISION REPORT**

REPORT NO. 5729
CITY: Franklin City
LOCATION: Franklin State Fairgrounds, near the NashTel Arena
DATE AND TIME: May 23, 2020, 10:58 p.m.
OFFICER ID: Police Officer Chad Silversmith, Badge #45622

PARTY 1: Janet Klein, 512 Lake Ave., Franklin City, FR 33105, 2017 Toyota Corolla
Injured? Yes, Ms. Klein complains of wrist pain
Property damage? Yes, to rear bumper, rear, and passenger side of car

PARTY 2: Roger Akin, 222 Holly St., Franklin City, FR 33113, 2010 Chevy Suburban
Injured? No
Property damage? Yes, to front driver's-side bumper

PARTY 3: Sean Grant, 210 7th St., Apt. 5, Franklin City, FR 33145, 2019 MINI Cooper
Injured? No
Property damage? Yes, to front bumper and hood of car

NOTES: I arrived approximately 10 minutes after the collision. Witnesses and parties to the collision reported the same facts. All three parties had been driving toward the fairgrounds exit. Party 1 was driving on the main gravel road toward the Lomas Boulevard exit. An unknown

driver's vehicle pulled in front of Party 1's vehicle as Party 1 was approximately 100 feet from the exit. Party 1 braked quickly to avoid rear-ending the unknown driver's vehicle. Party 2, who had been turning from a parking spot onto the main gravel road, then collided with the passenger-side rear door of Party 1's vehicle. Party 3 simultaneously collided with Party 1's vehicle directly from behind. Party 3 was driving on the main road toward the exit, directly behind Party 1, when the accident occurred. The unknown driver immediately left the scene. Witnesses reported that none of the parties were driving at an unreasonable speed. When I arrived, Party 1 was yelling expletives at Party 2 and Party 3 and gesticulating wildly. Party 1 then turned to me and yelled, "You need more than one exit here. Whoever runs this parking lot is an idiot. The State will pay for this!"

I certify under penalty of perjury under the laws of the State of Franklin that the foregoing is true.

Chad Silversmith
_____
Officer Chad Silversmith, Badge #45622
May 23, 2020

File 4:

Law Offices of Bunke & Huss
600 Center Street, Suite 210
Franklin City, Franklin 33113

MEMORANDUM

To: George Bunke
From: Ernest Thomas, investigator
Date: September 28, 2020
Re: Janet Klein matter

Per your request, I have obtained more facts about the incident at the Franklin State Fairgrounds involving Janet Klein. I will continue my investigation, but this is the information I have obtained thus far. Please note the attached email correspondence with Randy Small, the State parking supervisor who manages the parking lots at the fairgrounds.

Parking Lots at the State Fairgrounds

I visited the fairgrounds yesterday at noon to inspect the scene of the collision. There are two parking lots at the fairgrounds. Lot A is adjacent to the area where the rides, booths, and tents are erected during the State Fair. The other parking lot, Lot B, is adjacent to the NashTel Arena, where concerts and events are held. The arena has 6,000 seats.

Lot B, where the accident occurred, is a 70,000-square-foot gravel parking lot. It accommodates 5,000 vehicles. There are two possible exits from Lot B:

—**Lomas Boulevard exit:** This is a paved exit and was the only exit open on May 23, 2020, the day of the accident.

—**Central Avenue exit:** This is also a paved exit. However, this exit is barricaded by galvanized steel barriers. While heavy and substantial, these barriers are not affixed to the ground and could be moved if desired.

There is one gravel roadway through the center of Lot B that leads to the Lomas Boulevard exit. This gravel roadway also leads, at its other end, to the Central Avenue exit, which could be used by removing the barriers. To exit the parking lot, one must drive down this roadway to the Lomas Boulevard exit.

I visited the fairgrounds again last night. The NashTel Arena was hosting a country music concert, and I wanted to see if Lot B was being operated in the same manner as it had been during my daytime visit. Again there was only one exit available, the exit onto Lomas Boulevard. The exit onto Central Avenue was still barricaded.

State Parking Lot Employees

While I was there last night, I spoke to several State employees who work for the State's parking bureau at the fairgrounds and have worked during large events in the past. I first spoke to Edward "Ed" Cranston. Mr. Cranston reported that he was working in the parking lot on May 23, the night of the collision involving Janet Klein. He said he was nearby when the collision occurred, saw the collision, and remembers Janet Klein yelling. He reported that he was certain that only one exit was operational that night, and that it was the exit to Lomas Boulevard. He said that the exit to Central Avenue has been barricaded since he started working for the parking bureau two years ago. He went on to say that he has repeatedly told his supervisor, Randy Small, that the barricades should be moved so that the Central Avenue exit can be used.

I spoke to Emma Moore, who is also employed by the State parking bureau and who works as an attendant when there are big events at the NashTel Arena. Ms. Moore confirmed that the barrier blocking the exit to Central Avenue has been in place "for years." She said that she thinks that the accident was the result of her supervisor's (Randy Small's) negligent supervision of her team and the parking lot operations. She told me that numerous staff members have expressed safety concerns about having only one exit in Lot B and that she personally warned Mr. Small that this would cause an accident. Ms. Moore said that Mr. Small is a "terrible supervisor" and is "super lazy." She said that she has considered asking her coworkers to help her move the barricades blocking the Central Avenue exit, but that she knows she is not allowed to do so without her supervisor's permission.

State Ownership of the Property

I confirmed that NashTel Arena, the fairgrounds, and the surrounding parking lots are owned by the State of Franklin.

Attachment

Email correspondence between Ernest Thomas and Randy Small

To: Randall Small <randallsmall@parking.franklin.gov>
From: Ernest Thomas <ethomas@bunkehuss.com>
Date: September 27, 2020, 2:30 p.m.
Subject: Accident at Franklin State Fairgrounds

Dear Mr. Small,

I am an investigator with the Bunke & Huss law firm, which has been retained by Ms. Janet Klein. I am investigating a three-car collision that occurred in the Franklin State Fairgrounds parking lot after the Hopps Rodeo on May 23, 2020. The collision involved Ms. Janet Klein, Mr. Roger Akin, and Mr. Sean Grant. I would like to meet with you to discuss the incident. If a lawyer is representing you or the State in this matter, please inform them of my inquiry, pass this request along, and have them call me. Otherwise, let me know of your availability.

Sincerely yours,
Ernest Thomas

To: Ernest Thomas <ethomas@bunkehuss.com>
From: Randall Small <randallsmall@parking.franklin.gov>
Date: September 27, 2020, 4:15 p.m.
Subject: RE: Accident at Franklin State Fairgrounds

Mr. Thomas,

I received your email. I remember that accident and was there on-site when it happened. That lady Janet Klein was yelling at the police officer and threatening to sue the State. I received a copy of the State of Franklin Traffic Collision Report the week after the incident. Therefore, I am unwilling to meet with you unless I have a lawyer present. I operate a safe parking lot at the fairgrounds, and my employees do a good job. I have been the director of that parking lot for nine years. I know what I'm doing.

Randy Small
Director of Parking Facilities

LIBRARY

Library 1: **Excerpts from Franklin Tort Claims Act**

§ 41-1. Legislative declaration

It is the public policy of Franklin that state and local governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act.

…

§ 41-4. Granting immunity from tort liability; authorizing exceptions

Any state and local governmental entity and any public employee acting within the scope of employment are granted immunity from liability for any tort except as waived by §§ 41-5 through 41-15.

…

§ 41-6. Liability; buildings, public parks

The immunity granted pursuant to Section 41-4 is waived when bodily injury, wrongful death, or property damage is caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building or public park.

…

§ 41-16. Notice of claims

(a) Every person who claims damages from the State or any local governmental body under the Tort Claims Act shall present to the Risk Management Division for claims against the State, to the mayor of a municipality for claims against the municipality, to the superintendent of a school district for claims against the school district, to the county clerk of a county for claims against the county, or to the administrative head of any other local governmental body for claims against such local governmental body, within 90 calendar days after an occurrence giving rise to a claim for which immunity has been waived under the Tort Claims Act, a written notice stating the time, place, and circumstances of the loss or injury.

(b) No suit or action for which immunity has been waived under the Tort Claims Act shall be maintained and no court shall have jurisdiction to consider any suit or action against the State or any local governmental body unless notice has been given as required by this section, or unless the governmental entity had actual notice of the occurrence.

Library 2: **Rodriguez v. Town of Cottonwood**
Franklin Court of Appeal (2018)

The plaintiffs appeal from a summary judgment entered in favor of the Town of Cottonwood. We review to determine whether the Franklin Tort Claims Act waives sovereign immunity when a child is injured on a playground during a summer day camp conducted by a municipality.

The plaintiffs enrolled their five-year-old son, Jack, and his sister in the Town of Cottonwood's summer day camp program. The operation of the program, which was held at Blue Mound Park, called for an active on-site supervisor and three additional employees. At the time Jack was injured, neither the on-site supervisor nor any other person performing her function was present. In fact, there were only two employees with the children at the park.

On August 4, 2016, camp had ended for the day and the children were gathered at the playground waiting for their parents to pick them up. The two employees present with the children were inattentive. Jack followed other children up a slide rather than using the steps and was injured when he fell from the top as he attempted to turn around. Jack's father, Robert Rodriguez, arrived immediately after the accident and took his son to the hospital. Jack suffers from nerve damage caused by his fall from the slide.

The district court entered summary judgment in favor of the Town, finding that § 41-6 of the Tort Claims Act did not waive sovereign immunity for the Town's failure to exercise ordinary care in the supervision of children who participated in its summer day camp program. The court rejected the plaintiffs' argument that the absence of adequate supervision was a dangerous "condition" of the playground for which sovereign immunity had been waived. This appeal followed.

The issue on appeal turns on the waiver language of § 41-6, "caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building or public park." This language has been interpreted to refer only to "operation" or "maintenance" that results in a condition creating a risk of harm. In *Arthur v. Custer County* (Fr. Ct. App. 2008), we found that § 41-6 did not waive immunity for negligent performance of an employee's duties unless negligent performance of those duties resulted in a dangerous or defective condition in a public building or public park. The claim cannot be based solely on negligent supervision. While negligent supervision is a tort at common law, it is not one of the torts for which immunity is waived by § 41-6 of the Act.

The plaintiffs allege that the Town's negligence in permitting the day camp to operate with inadequate staffing constituted an unsafe condition. In support, the plaintiffs assert that Franklin courts have found the following to be unsafe, dangerous, or defective conditions: failure to properly install windows so that they would not fall out, *Williams v. Central School District* (Fr. Sup. Ct. 2008); the negligent maintenance of electrical systems on school property that was so defective it led to a fire, *Schleft v. Board of Education of Terry* (Fr. Sup. Ct. 2010); the failure to keep residents safe from roaming dogs on the common grounds of a county housing project, *Farrington v. Valley County* (Fr. Sup. Ct. 2015); and the failure to rectify a prison layout that inhibited inmate surveillance, limiting the guards' ability to monitor prisoners to prevent attacks on a prisoner, *Callaway v. Franklin Dep't of*

Corrections (Fr. Ct. App. 2011). Thus, the plaintiffs argue, the absence of supervision at the day camp constituted an "unsafe, dangerous, or defective *condition*" for which governmental immunity had been waived.

All cases cited by the plaintiffs concern instances of negligent conduct that created unsafe conditions. In the case at bar, however, the playground was a safe area for children, and the slide was safely built and in sound condition. Rather, it was the negligent supervision of the campers by the camp employees and not the condition of the premises that resulted in Jack's injury. Therefore, sovereign immunity had not been waived under § 41-6, and summary judgment in favor of the Town on the plaintiffs' tort claim was appropriate.

Affirmed.

Library 3:

Farrington v. Valley County
Franklin Supreme Court (2015)

This case concerns the waiver of immunity under § 41-6 of the Franklin Tort Claims Act. At issue is whether the "maintenance of any building" includes keeping the grounds of a public housing project safe from unreasonable risk of harm to its residents and invitees. The trial court dismissed all named defendants under the immunity granted by the Tort Claims Act, and the court of appeal affirmed. In this appeal, Farrington requests that we review only the dismissal of the cause of action against defendant Valley County Housing Authority, the governmental agency authorized by Valley County to operate County-owned and publicly funded housing within the County.

The facts are as follows. On October 23, 2013, three-year-old Daniel Farrington was severely bitten by a dog roaming the grounds of the Valley Vista Housing Project, a residential complex owned by Valley County and operated by the Valley County Housing Authority. Daniel was in the care of his aunt, a resident of Valley Vista.

Heather Farrington, Daniel's mother, sued the defendants on Daniel's behalf for their alleged failure to keep the premises of Valley Vista safe and for their alleged failure to enforce the County's animal-control ordinances. The trial court dismissed the complaint against all defendants for failure to state a claim upon which relief could be granted (commonly known as Rule 12(B)(6)). The court of appeal affirmed, holding that the applicable statute, § 41-6, did not contemplate that the "maintenance of any building" included keeping the grounds safe from roaming dogs or requiring enforcement of animal-control ordinances. Without any specific regard to animal-control statutes, we find that § 41-6 does contemplate waiver of immunity where, due to the alleged negligence of public employees, an injury arises from an unsafe, dangerous, or defective condition on property owned and operated by the government. For that reason, we reverse.

The complaint alleges that the Housing Authority was aware or should have been aware of the continuing problem of roaming dogs and the resulting danger this condition posed for the common areas of Valley Vista, which the Housing Authority had the duty to maintain in a safe condition.

The Housing Authority claims that it is immune from suit pursuant to the Franklin Tort Claims Act and that dismissal under Rule 12(B)(6) is proper. It argues that the Act does not apply to grounds, only to buildings and parks. It also contends that there was no waiver of immunity under § 41-6 because the failure to control loose dogs bears no relationship to the maintenance of a public building or park and that the child's injuries were not caused by a defect in a public building or park. Moreover, the Housing Authority maintains that Daniel's injury did not arise from a defective condition existing upon the land of the housing project.

A plain reading of § 41-6 convinces us that the Franklin Legislature intended to ensure the safety of the general public by imposing on public employees a duty to exercise reasonable care in maintaining premises owned and operated by governmental entities. The legislature included both buildings and parks within the waiver provision ("while acting within the scope of their duties in the operation or maintenance of any building or public park"). Thus, we discern no intent to exclude from that waiver liability for injuries arising from defective or dangerous conditions on the property surrounding a public building. We therefore conclude that the Tort Claims Act waives immunity for unsafe conditions in buildings *or on the grounds surrounding the buildings*. The common grounds upon which the County-owned and -operated Valley Vista Housing Project is situated fall within the definition of "building" under § 41-6.

This case rests upon whether dogs roaming the common grounds of a government-operated residential complex could represent an unsafe condition. Given the potential safety risks to Valley Vista residents and invitees, we find that under these circumstances, loose-running dogs could represent an unsafe condition upon the land.

The complaint alleges that the Housing Authority knew of the unsafe condition represented by dogs running loose within the project. As landlord, the Housing Authority has a duty to safely maintain those areas expressly reserved for the use in common of the tenants. Whether the Housing Authority exercised reasonable care in maintaining the common grounds of Valley Vista under the circumstances would depend on what it knew or should have known about loose dogs in the common areas, whether those dogs should have been foreseen as a threat to the safety of the residents and invitees, and the means available to the Housing Authority to control the presence of those dogs. We hold that the complaint sufficiently alleges facts that state a claim upon which relief could be granted.

Reversed and remanded.

Matthew Beck sued the City of Poplar to recover damages for personal injuries received in a car accident. The district court granted summary judgment to the City on the ground that Beck had failed to comply with the notice requirement of the Tort Claims Act § 41-16. The court of appeal reversed. On appeal we consider whether the City traffic department's receipt of an accident report in this case is "actual notice" under the Act.

The court of appeal reasoned that if the City traffic department is the governmental agency responsible for overseeing the safety of intersections, then notice of the occurrence to that department in the form of the accident report constitutes actual notice to the City. The court's holding and instructions were based on our statement in *Ferguson* that subsection 41-16(b) means that "the *particular agency that caused the alleged harm* must have actual notice before written notice is not required." *Ferguson v. State of Franklin* (Fr. Sup. Ct. 2010) (emphasis added).

Subsection 41-16(a) clearly states the legislature's intent that the governmental entity that is the subject of a claim must be given *written notice* of the alleged tort. Subsection 41-16(b) creates an exception to this requirement where the governmental entity allegedly at fault had *actual notice* of the tort. The purpose of subsections 41-16(a) and (b) is "to ensure that the agency allegedly at fault is notified that *it may be subject to a lawsuit.*" *Id.* (emphasis added).

Under some circumstances, a police or other report could serve as actual notice under § 41-16(b). But that occurs only where the report contains information that puts the governmental entity allegedly at fault on notice that *there is a claim against it.* The statute contemplates that the governmental entity must be given notice of a likelihood that litigation may ensue, in order to reasonably alert it to the necessity of investigating the merits of a potential claim against it.

In *Solomon v. State of Franklin* (Fr. Sup. Ct. 2012), we held that notice, whether given under § 41-16(a) or by actual notice, must be given within 90 calendar days of the occurrence. In *Solomon*, the plaintiff provided actual notice. In that case, in a phone call with an official of the State Parks Commission made within 90 calendar days of the decedents' deaths, the plaintiff described the facts related to the decedents' deaths and told the official that he had hired a lawyer to start legal proceedings against the State.

We have reviewed the report pertaining to the accident involving Matthew Beck. The report listed only the date, time, and location of the accident, identifying information about Mr. Beck and the city driver, and the fact that Beck suffered minor injury. There is nothing in the report that could be construed as informing or notifying the City traffic department that it may be subject to a lawsuit. Nor is there evidence that the City was notified in any other manner that legal proceedings would be initiated.

The court of appeal is reversed, and the trial court's grant of summary judgment in favor of the City is upheld.