February 2020

New York State
Bar Examination

MEE & MPT Questions

MEE QUESTION 1

A homeowner entered into two separate contracts with a contractor for the renovation of her kitchen and the remodeling of her bathroom. The homeowner has refused to pay the contractor on both contracts because of dissatisfaction with his work.

Under the kitchen contract, the contractor had agreed to renovate the homeowner's kitchen for $50,000, payable in installments. The final installment of $8,000 was due 10 days after completion of the project. The kitchen contract called for repainting the cabinets, installing new appliances bought by the homeowner from a third party, and replacing the flooring in the kitchen with linoleum, which is a floor covering made from natural materials. When the contract was negotiated, the contractor had asked the homeowner why she wanted "such old-fashioned flooring instead of more modern resilient flooring like vinyl." The homeowner had responded, "We are a green household, and it is very important to us to use linoleum, which is a green product, unlike vinyl. Moreover, I grew up in a house with a linoleum floor in the kitchen, and I really want to be reminded of my youth when I walk into the kitchen."

Despite the clear contract language, the contractor installed vinyl flooring in the kitchen. The vinyl flooring looks similar to the contractually required linoleum but is not as durable. Before the final payment was due, the homeowner discovered that the flooring was vinyl rather than linoleum and confronted the contractor. The contractor stated, "I knew that you wanted linoleum, but that's a crazy idea. Vinyl was a lot easier for my workers to install, and it looks as good as linoleum. So I made an executive decision to go with vinyl." The homeowner announced that she would not make the last installment payment unless the contractor removed the vinyl flooring and replaced it with linoleum. Removing the vinyl flooring and replacing it with linoleum would be labor-intensive and would cost the contractor approximately $10,000. The market value of the house, however, would be the same whether the kitchen had vinyl flooring such as that installed by the contractor or linoleum flooring as called for in the contract.

Under the bathroom contract, the contractor had agreed to remodel the homeowner's bathroom for $25,000. The contract called for the existing bathtub to remain along one wall and a new vanity (cabinet and sink) to be installed along the opposite wall. The contract called for a 30-inch space between the vanity and the bathtub (so that a person could easily walk between them).

After the contractor said he was finished, the homeowner measured the space between the vanity and the bathtub and discovered that it was only 29 inches. The homeowner then announced that she would not pay the last installment of the contract price ($10,000), which was due upon completion of the remodeling, unless the contractor "did something" to make the

space at least 30 inches wide. The only way to make the space at least 30 inches wide would be to remove either the vanity or the bathtub and to obtain and install a smaller custom-made model. This would cost the contractor about $7,500. The market value of the house with only a 29-inch space between the vanity and the bathtub, however, would be $500 less than with a 30-inch space.

The homeowner had selected the contractor because of the contractor's reputation for high-quality installation. In both contracts, the price was based mostly on labor costs because the cost of materials and fixtures was relatively small.

Assuming that the contractor will do nothing to address the homeowner's concerns:

1. How much more, if anything, is the homeowner required to pay the contractor under the kitchen contract? Explain.

2. How much more, if anything, is the homeowner required to pay the contractor under the bathroom contract? Explain.

MEE QUESTION 2

Ten years ago, a woman and her husband purchased a one-story commercial building in a city in State A "as joint tenants with right of survivorship and not as tenants in common." They had a "commuter marriage." The husband lived in an apartment in State A. The woman, who worked for an international corporation, lived in a rented apartment overseas. They met one weekend each month.

Three years ago, the husband borrowed $150,000 from a friend and granted the friend a mortgage on the commercial building to secure repayment of the loan. The husband used the $150,000 to purchase a yacht. The certificate of title for the yacht was issued in his name alone.

Two years ago, the husband leased the building to a commercial tenant for a 10-year period at an annual rent of $9,000, "payable in equal monthly installments solely to" the husband.

The woman did not know about either of these transactions, and she did not join in the mortgage or the lease.

Last year, following the husband's unexpected death, the woman first learned of the mortgage and the lease.

State A applies the title theory of mortgages, and its courts strictly apply the common law four-unities test. State A does not recognize tenancies by the entirety.

1. Did the husband's execution of the mortgage sever the joint tenancy? Explain.

2. Assuming that the execution of the mortgage did not sever the joint tenancy:

   (a) Did the husband's execution of the lease sever the joint tenancy? Explain.

   (b) Assuming further that the lease severed the joint tenancy, then upon the husband's death, what rights, if any, does the tenant have in the building? Explain.

3. Assuming that neither the mortgage nor the lease severed the joint tenancy:

   (a) During the spouses' lifetimes, was the woman entitled to half of the rental income payable to her husband under the lease? Explain.

   (b) At the husband's death, what rights, if any, do the woman and the tenant have in the building? Explain.

MEE QUESTION 3

During a snowstorm, a woman and a man were driving in opposite directions on a state highway when their cars collided head-on in the middle of the road. At the moment of impact, the locking mechanism on the woman's seat belt malfunctioned, and the woman was thrown from her car and seriously injured.

The woman was transported from the scene of the accident in an ambulance owned and operated by AmCo, a private ambulance company. On the way to the hospital, the ambulance driver lost control of the ambulance, which skidded off the highway, causing further injury to the woman and exacerbating the injuries she had suffered in the original accident.

Six months later, the woman filed a tort action in federal district court against the man, AmCo, and CarCo, the manufacturer of the woman's car. The complaint alleges that each defendant is liable for all or part of the woman's injuries. In particular, the complaint alleges that the man caused the original accident by swerving across the median of the highway, that AmCo's driver was driving too fast for the weather and road conditions, and that CarCo is liable because the seat belt in the woman's car was defectively manufactured. The woman's complaint properly invoked the court's diversity jurisdiction, and each defendant was properly served with process. Each defendant filed an answer to the complaint and denied liability.

Seven days after it served its answer, CarCo served a summons and complaint on LockCo, the company that manufactured and supplied the seat belt locking mechanism that CarCo installed in the woman's car. CarCo seeks to join LockCo as a party to the woman's action, alleging that LockCo must indemnify CarCo if the seat belt locking mechanism is found to have been defective and CarCo is held liable to the woman.

1. Under the Federal Rules of Civil Procedure, did the woman properly join the man, AmCo, and CarCo as defendants in a single action? Explain.

2. Under the Federal Rules of Civil Procedure, did CarCo properly join LockCo as a party to the woman's action against CarCo? Explain.

MEE QUESTION 4

On February 1, Construction Company borrowed $500,000 from Bank. Construction Company's president, on behalf of the company, contemporaneously signed and delivered to Bank a security agreement that included the following language:

> To secure the repayment obligation of Construction Company to Bank, Construction Company hereby grants Bank a security interest in all rights of Construction Company to be paid with respect to any contract for the construction or repair of bridges or roads, whether such right exists now or arises in the future.

On March 1, Construction Company entered into a contract with a developer to build roads for a housing development. The contract required the developer to pay $450,000 to Construction Company upon completion of the road-building project.

On September 1, Construction Company defaulted on its obligations to Bank under the loan and the security agreement. Bank immediately sent a letter to the developer. The letter, which was signed on behalf of Bank by its president, read as follows: "In accordance with a security interest granted to us by Construction Company, all payments under your contract with Construction Company should be made to us at [address of Bank]."

This letter was received by the developer on September 3.

On October 1, Construction Company completed its project for the developer and sent an invoice to the developer demanding payment. The developer's treasurer decided to pay Construction Company, and not Bank, because the developer had a contract with Construction Company but not with Bank. The developer's treasurer promptly sent a check for $450,000 to Construction Company, which deposited the check and used the proceeds to pay its employees and subcontractors.

A few days later, when Bank learned that Construction Company had completed the road-building project, Bank sent an email to the developer demanding that the developer pay Bank the $450,000 contract price. Attached to the email was a copy of the security agreement signed by Construction Company and a copy of Bank's September 1 letter to the developer directing it to make all contract payments to Bank. The developer responded that it had already paid Construction Company and was therefore discharged from its payment obligation under the road-building contract. The developer also stated that the security agreement executed on February 1 could not have encumbered Construction Company's right to be paid under the road-building contract because that contract did not exist until March 1.

1. Did Bank have a security interest in Construction Company's right to be paid $450,000 by the developer for the road-building project? Explain.

2. Was the developer discharged from its payment obligation under the road-building contract by virtue of its having paid Construction Company? Explain.

MEE QUESTION 5

Linda owned and operated a clothing store as a sole proprietorship. To increase sales, she decided to offer a same-day delivery service to local customers. Rather than hiring an employee to make deliveries, she decided to use a driver who was an independent contractor to

make deliveries on an as-needed basis. Because she did not know anyone who could do this work, she searched a website that listed local delivery drivers.

The website included the drivers' names, their hourly rates, and customer reviews of their work. A driver on the list with the lowest hourly rate by a wide margin used his own delivery van for making deliveries. But 40 recent customer reviews of this driver on a scale of 1 (low) to 5 (high) rated him as 1.5, citing specific instances of misbehavior, untrustworthiness, and bad driving. The website also reported that in the last couple of years, the driver had been sued three times for negligent driving and had been found liable in each case. Nonetheless, Linda decided to use this driver to make deliveries because of his inexpensive hourly rate and because he had his own delivery van.

When she hired the driver, Linda told him that, when making deliveries for the store, he would have to place self-sticking, removable signs advertising the store on both sides of his delivery van. He agreed, but because such signs ranged in price from $100 to $500 per pair, he told Linda that she would have to purchase them for him to use. Because she was too busy to do that, Linda asked him to purchase the signs but not to spend more than $300 for the pair when doing so. Linda gave the driver one of the store's cards, and as a means of identifying the driver as acting for the store, she wrote on the back, "This is my agent to purchase signs for my store."

The driver then went to a local sign shop, showed the shop owner the business card that Linda had given him (including her handwritten note on the back), and purchased a pair of custom-made signs for $450 on credit. Because the signs were custom-made, they were not returnable or refundable. When the completed signs were delivered to Linda, she refused to take possession of them or pay the sign shop for them because their cost exceeded the amount she had told the driver to spend by $150. The driver then made two smaller signs with the store name on them and, with Linda's approval, put them on his van when making deliveries.

Three weeks ago, Linda called a customer and told her, "My driver is on his way to make a delivery to you in a van with the store's name on its side." The customer kept watch at her window, and when she saw the van with the store's signs on it, she went out to the driveway through her garage. As she started to walk toward the van, the driver negligently hit the accelerator pedal, causing the van to hit the customer, who sustained substantial injuries.

Assume that there was an enforceable contract to buy the signs from the sign shop, that the driver's negligence proximately caused the customer's injuries, and that the driver was acting as Linda's independent-contractor agent.

1. Is Linda liable to the sign shop for the purchase price of the signs? Explain.

2. Is the driver liable to the sign shop for the purchase price of the signs? Explain.

3. Even though the driver was an independent contractor, is Linda vicariously liable to the customer for the injuries resulting from the driver's negligence? Explain.

4. Is Linda directly liable to the customer for the injuries the customer sustained? Explain.

MEE QUESTION 6

A man and a woman were waiting in line at a public park for tickets to attend an outdoor performance of a play. They soon began arguing about sports, and as their conversation became more animated, the man began shouting at the woman and poking her shoulder with his finger. As the man poked harder and harder, the woman responded by punching the man in the nose.

The woman was arrested at the scene and charged with battery.

At trial, the prosecutor intends to elicit the following testimony from an eyewitness who was standing in the line:

> Before the man arrived, I saw the woman talking to a friend. The friend said to the woman, "You and I have waited so long for these tickets, if anyone annoys us today they will not be seeing this play—they'll be going to the hospital!" The woman nodded her head and gave the friend a thumbs-up signal.
>
> I recognized the woman. I live in her neighborhood, and I probably see her at least twice a week. Every time I see her, she is arguing with people, acting out, and generally causing problems.

Assuming that the eyewitness is permitted to testify for the prosecution, defense counsel plans to

> (1) cross-examine the eyewitness about her five-year-old conviction for shoplifting, a crime punishable by a maximum sentence of six months in jail; and

(2) cross-examine the eyewitness about a letter recently written by the eyewitness to the man saying, "Thanks for 10 years of a great friendship."

The jurisdiction's rules governing crimes and affirmative defenses follow common law principles. The evidence rules of the jurisdiction are identical to the Federal Rules of Evidence.

The woman's friend is unavailable and will not testify at trial.

1. Assuming that the prosecution proves the elements of battery, can the woman establish a common law affirmative defense based on these facts? Explain.

2. What portions of the eyewitness's testimony, if any, would be admissible? Explain.

3. What portions, if any, of the defense counsel's cross-examination should the court permit? Explain.

Do not discuss any constitutional issues.

MPT 1 – *Downey v. Achilles Medical Device Company*

The examinee's law firm, Betts & Flores, represents Achilles Medical Device Company (AMDC) in a products liability action alleging that AMDC negligently manufactured and sold defective walkers. There are currently five named plaintiffs; the trial court has yet to rule on the plaintiffs' motion for class certification. The examinee's task involves a professional responsibility issue regarding contacts with represented persons. An investigator employed by the plaintiffs' lawyers wants to question one former AMDC employee and four current employees about the facts surrounding the Downey litigation. The investigator has not asked for permission from AMDC's counsel to do so. The examinee must address whether this investigator can speak to AMDC's current and former employees without the advance permission or presence of Betts & Flores. Second, the examinee is to analyze whether Betts & Flores attorneys can speak to current or prospective members of the plaintiffs' proposed class without the prior permission of plaintiffs' counsel. The File contains the instructional memorandum from the supervising partner, a file memorandum describing the client's concerns, and a file memorandum that summarizes the interviews of the AMDC employees. The Library contains excerpts from the Franklin Rules of Professional Conduct (identical to

the ABA Model Rules of Professional Conduct), an ethics opinion from the Franklin Board of Professional Conduct, and one Franklin Court of Appeal case.

MPT 2 – *In re Eli Doran*

This performance test requires examinees to draft the written closing argument in support of two consolidated petitions: one to annul a marriage and one to set aside a will. The examinee's law firm represents Carol Richards, the niece and recently appointed legal guardian of Eli Doran, Carol's elderly uncle. For about two years, Eli, who has dementia, has been living in an assisted living facility operated by Paula Daws. A few months ago, Carol learned that Paula had secretly married Eli and then, almost nine months later, had prepared a will for Eli that left his entire estate to her. Although a court has determined that Eli is now legally incompetent, that determination does not address whether Eli had the capacity to consent to marry in January 2019 or whether he had testamentary capacity when he signed the will later that year. The examinee's task is to prepare a written closing argument persuading the court that the Doran-Daws marriage should be annulled based on Eli's lack of capacity to consent to marry and that the will should be set aside based on his lack of testamentary capacity at the time it was executed. The File contains the instructional memorandum, the office guidelines for drafting written closing arguments, and excerpts of the hearing testimony of Carol Richards, Paula Daws, and other witnesses. The Library contains two Franklin appellate cases, one discussing the legal capacity to consent to marry and one addressing the standard for testamentary capacity.

February 2020

New York State
Bar Examination

Sample Essay Answers

FEBRUARY 2020 NEW YORK STATE BAR EXAMINATION

SAMPLE ESSAY ANSWERS

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

ANSWER TO MEE 1

The first issue to be considered is whether the kitchen contract and the bathroom contract should be regarded as non-sale of goods contract (which would be governed by common law) or whether it would be governed by Article 2 of the UCC given that it apparently involves goods to be provided (such as appliances, flooring, cabinet).

Most Courts would consider this issue using the dominant purpose test. Here, apparently, the main purpose that the homeowner entered the contract is to obtain services (i.e. renovation service and decorating service etc.). The dominant purpose appears to be service related, and accordingly the common law should govern, especially in light of the fact that we are told that the homeowner had selected the contractor because of the contractor's reputation, and the price of the materials and fixtures was relatively small.

In determining this issue, some Court would divide the contract into two different elements (i.e. one for sale of goods and the other for services, to be governed by different rules), but it remains not to be the common approach.

Question 1

Assuming that common law governs the contract, the next issue here to be considered is whether the homeowner remains liable to pay the final installment (which is stated to be payable 10 days after completion of the project) given the breach.

In determining this issue, the Court would normally consider whether there is substantial performance by the contractor and whether the breach is material. If it is a material breach, the Court may find that the homeowner is not required to perform his further obligation on his part.

When assessing whether a breach is material, the Court in the past has considered factors such as how serious is the breach, the extent of breach, whether damages would be adequate remedy, whether any remedial work can be done, the loss suffered, whether the breach is intentional or willful etc.

In the present case, the facts show that the contractor willfully and intentionally chose to disobey the homeowner's instruction to replace the floor with linoleum. Instead, the contractor expressly said that he thought that it was a crazy idea and went with vinyl instead. The facts also reveal that removing the vinyl flooring and replacing it with linoleum would be labor-intensive and would cost the contractor approximately $10,000, which is more than the final outstanding installment of $8,000. The facts also suggest that the vinyl is not as durable. These factors tend to suggest that the breach committed is material.

On the other hand, the facts suggest that vinyl flooring looks similar to linoleum and the market value of the house would be the same whether the kitchen had vinyl flooring or linoleum. These factors suggest that the breach committed might not be that material.

On balance, given the express requirement of the homeowner (given the discussion between the contractor and the homeowner explaining that it is very important to use the linoleum because the homeowner has a green household and he grew up in a house with a linoleum floor in the kitchen which gave him additional benefit) and the willfulness of the breach by the contractor, the Court may well consider that the breach is material and the project has not been "completed", and the homeowner to be excused from paying the final installment.

For completeness, there were some Court decisions which suggest that the Court would prefer not to have economic waste, i.e. if there is no material difference in the product /service provided, it would not require the contractor to remedy the product or service to conform to the contractual provisions. However, there is an exception, namely that the specific requirement has special value to the homeowner. Here, as mentioned above, the specific requirement of vinyl has special values due to he has a green household and childhood memory. Accordingly, it is likely that the Court would not require the homeowner to pay any further amount, especially in light of the fact that the cost of repair ($10,000) would be higher than the final installment of $8,000.

Question 2

Similar to question 1, the issue is whether there is substantial performance by the contractor and whether the homeowner would be excused from paying the last installment of $10,000.

The variance in this contract is that the space between the vanity and the bathtub constructed is 29 inches instead of 30 inches as provided for in the contract.

In assessing the materiality of the breach, the Court would likely consider the purpose behind. Here, it is for a person to easily walk between them. It would appear that the difference between a 29-inch and 30-inch space is minimal, and a person could pass through them similarly. The Court would also consider that to remedy the situation, it would require substantial work to remove either the vanity or the bathtub and cost the contractor about $7,500, and that the market value difference is just $500.

On balance, it is likely that the Court would find the breach to be not material, and that there was substantial performance, such that the homeowner would be required to pay the final installment of $10,000, less any damages suffered (which based on the facts given is $500). Unless the homeowner can show any other losses, he would be required to pay $9,500 to the contractor.

ANSWER TO MEE 1

1. The homeowner does not need to pay anything more to the contractor under the kitchen counter. The issue is whether the contractor's installation of a vinyl floor instead of a linoleum floor was a major breach in the contract. A contract for the performance of services is governed by the common law of contracts. This contract for renovation of the homeowner's house is a service contract therefore common law governs. Under the common law a person who owes performance to another does not have to provide perfect performance but must provide substantial performance. This means that the person who is owed services must get the substantial benefit of her bargain. A person's performance under the contract will be excused when the person on the other side commits a major breach of contract. She can stop the contract immediately and sue for damages. When there is a minor breach, the nonbreaching party must still perform under the contract and then can sue for damages. Whether a breach is minor or material is a fact intensive question and involves looking at a variety of factors such as the diminution in value the breach caused, the nonbreaching party's specific expectations, and the willfulness of the breach. Usually, when there is a willful breach, the substantial performance doctrine does not apply and a person can sue immediately as if it were a material breach. The builder seems to have complied with repainting the cabinets and installing new appliances. Here, the homeowner entered into an installment contract with the builder for repainting cabinets, installing new appliances and replacing the floor. Despite his compliance with those requirements the court will likely find this to be a material breach. However, there was clear contract language that required the linoleum floor. The homeowner specifically told the builder why she wanted a linoleum floor, because her house was a green house and it reminded her of childhood. Therefore the builder had specific knowledge of the homeowner's wishes. Moreover, he went expressly against her wishes when installing the vinyl floor and tried to disguise it and pass it off as linoleum. He told her that he thought it was a crazy idea and that vinyl was easier to install and that he made an executive decision. This is a willful breach of the contract because he knowingly installed the floor without telling her on purpose. The fact that the market value would be the same with a vinyl floor or a linoleum floor weighs against finding this to be a material breach. However, to counter that, the vinyl floor is slightly less durable than the linoleum floor. Accordingly the court will likely find this to be a material breach. Therefore the homeowner need not pay the rest of the installment owed and can sue for damages on the contract. The contractor may be able to submit a quasi-contract theory to get the value of the benefit conferred on the homeowner for the floor; however this is unlikely because he will fully committed a material breach.

2. The homeowner must pay the contractor the entire $25,000 for the bathroom contract. The issue here is whether the contractor's failure to put a 30 inch space between the vanity and bathtub, and putting only a 29 inch space instead, constitutes a major or minor breach of the contract. As discussed above this contract is governed by the common law of contracts. The same theory of substantial performance applies to the bathroom

contract. A nonbreaching party's performance will be excused for a major breach and she can sue immediately. However, if there is a minor breach of contract the nonbreaching party must tender her performance and then can sue for any damages that are a result of the breach. The court uses the same factors to determine whether a breach is major or minor as listed above. Here, the breach was much less severe. The contractor was supposed to make a 30-inch gap so that a person could walk through between the vanity and bathtub. The contractor did not follow this specification, as the gap was only 29 inches. Despite this error, the contractor otherwise substantially performed. The contractor provided the new vanity and put it in to almost follow the contract specifications. There are no facts to indicate that this minor one inch breach substantially affects the value of the bathroom or house, as it seems to be only a $500 difference. Moreover, it would cost the contractor a substantial sum to remedy the breach, almost $7,500. Because this is a minor breach, the homeowner must tender her performance and pay the contractor the final installment of $10,000. She can then sue for damages. Her damages would likely be the difference in the value as promised and the value as conferred. There is a $500 difference between the value of the house with the one inch less gap than without. Therefore her damages would be $500. Accordingly, in the meantime, the homeowner must tender her entire $25,000 performance to the contractor.

ANSWER TO MEE 2

1. The issue is whether the mortgage severs the joint tenancy in the state that follows the title theory of mortgages.

At common law, the "joint tenancy with the right of survivorship" requires the so-called for unities: (i) unity of possession, (ii) unity of interest, (iii) unity of transfer and (iv) the unity of title. In states that follow the title theory of mortgages, granting of a mortgage is treated as the transfer of the title to the property in question from the mortgagor to the mortgagee (unlike as in states that follow the lien theory where the mortgage is treated as a lien only).

Here, the husband granted the friend a mortgage on the commercial building that he owned with his wife as joint tenants with the right of survivorship. As granting of the mortgage transferred the husband's title to the property to the mortgagee (i.e. the friend), the four unities were destroyed--there was no unities of title and transfer.

For this reason, the husband's execution of mortgage severed the joint tenancy.

2. (a) The issue is whether the execution of the lease severs the joint tenancy.

As noted above, the "joint tenancy with the right of survivorship" requires the so-called for unities: (i) unity of possession, (ii) unity of interest, (iii) unity of transfer and (iv) the unity of title. Execution of a lease on the property owned in joint tenancy does not destroy any of such unities.

When the husband executed the lease, the husband did not transfer his interest to the commercial tenant. The husband only entered into a contractual relation with the commercial tenant and created a leasehold interest in the property in question (such leasehold interest was held by the commercial tenant). As noted above, since no unity was destroyed by such action, the execution of the lease did not sever the joint tenancy.

2. (b) The issue is whether the leasehold continues after the death of the landlord.

As a general rule, a tenancy in years (that is a tenancy that is entered into for a specific period of time) does not terminate upon the death of the landlord. The landlord's estate will be still bound by the terms of the lease. Simply put, a tenant has to pay his rent to a new landlord who will be obliged to honor the obligations of the previous landlord. This case would be different if there would be a different kind of a tenancy (e.g. a tenancy at will).

Here, the husband entered into a tenancy-in-years contract with the tenant (i.e. this was a lease for period of 10 years, with the annual rent of $9,000--the fact that the rent was payable in monthly installments does not mean that this was a periodic tenancy). For this reason, upon the husband's death, the commercial tenant will have a leasehold rights that will be valid against the new landlord (i.e. the husband's estate, because the joint tenancy was severed).

3. (a) The issue is whether joint tenants are entitled to the rental income generated by the property they own.

As a general rule, tenants in common and joint tenants are entitled to the rental income that the property they own generate.

For this reason, during the spouses' lifetimes, the woman was entitled to half of the rental income because, as they owned the commercial building as joint tenants, their shares must have been equal (i.e. each spouse owned 50% of the building) and the woman would be entitled to such 50% of the rental income.

3. (b) The issue is what rights the woman and the tenant have in the building.

The key feature of the joint tenancy with the right of survivorship is that, upon one joint tenant's death, such joint tenant's interest automatically passes to the second (living) joint tenant (and not to the deceased joint tenant's estate, e.g. through intestate succession).

Thus, as the woman and the husband were joint tenants with the right of survivorship, upon the husband's death, his interest (50% of the property) was automatically transferred to the woman. The woman, as a result of such transfer, would own the entire building (i.e. 100% of the property).

As noted above, the tenant had a binding agreement with the husband. However, because upon the husband's death the entire property would be owned by the woman (with whom the tenant did not have any agreement), the lease would be terminated. The tenant would not have any rights in the building. The tenant would have, however, a breach of contract action against the husband's estate (for the breach of the lease agreement) and, most likely, the tenant would be able to recover damages. He would not have any rights in the property.

ANSWER TO MEE 2

1. Severance of the joint tenancy by the husband's execution of the mortgage

The husband's execution of the mortgage terminated the joint tenancy. The issue is whether the execution of a mortgage in a state that follows the title theory of mortgages severs a joint tenancy.

A joint tenancy with rights of survivorship is a special type of co-tenancy, where one co-tenant acquires the other's interest on their death. It is created under common law when the four unities are present, time, title, interest and possession. This requires the same interest to be created by the same instrument at the same time with an interest to possess the whole. It requires special words specifically referring to the right of survivorship to be created and a general transfer to two people will instead be treated as a tenancy in common. A tenancy by the entirety is another special type of co-tenancy that exists between husband and wife when they hold property together and that cannot be mortgaged or transferred without the consent of both parties.

State A does not recognize tenancy by the entirety and so it does not need to be considered here. The husband and woman expressly purchased as joint tenant with rights

of survivorship and therefore a joint tenancy rather than a mere tenancy in common was created.

A joint tenancy with rights of survivorship can be terminated by an inter vivos transfer by one party. In a state that follows the title theory of mortgages, the granting of a mortgage terminates a joint tenancy and creates a tenancy in common. The right of survivorship is terminated. In a lien theory state, the grant of mortgage will not sever the joint tenancy and a severance will only occur on enforcement.

As State A applies the title theory of mortgages, the husband's execution of the mortgage severed the joint tenancy.

2. (a) Severance of the joint tenancy by the husband's execution of the lease

Assuming that the execution of the mortgage did not sever the joint tenancy, the entry into the lease also would not have. The issue is whether entry into a lease by one party to a joint tenancy with payments "solely" to that party severs a joint tenancy.

Generally entry into a lease is not considered to be a transfer of an interest such that it causes a severance of a joint tenancy. The impact is similar to the effects of the grant of a mortgage in a lien theory jurisdiction. However, the lease can only attach to the interest that the granting joint tenant has and therefore it is subject to be terminated by the operation of the right of survivorship on the joint tenant's death.

Here, the husband entered a lease without the woman's knowledge or consent and provided that all rights to payment were solely to him. Despite this breaching the rights of the woman as joint tenant as noted below, it would not have caused severance of the joint tenancy. However, the tenant was subject to have his rights terminated by operation of the right of survivorship as noted below.

(b) Tenant's rights in the building

Assuming that the lease severed the joint tenancy, the tenant had a lease of the one half interest owned by the husband's estate on his death. The issue is what interest a tenant has when he has a lease from a tenant in common on that person's death.

On the death of a tenant in common, his interest will pass through his will or by intestacy, rather than through operation of the right of survivorship. The heirs will take subject to any interests created in the property.

Here, the husband had granted a lease prior to his death. Assuming that this severed the joint tenancy, the husband held his one half interest as a tenant in common. On his death,

this would pass to his estate through his will or through intestacy and his heirs would take subject to the tenant's interest in the premises. Those heirs would be his landlord.

Therefore, the tenant would retain his tenancy in the premises.

3. (a) Woman's entitlement to half of the rental income payable to her husband under the lease

Assuming that neither the mortgage nor the lease severed the joint tenancy, the woman is entitled to half of the rental income payable to the husband under the lease.

Joint tenants have an equal interest to possess the whole. While this does not require one joint tenant to pay the other rent while the other is not using their interest in the absence of ouster, it does require that they account for rents received from third parties.

As joint tenants have equal interest and there were two joint tenants, each had an undivided one half interest in the property. Here, the woman was not using the commercial building as she worked overseas. This did not result from the man's ouster as it was part of her job and therefore he would not be required to pay rent for use of the land. However, he was required to apportion rent received from the tenant and provide the woman half of that interest during their lives.

(b) Woman's and tenant's rights in the building on the husband's death

Assuming the neither the mortgage nor the lease severed the joint tenancy, the woman acquired title to the entire premises on the husband's death through the right of survivorship and the tenant lost his interest in the land. The issues are the rights of a tenant of a joint tenant to which the other joint tenant has no knowledge.

Where one joint tenant enters a lease that the other is not aware of, this does not sever the joint tenancy. However, the lease is only of the joint tenant's one half interest and is subject to the right of survivorship. This means that on the landlord joint tenant's death, the other joint tenant takes the interest in the whole of the land free of the lease and the tenant no longer has any interest.

Here, the wife only learnt of the lease after her husband's death. Assuming that neither the mortgage nor the lease severed the joint tenancy, the woman had acquired the entire fee simple interest in the premises at that point through the right of survivorship. Thus, the tenant's interest had been terminated.

ANSWER TO MEE 3

1. Woman's joinder of man, AmCo, and CarCo as defendants

Provided that there is proper jurisdiction for each claim, a plaintiff can join claims against different defendants as long as the claims arise out of the same transaction or occurrence and raise a common issue of law or fact.

Here, the facts provide that the woman's complaint properly invoked the court's diversity jurisdiction. The claims against the man and CarCo certainly arise out of the same occurrence - - the accident during the snowstorm in which the man's car collided with the woman's and the woman was thrown from her car due to a seatbelt malfunction. It is less clear that the claim against AmCo arises out of the same transaction of the other two. The woman is only seeking to hold AmCo liable for conduct that happened slightly later, when she was transported from the scene of the accident in their ambulance, at which point the ambulance driver lost control and skidded off the highway, causing additional injuries. The defendants may argue that this could not qualify as the same occurrence for joinder purposes because the alleged negligence happened after the other accident was already over, and the woman suffered separate injuries than those she suffered in the original accident. It's unclear the lapse of time between the first and second accident, but a court would probably find that these events arise out of a sufficiently similar occurrence to be joined. The only reason the ambulance was there was because of the accident with the man and the failure of the CarCo seatbelt, which likely happened only a short time before because it was a snowstorm and this was a serious accident that occurred on a highway. Plus, there will be common issues of facts and law between all of the claims, because the woman may have to apportion which defendant is responsible for which injury and which injuries occurred at which time, which is relevant to all claims, as well as basic matters such as her overall health before the accident.

Thus, because all of the claims arise out of the same transaction or occurrence and share similar issues of law and fact, the woman properly joined the three defendants in one lawsuit.

2. CarCo's joinder of LockCo as a party

The Federal Rules of Civil Procedure provide for third party practice or impleader. This allows for a party denying liability (usually a defendant) to bring in another person to the case as a third- party defendant, by claiming that *if* the third-party plaintiff is found liable in the original action, the third-party defendant must pay for some (contribute) or all (indemnify) the damages owed by the third-party's plaintiffs. A person or entity can be joined as a third-party defendant within fourteen days of the answer, and must be served the summons and complaint on the new party. They need not independently meet the

rules of diversity jurisdiction, as they necessarily meet the requirements of supplemental jurisdiction by arising out of the same transaction or occurrence as the original claim.

Here, CarCo has attempted to implead LockCo, or join LockCo as a third-party defendant, claiming that LockCo must indemnify CarCo if the seat belt locking mechanism is found defective and CarCo is found liable. This states a property third-party practice claim. The only issue is whether CarCo served the summons and complaint on LockCo in a timely fashion. Because the rule provides that a third party defendant can be joined within 14 days of the answer, and CarCo filed the third party complaint seven days after the answer, the joinder was proper under the FRCP.

Thus, CarCo properly impleaded LockCo.

ANSWER TO MEE 3

1. Joinder of man, AmCo and CarCo as defendants in a single action

Joinder of man, AmCo and CarCo as defendants in a single action was proper under the Federal Rules of Civil Procedure. The issue is the circumstances in which parties may be permissively joined.

Under the Federal Rules of Civil Procedure, parties may be permissively joined to an action and a plaintiff may be permitted to bring an action against more than one defendant where the actions arise out of a single transaction and occurrence and there are common questions of fact and law.

Here, the actions against the man, AmCo and CarCo all arise out of a single occurrence that is the accident that occurred when the woman and man were driving on a state highway during a snowstorm and the subsequent treatment that occurred. While there was a separate accident that occurred while the woman was being transported by AmCo and that is what her claim against them relies on, this should be considered to be one continuing transaction or occurrence as the man's liability may extend to that accident under the doctrine of causation. Further, there are common questions of fact and law involved, namely what injuries the woman has suffered as a result of the accident and the contributory negligence and liability of each defendant as joint tortfeasors for those damages. Further, it is clear here, that joining the parties did not destroy diversity of citizenship jurisdiction as the facts assert that the woman properly invoked the court's diversity jurisdiction.

Therefore, it was proper for the woman to have joined the man, AmCo and CarCo as defendants in a single action under the Federal Rules of Civil Procedure.

2. Joinder of LockCo as a party to woman's action against CarCo

CarCo's joinder of LockCo was proper under the Federal Rules of Civil Procedure. The issue is whether the rules permit a defendant to implead a third party seeking contribution or indemnity.

Under the Federal Rules of Civil Procedure, a defendant may properly join a third party as party to an action where they claim contribution or indemnity. This requires that the defendant claim that the impleaded party is responsible for some or all of the liability that the defendant may be held to owe to the plaintiff in the action.

Here, CarCo is claiming that if it is liable to the woman due to the defectively manufactured seatbelt, then LockCo as the manufacturer and supplier of the seatbelt locking mechanism should be required to indemnify them of contribute to the recovery. This is proper invocation of third party joinder under the Federal Rules of Civil Procedure.

ANSWER TO MEE 4

1a. The issue is whether Bank had a security interest that attached to Construction Company's right to be paid by the developer.

In order for a secured party to have an enforceable right in collateral, the security interest must attach to the collateral. Attachment occurs when (1) the secured party provides value, (2) the debtor has rights in the collateral, and (3) the debtor authenticates a security agreement describing the collateral, or the secured party has possession or control of the collateral pursuant to the security agreement.

Here, Bank (as secured party) gave a loan of $500,000 to Construction Company (thus providing value), Construction Company had an interest in its rights to be paid with respect to construction contracts, and Construction Company's president, on behalf of Construction Company, signed a security agreement that described the collateral as "all right of Construction Company to be paid with respect to any contract for the construction or repair of bridges or road, whether such right now exists or arises in the future." Therefore, Bank's security interest attached.

1b. The issue is whether a security interest in after-acquired accounts is enforceable against future account debtors.

Accounts are intangible collateral that consist of the right to payment for goods sold, services provided, or licenses granted. A security agreement can include collateral that the debtor currently has rights to, as well as collateral that is acquired in the future by the debtor, called an after-acquired collateral class. An after-acquired collateral clause is generally enforceable for collateral acquired in the future, with the exception of an after-acquired collateral clause for consumer goods (in which case the clause is only valid if the debtor receives possession of the consumer goods within 10 days after the secured party gives value).

Here, Bank acquired a security interest in Construction Company's accounts. Construction Company has a right to be paid for the services it renders under contracts for the construction or repair of bridges and roads, and the security agreement described these rights to be paid as the collateral. Additionally, the security agreement contained an after-acquired collateral clause because it described the collateral as including rights to payment that arise in the future. When Construction Company contracted with the developer to build roads, developer became an account debtor, who owed Construction Company money for the services provided. This contract was entered into on March 1, which is after the security interest of Bank in Construction Company's accounts attached (on February 1). However, under the after-acquired collateral clause, this account was included in the security agreement. Therefore, Bank had a security interest in Construction Company's right to be paid $450,000 by the developer.

2. The issue is whether an account debtor is discharged from its obligation under an account/contract when it pays the debtor after receiving notice that the debtor had defaulted on a security agreement in such accounts.

When a secured party has an attached interest in accounts, and the debtor defaults on the security agreement, the secured party may notify the account debtors (those who owe under the accounts) and demand that the account debtors pay the secured party rather than the debtor. When an account debtor receives such notice, they are generally required to pay the money owed to the secured party instead of the debtor. However, an account debtor may request further verification of the assignment of the right to payment from the secured party prior to paying.

Here, Construction Company defaulted on its security agreement with Bank. Bank then sent a letter to Developer, signed by Bank's president, which stated that Bank had a security interest, granted by Construction Company, in payments owed by the developer to Construction Company under their contract. The letter requested that all such payments be made to Bank instead. This letter was received on September 3rd. Developer then paid Construction Company, not Bank, after the project was completed on October

1st. Then a few days later, Bank sent an email which demanded payment and included a copy of the signed security agreement between Bank and Construction Company.

The developer had the right to request further assurances/verification of the assignment to Bank of the right to payment under their contract with Construction Company on September 3rd. The letter they received did not provide enough verification that Bank was properly assigned this right to payment. However, the developer did not do so. Instead, they paid Construction Company after the project was complete. Bank's email constituted sufficient verification (because it included the signed security agreement), but the developer had already paid Construction Company the $450,000. Because the developer never requested further assurances or verification of the assignment of their contract payments to Bank, they had an obligation to pay Bank. Therefore, the developer was not discharged from its payment obligations. But, the developer may recover any payments made to Bank from Construction Company because Construction Company defaulted on their security agreement with Bank and accepted payment and deposited such payment (and spent it) from the developer, despite knowledge of the obligation to Bank.

ANSWER TO MEE 4

(1) Bank's security interest in the road-building project: Bank had a security interest in Construction Company's right to be paid $450,000 by the developer for the road-building project. At issue is whether a secured party may use an after-acquired property clause to obtain a security interest in future collateral.

UCC Article 9 is fundamentally about a secured party's rights in collateral as against the debtor and as against third parties. In order to secure its rights against the debtor, a secured party's interest must attach to the collateral. Attachment occurs when: (i) there is an intent to create security interest (usually evidenced by a security agreement in writing but also by possession or control of the collateral); (ii) the debtor receives rights in the collateral; and (iii) the secured party gives value. When attachment occurs using a written security agreement, the security agreement must evidence an intent to create a security interest, be authenticated (e.g., signed) by the debtor, and describe the collateral. Here, with respect to the writing there is intent to create a security interest as evidenced by the language in the agreement granting Bank a security interest, the facts state that the Company's president signed the security agreement and lastly, the agreement describes the collateral fairly specifically. In security agreements, collateral must be described either using plain language or using the UCC Article 9 enumerated categories of tangible or intangible goods. Here, the security agreement uses plain language and describes the

contracts that might arise in the future. Thus, the requirements for a valid security agreement are met and furthermore, the debtor received rights in the collateral (i.e., the right to payment from the contracts) and the creditor gave value in the form of $500,000.

However, the next issue is whether the Bank can obtain a security agreement in collateral that the debtor doesn't yet have possession of. Many times security agreements will contain after- acquired property clauses (which are largely acceptable) whereby the secured party takes a security interest in collateral that the debtor takes possession of later and, immediately upon debtor's gaining possession of that collateral, the secured party's interest attaches. A new security agreement is not necessary. Here, the Bank has taken a security interest in after- acquired accounts. Accounts are intangible goods which evidence a right to receive payment for prior rendered goods or services. Therefore, when the Company later acquired possession of its account from the developer (i.e., the Company's right to be paid for the road development), the Bank's interest attached and the bank had a valid security interest in that account. Thus, the Bank did in fact have a security interest in the Construction Company's right to be paid $450,000 by the developer.

Notably, in order to establish the Bank's priority against third parties who may also have security interests in the same collateral, it must perfect its security interest. Perfection can occur in a number of ways such as by filing a financing statement, taking possession or control of the collateral, filing a notice of lien on the certificate of title or, in some cases, perfection can occur automatically such as with purchase money security interests in consumer goods. However, in this case, perfection is not at issue because the Bank is only seeking to enforce its rights in the collateral as against the developer (discussed below) rather than seeking to establish a higher priority over other secured creditors.

(2) Developer's duty to the Bank: Developer was not discharged from its payment obligation under the road-building contract by paying Construction Company. At issue is whether an account-debtor is required to pay the secured party with an interest in the account when it has notice of such security interest.

When a party has an enforceable security interest in an account, such as the Bank in this case does for the reasons discussed in Section (1), it may enforce that right against the account- debtor (i.e., the person owing the debtor to the secured party). Here, the developer is an account-debtor to the Construction Company because the Construction Company has completed the road-building project contracted for. Therefore, the Construction Company has an account receivable for the services it rendered to the developer and the developer is obligated to pay the Construction Company. However, as stated above, when a secured party has an enforceable security interest in an account, the secured party may send notice of its security interest in the account and demand that payment be made to it rather than to the original debtor. In such a case, the account-debtor must pay the secured party the amount it owes and can only discharge its

obligation by doing so. Therefore, when the developer failed to pay the Bank and instead paid the Construction Company, the developer did not discharge its duty to the Bank because it had notice of the Bank's security interest by virtue of the Bank's September 1 letter.

ANSWER TO MEE 5

1. The issue is whether Linda is a party to the sign-purchasing contract.

An agent relationship is created by an agreement between the agent and the principal, where the agent will act under the control and direction of the principal.

In acting on behalf of the principal, the agent can act with actual authority or apparent authority. Actual authority is either expressly granted by the principal or by implication of the principal's conducts. Apparent authority is where a third party has reason to believe that the agent is acting on behalf of the principal and that the agent has the authority to act on behalf of the principal.

In an agent-principal relationship, the agent may enter into binding contracts with a third party. However, whether the principal is also a party to the contract depends on whether the principal was disclosed. If the Principal was undisclosed, then the agent is personally on the contract. If the principal's identity is not disclosed but a third party knows that the agent was acting on behalf of someone, the both the principal and the agent are on the contract. If the principal's identity is disclosed, then only the principal is on the contract with the third party.

Here, the driver was acting as Linda's agent, because Linda asked the driver to purchase a pair of the sticky-sign. Linda also wrote on the store card "this is my agent to purchase signs for my stores." The store card clearly identified Linda's identity and her agent-principal relationship with the driver.

Thus, when the driver gave the store card to the shop owner, the shop owner knows the identity of Linda, as well as driver was acting on behalf of Linda. When the principal is disclosed, the principal is a party to the contract.

Linda may argue that the driver exceeded his actual authority - Linda only authorized him to buy sticky signs less than $300. By entering into a contract that exceeded that price, the driver acted outside of the scope of his authority.

Nevertheless, the driver is still acting with apparent authority. The store card clearly held the driver out as Linda's agent. The shop owner is justified and is reasonable to think that the driver has the authority to act on Linda's behalf. Linda has to honor the contract.

Accordingly, Linda is personally liable for the contract with the shop owner and must pay for the purchase price of the sign.

2. The issue is whether the driver is personally liable to the sign shop for the purchase price of the sign.

As analyzed earlier, an agent entering into the contract when the principal is fully disclosed is not a party to the contract.

Thus, because the shop owner clearly learned the identity of Linda from Linda's store card, and the shop owner knows that the driver was acting on behalf of Linda, only Linda is a party to the contract. The driver is not personally liable on the contract between Linda and the sign shop owner.

However, as analyzed before, the driver exceeded the scope of his actual authority when he made a purchase that exceeded $300. He might be liable to Linda for the extra $150.

3. The issue is whether Linda is vicariously liable for the driver's negligence act.

To be vicariously liable on a respondeat superior theory, the principal and the agent must have a relationship akin to an employer-employee relationship where the agent is subject to the control of the principal. An employer is vicariously liable for any negligence by the employee if the employee was acting within the scope of his employment. A principal may be vicariously liable for conduct done by an independent contract if the duty is nondelegable, or if the independent contractor is performing an inherently dangerous activity.

Here, Linda only hired the driver because she did not want to hire an employee. She used the driver as an independent contractor who makes deliveries for her on an as-needed basis.

There is not a lot of information on the actual relationship between Linda and driver.

Assuming the driver is an independent contractor, the driver is not subject to Linda's control when making deliveries. If this is the case, then Linda is not vicariously liable for the customer's injuries, as making deliveries is not an inherently dangerous activity, and there is no non- delegable duty on Linda's part. The driver would be personally liable for the customer's injuries.

The customer can argue, however, that the driver is an agent of Linda that has apparent authority, because the driver's van carries Linda's store's signs, and a reasonable third party would think that the driver is acting on behalf of Linda and is Linda's employee.

However, respondeat superior requires actual control of the agent/employee by the principal/employer. Without further information as to the actual relationship between Linda and driver, the driver is probably only an independent contractor, as the parties intended.

Thus, Linda is not vicariously liable for the customer's injury.

4. The issue is whether Linda is negligent in hiring the driver.

To prove negligence, we need to prove duty, breach, causation, and injury.

Duty & Breach

A shop owner in making hiring decision is held to the standard of that of a reasonable shop owner.

Here, that duty includes making prudent hiring decisions as a reasonable shop owner. Linda knew the driver was inadequate from the website. First, the driver's rate was the lowest by a wide margin - that alone should put a reasonable shop owner on notice. Further, the driver only has a 1.5/5 rating by 40 recent customers, citing to specific instances of misbehavior, untrustworthiness, and bad driving. The website also shows that the driver had been sued three times for negligent driving and had been found liable in each case.

When reading these ratings, a reasonable shop owner would not hire this driver, as the record clearly indicates that the driver would have significant risk for misbehaving and driving negligently. However, Linda hired him to save money.

Linda's hiring decision failed to conform to the conduct of a reasonable shop owner, and she breached her duty.

Causation

The breach of duty must be both an actual cause and a proximate cause of the injury. Actual cause is, but for the breach, the injury would not have occurred. Proximate cause is the injury is a foreseeable result of the breach.

Here, but-for the hiring of the driver, the customer would not have been injured. There is actual cause. Further, the customer was injured because the driver negligently stepped on

the gas pedal - which is foreseeable when Linda decides to hire the driver with a known history of negligent driving. Thus, there is also proximate cause.

Injury

The customer sustained substantial injury as a result of being hit by the van.

Because we can prove duty, breach, causation, and injury, Linda is directly liable for the customer's injury for negligently hiring the driver.

ANSWER TO MEE 5

1. At issue is whether Linda is liable to the sign shop for the purchase price of the signs by virtue of her agent having apparent authority to enter into such contracts on her behalf.

A principal-agent relationship is created where (1) an agent and principal both assent to (2) the agent to act on behalf of and for the benefit of a principal and (3) under the principal's control. Here Linda sought to hire a driver as an independent contractor to make deliveries for her business. Linda and the driver both assented to the relationship where the driver would, on behalf of Linda as the sole proprietor of her clothing store, make deliveries to customers for the benefit of Linda as the clothing store owner. They assented that the driver would be subject to Linda's control in terms of when and where to make deliveries and to drive with signs on the van advertising Linda's store. Therefore, Linda and the driver had a principal-agent relationship in which Linda was the principal and driver as the agent.

A principal is liable for the contracts entered into by an agent on such principal's behalf where the agent acted with actual or apparent authority. Actual authority is authority to enter into contracts granted to the agent either by express grant of authority from the principal (express actual authority) or implicitly if it is reasonably necessary to performs the tasks asked or required of the agent for the principal (implicit actual authority). Here, Linda explicitly told the driver not to pay more than $300 for the signs. The driver therefore had no actual authority to enter into a contract of more than $300 for the purchase of the signs, neither implicit or explicit as it directly contradicted what Linda told the driver.

Apparent authority exists where the principal's manifestations to a third party leads the third party to reasonably believe that the agent had authority to bind the principal. Here, Linda sent the driver to purchase signs advertising her store. She gave the driver a

business card and wrote that the driver is her agent for the purpose of purchasing signs for her store. She told the driver to give this card to the local sign shop. This is a direct manifestation from Linda to the sign shop that the driver has authority to enter into contracts to purchase signs on her behalf. Because Linda made such a manifestation to the sign shop by providing the driver with this card, and because such a manifestation would reasonably lead the sign shop to believe that the driver had authority to enter into the contract to purchase signs for Linda, the driver had apparent authority in this act. Because the driver had apparent authority, Linda as the principal is bound to the contract he has entered into as her agent with the sign shop and is liable for the full purchase price of the signs.

2. At issue is whether an agent with apparent authority is liable to a third party with which he contracted for on behalf of the principal

Where an agent discloses the identity of the principal and acts with either actual or apparent authority in entering into a contract with such third party, the contract binds only the principal. The agent is not liable to contracts entered into on behalf of the principal with authority. Here, as described above, the driver, the agent, had apparent authority to enter into the contract for the signs on behalf of Linda, the principal. The contract was not entered into for the benefit of the agent and strictly for the benefit and on behalf of the principal. The agent was therefore not a party to the contract. The principal was disclosed. The driver gave the business card with Linda's name on it to the store and the signs themselves had the name of the store. Because the driver had apparent authority as Linda's agent and Linda was disclosed to be the principal, the driver, the agent, is not liable under the contract notwithstanding the fact that he lacked actual authority.

It should be noted that while the driver is not liable to the sign shop, he may be liable to indemnify Linda under the theory that he has breached his fiduciary duties to her by violating her express instruction not to spend more than $300. However, the sign shop cannot hold the driver liable directly and must hold Linda liable, who in turn may be able to sue the driver.

3. At issue is whether Linda is vicariously liable to the customer for the negligence of the driver, her independent contractor

A principal employer is vicariously liable for negligence torts of his agent employee where such tort was committed in the course of employment. A principal's liability as to torts committed by its independent contractor, however, is much narrower. Ordinarily, a principal may only be held liable for the negligence of his independent contractor where the injury was the result of a nondelegable duty, such as the duty of a landowner to an invitee, or the result of an inherently dangerous activity. Driving is not considered an inherently dangerous activity. Therefore, because the facts stipulate that the driver is

Linda's independent contractor and not employee, under the ordinary rules she would not be vicariously liable for his negligence.

That being said, under these facts a court may find it equitable to impose the doctrine of estoppel and impose liability on Linda, notwithstanding the independent contractor limitation. Estoppel is granted where an unjust outcome will arise and the principal held out the agent as her employee, to the extent that others would reasonable believe the agent is an employee. Here, the facts suggest that estoppel may be warranted. First, Linda had the driver put signs on his van advertising her store. A reasonable person seeing a van with such signs would assume that the driver is an employee rather than an independent contractor. Second, Linda referred to the driver as "My driver" and noted that he drives around "in a van with the store's name on its side." This can be construed as a holding out of the agent as an employee rather than an independent contractor. It would seem unjust to allow Linda to have the driver drive around town in a van with signs advertising her store, referring to him as "my driver" and limit her liability to his negligence because he is only an independent contractor. Because Linda held out the driver as her employee to the extent where reasonable people would understand the driver to be her employee and an unjust outcome may result, the Linda may be held vicariously liable for the negligence of the driver based on the doctrine of estoppel, notwithstanding the driver being only an independent contract rather than an actual employee.

4. At issue is whether Linda's negligence caused the customer injuries and would therefore be liable

While a principal's vicarious liability with regard to actions of such principal's independent contractor are limited, a principal can still be held liable for her own negligent actions, including negligent hiring or negligent entrustment.

Negligence requires a showing that one had a (1) duty and (2) breached such duty, thereby (3) actually and proximately causing (4) damages. Under the Cardozo approach, only foreseeable plaintiffs have a duty, while under the Andrews approach all those who are injured as a result of an act are owed a duty. Most jurisdictions follow the Cardozo approach. Here, the customer is a foreseeable plaintiff. It is foreseeable that a customer would be injured from negligent driving where the negligent driver drives in such person's proximity. Once a duty is established, a person must act a reasonable prudent person would under similar circumstances or is otherwise said to have breached the duty. Here, Linda owed the customer a duty. Namely, she had a duty to hire a reasonably experienced and safe driver. Instead, she hired someone who had a rating of 1.5 out of 40 reviews and who was specifically said to have been a bad driver. In fact, Linda knew the driver had been sued and found liable for negligent driving three times. A reasonably prudent person would not hire a driver based on such reviews in the course of one's business. Because Linda did hire this person, she breached her duty to the customer. Furthermore, the injury as the actual and proximate cause of the negligent hiring of the

driver. Actual cause exists where the injury would not have occurred but-for the breach. The customer would not have been injured but-for Linda's hiring of the negligent driver. Proximate cause requires the injury to be in the realm of things that are probable and normal occurrences of the breach. A person getting hit by a car is the probable and normal outcome of hiring a bad driver. Therefore, both actual and proximate cause are met. Lastly, the customer suffered damages. Therefore, all elements of negligence are met. Linda can be found directly liable to the customer for negligent hiring. Linda and the driver may be found to be jointly and severally liable for the injuries to the customer. Linda is therefore directly liable to the customer for injuries the customer sustained.

ANSWER TO MEE 6

1. Woman's ability to establish common law affirmative defense to battery

At common law, the defense of self-defense will act as justification for what would otherwise be an offense if the defendant reasonably believes force is necessary to protect herself from physical harm by the victim. The defense is usually not available to one who is an initial aggressor in an interaction. Some jurisdictions also require that the defendant retreat if possible before resorting to self-defense, though for non-deadly force (and in many states, even deadly force) the majority follow the true man doctrine of permitting the defendant to use self-defense without retreating.

In this case, the man and woman had been arguing about sports when the man starting poking his finger at her shoulder. Although the parties were previously exchanging words, this was the first use of force in the interaction, so the woman probably wouldn't be considered the initial aggressor. The woman may have reasonably believed that some force was necessary to prevent the man from continuing to poke her "harder and harder," though it's unclear if a punch in the face was necessary. That said, it may be reasonable non-deadly force depending on how hard the man was poking her. It also will matter whether or not the woman actually sincerely believed such force was necessary, though the facts do not indicate her motives. She also likely has no duty to retreat under the common law, as noted above.

Thus, the woman has a potentially meritorious defense of self-defense, assuming the punch was reasonable force to prevent herself from being continually poked by the man.

2. Admissibility of eyewitness testimony

Testimony about woman and friend's conversation

Relevance

Testimony is relevant if it is logically and legally relevant. Logical relevance is the tendency to make a fact of consequence to the matter any more or less true. Legal relevance is when evidence's relevance is not substantially outweighed by its unfair prejudice.

Here, the testimony about the conversation is logically relevant because it makes it more likely that the friend and woman were in a fighting mood and willing to cause harm if anyone "annoyed" them. It is probably legally relevant because although it places the woman and friend in a bad light, it does not cause unfair inferences on account of past criminal activity or inflaming the passions of the jury.

Thus, the evidence is relevant.

Hearsay

Hearsay evidence is an out-of-court statement admitted for the truth of the matter asserted, and is generally inadmissible.

Here, the eyewitness plans to testify about a conversation between the friend and the woman. The friend makes several statements, including that they might send people "to the hospital" if anyone annoys them today. This would likely be admitted for its truth - namely, that they had been waiting for a long time and would potentially beat up anyone that bothered them. As for the woman's response, she nodded her head and gave the friend a thumbs-up, which while nonverbal would count as assertive conduct because it communicates an idea.

Thus, this conversation contains hearsay that would ordinarily be inadmissible

Hearsay Exemptions: Statement of a Party Opponent

Under the FRE, an out-of-court statement is not hearsay if it was made by a party opponent. This can include adoptive admissions, which occur when another person makes a statement and the party opponent signals that they adopt the statement as their own.

In this case, the woman nodded and gave her friend a thumbs up after the friend make the comment about sending people to the hospital. These two actions combined seem to signal that the woman agreed with the friend's statement, which could potentially make both the woman's assertive actions and the friend's statement a party opponent admission under the hearsay exemption. The defendant may argue that her nodding along politely

does not mean that she adopted the statement, but given her simultaneous thumbs up, this is unlikely.

Thus, the conversation could be admissible as a statement of a party opponent.

Testimony about woman's behavior in the neighborhood

Relevance

See rule above. The testimony is logically relevant because it shows that the woman has a tendency to pick fights with people around her neighborhood and "cause problems". But it might not be legally relevant because it would cause the fact finder to make unfair inferences about her current conduct based on her past conduct, and is not necessarily that probative. That said, the rule against character evidence is probably a stronger ground for exclusion of this evidence.

Character evidence

Evidence of character is generally inadmissible unless it forms an element of the cause of action (i.e., custody cases) or falls under one of the limited exceptions. In other words, evidence past character generally is not usable to show that the person acted in conformity with that character trait on this occasion. In a criminal case, a defendant may assert their own character that is inconsistent with the offense charged, and then the prosecution may attack it; but the prosecution cannot attack the defendant's character in the first instance.

Here, the prosecution plans to elicit testimony regarding how the woman acts in her neighborhood. There is no indication that the woman has put her character at issue, though this could be a problem if the woman raises self-defense and asserts that the victim was the one with the defective character. However, as the case currently stands the prosecutor has brought up evidence of character impermissibly.

Thus, this part of the testimony should be rejected.

<u>3. Propriety of defense counsel's cross-examination</u>

Cross-examination about shoplifting

One exception to the rule barring character evidence is when it comes to impeachment, including impeachable offenses. A party may impeach a witness with evidence of their past criminal conduct if the offense either involves an element of lying or is a felony (punishable by one year or more); subject to particular balancing tests that may be different that FRE 403.

Here, the eyewitness's shoplifting offense was only punishable by six months in jail, and would thus not constitute a felony under the FRE. Shoplifting is also not an offense that includes an element of lying or deceit.

Thus, the defense is not permitted to cross-examine the witness about this conviction.

Cross-examination about letter

A witness may also be impeached through examination or evidence relating to the witness's potential bias in favor of the opposing side. This can be proved with specific instances of conduct.

Here, the letter indicates that the eyewitness knows the victim, and in fact has had a 10-year long friendship with the victim. This certainly could constitute grounds for bias because it gives the witness a reason to potentially lie during testimony or interpret the facts more favorably to the victim. Such evidence of bias is a proper ground for impeachment.

Thus, the defense may cross-examine the witness about the letter.

ANSWER TO MEE 6

1. Self-Defense

The issue here is whether the woman can successfully establish the common law affirmative defense of self-defense.

Generally speaking, when a person is faced with another person exerting force against their person, they may exercise force in order to prevent the further exercise of force. The exercise of force may not be proper if the amount of force necessary is not reasonably proportionate to the amount of force already exerted against them or threatened against them. Moreover, if faced with ordinary force, a person may not respond with deadly force. Furthermore, the defense is not available if the defendant was the initial aggressor in the interaction. However, even an initial aggressor may be entitled to act in self-defense if they withdraw from the confrontation and communicate that withdrawal. At common law, there is no duty to retreat before acting in self-defense.

Here, the woman would likely want to pursue the common law defense of self-defense because it would negate the charge of battery. Battery is an unlawful contact with the

person of another. Self-defense directly attacks the unlawfulness portion of that element. Here, the interaction between the man and the woman began as an argument about sports. Eventually, it became more animated and the man started shouting at the woman and poking her shoulder more and more intensely. Under these facts, it does not appear that the woman was the initial aggressor in this situation and in fact the man was. Therefore, she could invoke the defense of self-defense. This poking by the man constitutes a use of ordinary force against the woman. Rather than doing it once, he did it repeatedly and made it harder and harder. Based on this repetitious conduct, the woman responded by punching the man in the nose. Certainly the woman would be entitled to act in self-defense to prevent the man from poking her further. However, it does not appear that the level of force the man exerted against the woman was reasonably proportionate to the force the man used against the woman. A reasonable and proportionate use of force would require that there would likely be if the woman shoved the man away from her. Instead, she escalated the level of force and punched him in the nose. By no circumstances does poking someone warrant punching them in the nose, even if it is still using ordinary force and is in the attempt to stop an unlawful contact.

Accordingly, the woman will not be able to establish the affirmative defense of self-defense.

2. Eyewitness Testimony

a) Testimony About the Woman's Conversation

Relevance

The issue here is whether the woman's testimony is admissible.

Generally speaking, to be admissible, all evidence must be relevant. Evidence is relevant if it tends to make a factor more or less probable and that fact is of consequence in determining the action.

Here, the woman's testimony about what she heard the woman say to a friend is relevant. The witness will testify that she saw the woman talking with a friend and indicated that the woman's friend and mentioned that if anyone annoys them, they would not see the play because "they'll be going to the hospital." After the woman's friend made this statement, the witness' testimony indicates that the woman nodded her head and gave the friend a thumbs up. This evidence is relevant because it could speak to the woman's intent to commit a battery as the man was annoying her by poking her. Furthermore, if the woman invoked the affirmative defense of self-defense, it would support the notion that she was not acting out of self-defense and may have been the initial aggressor after all.

Accordingly, this testimony is relevant.

Hearsay

The issue here is whether these statements, although relevant, are inadmissible hearsay. Hearsay is an out of court statement offered for the truth of the matter asserted. A statement includes written and spoken words as well as conduct intended as an assertion. Absent an exclusion from the hearsay rule or an exception, the statement is inadmissible under the federal rules of evidence. One such exclusion from the rule is statements made by a party opponent.

Here, there are two hearsay statements at issue. The first is the friend's oral statement regarding people annoying them. The truth of this statement is that the woman and her friend waited so long for these tickets that if anyone annoyed them, they would not be seeing the play. Instead they would be going to the hospital. While this statement could potentially be offered for its truth, it could also potentially be offered for the effect on the listener. The prosecution may seek to offer this statement as it rationally relates to the woman's decision to put a thumbs up and nod her head. However, while this use may be possible, the prosecution likely intends to offer it specifically for its truth. However, a defendant may adopt the hearsay statement of another and make it their own. If the defendant does in fact do so, then that statement constitutes the defendant's own statement which means that the friend's absence from court is inconsequential. Immediately after, the woman began nodding her head and giving a thumbs up. This could likely indicate that the defendant adopted the woman's statement as her own. Which brings upon a discussion of the other hearsay statement, the nodding and thumbs up. Here this statement would constitute assertive conduct. The nodding of the head and the thumbs up clearly indicate the woman was agreeing with what her friend was saying. Therefore, that would constitute conduct intended as an assertion. Since it is in fact the defendant who did that conduct, then it would be excluded from the hearsay rule as an admission of a party opponent.

Accordingly, because these statements are both relevant and constitute admissions of a party opponent, this portion of the testimony is permissible.

b) Opinion Testimony

The issue here is whether the woman's statements about her knowledge of the woman from the neighborhood constitutes improper character evidence.

Generally speaking, character evidence is inadmissible to show conduct in conformity with that character trait. This is known as propensity evidence. However, if character evidence serves another non propensity purpose, then it may be admissible. Generally speaking, the prosecution may only offer character evidence on a defendant's pertinent

trait if the defendant places their character in issue. If they provide a witness to do so, they may only make that inquiry via opinion or reputation evidence.

Here, the witness will testify that she knows the woman from the neighborhood and that every time she sees her, "she is arguing with people, acting out, and generally causing problems." While this evidence is certainly relevant as to whether she committed a battery. This is nevertheless improper character evidence. Firstly, there is no indication that the woman has placed her character in issue. Even if the woman were to raise self-defense as a defense, this evidence would be relevant as it would speak to her tendency to not be violent or whatever trait may be asserted, it would still be improper because it constitutes neither opinion or reputation testimony. Accordingly, in the absence of a claim of self-defense, this testimony is inadmissible and even if character was at issue, it would be in the improper form.

3. Cross Examination

Shoplifting Conviction

The issue here is whether it is proper for the defense counsel to cross examine the eyewitness about her conviction for shoplifting.

Generally speaking, a witness may be impeached in a variety of different ways such as by prior inconsistent statement or even by a criminal conviction. Under the federal rules, all felony convictions committed within the last 10 years are inherently admissible. A felony is a crime punishable by one year or more in jail. However, even if not a felony, the conviction may come in anyway if it is a crime of dishonesty such as fraud.

Here, the defense attorney wants to ask the witness about their conviction for shoplifting. The shoplifting charge was punishable by a maximum sentence of up to six months in jail. Thus, because it was not punishable by more than a year in jail, the defense attorney cannot attack the witness' credibility on the charge absent a showing that it is for a crime of dishonesty. Even if the defense attorney would try to attempt that shoplifting is a crime of dishonesty, they likely would not be successful because shoplifting although a theft crime without paying is not a crime of dishonesty. Consequentially, defense counsel cannot question about this conviction.

Letter

The issue here is whether the defense attorney can impeach the witness' credibility with the letter.

Generally speaking, a witness' credibility may be impeached by bias towards one party or another. A witness may be biased through a personal relationship with an interested party.

Here, the defense attorney will likely try to question the witness about a letter written to the man saying "thank you for 10 years of great friendship." This evidence indicates that the witness is in fact biased in favor of the victim of the crime. As a result of this bias, the impeachment will suggest that there is an inference of impropriety and that the witness' testimony is not trustworthy. Since this would constitute proper impeachment due to the relationship between the witness and the victim, the question is proper.

Accordingly, the defense attorney can question about the letter.

ANSWER TO MPT 1

MEMORANDUM

To: Hiram Betts

From: Examinee

Date: February 25, 2020

Re: *Downey v Achilles Medical Device Company*

I. Issues to be analyzed in this memorandum

This memorandum seeks to analyze the following two issues:

(1) Whether the plaintiffs' lawyers or their representatives may communicate, without our consent, with the current and former AMDC employees regarding their knowledge about the manufacture and/or sale of the walkers ("**Issue 1**"); and

(2) Whether we, as AMDC's attorneys, or our representatives may communicate with any named plaintiffs or potential members of the class without the consent of opposing counsel ("**Issue 2**").

II. Issue 1

A. Preliminary issue - whether investigator's actions can be imputed to the plaintiffs' law firm

Based on the File Memorandum from Hiram Betts, the former employee and four current employees of AMDC were approached by an investigator employed by the plaintiffs' law firm and the investigator has attempted to speak directly with the former employee and current employees without our consent. A preliminary issue is whether the plaintiffs' law firm will be responsible for the acts of the investigator employed by the plaintiffs' law firm.

Rule 5.3 of the Franklin Rules of Professional Conduct (the "**Rules**") is relevant to the responsibilities of lawyers regarding nonlawyer assistants. Rule 5.3(b) provides that with respect to a nonlawyer employed or retained by or associated with a lawyer, a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. Further, Rule 5.3(c)(1) provides that a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules if engaged in by a lawyer if the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved. Rule 5.3(c)(2) is not relevant - that applies to the responsibilities of lawyers of people in the law firm.

In this case, given that the investigators were employed by the plaintiffs' law firm, it is likely that the plaintiffs' law firm will have direct supervisory authority over the investigators. Accordingly, under Rule 5.3(b), the plaintiffs' law firm would be obliged to make reasonable efforts to ensure that the investigators' conduct is compatible with the professional obligations of the lawyer and comply with the Rules. Further, if the plaintiffs' law firm is found to have ordered or, with the knowledge of the specific conduct, ratifies conduct which is a breach of the Rules, Rule 5.3(c) (1) provides that the plaintiffs' law firm will be responsible for such conduct of the investigators.

B. Principles relevant to Issue 1

Rule 4.2 of the Rules provides: "*In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter*" without the prior consent of the represented person's counsel. Rule 4.2 applies equally to organizations and individuals. Comment [7] to Rule 4.2 states that such unauthorized communications with agents or employees of an organization are prohibited in the following three situations:

(1) where the agent or employee of the organization "supervises, directs or regularly consults with the organization's lawyer concerning the matter" ("**Situation 1**");

(2) where the agent or employee of the organization has "authority to obligate the organization with respect to the matter" ("**Situation 2**")**;** and

(3) where the agent's or employee's "act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability" ("**Situation 3**").

Rule 4.2 prohibits such unauthorized communications only with **current** agents and employees of the organization.

The application of these principles was further clarified in Ethics Opinion 2016-12 ("**2016 Opinion**"), which I will refer to below in my analysis.

C. Ron Adams

Ron was a former employee of AMDC. He worked for AMDC from 2003 to 2017 and was the director of quality control during that time. Ron is now retired.

The applicable principle is Comment [7] to Rule 4.2, which provides that consent of the organization's lawyer is not required for communication with a former constituent. Counsel is permitted to communicate freely with former agents and employees of an organization without the consent of the organization's lawyer regardless of the role the agent or employee may have played in the matter (*2016 Opinion*).

Accordingly, given that Ron is a former employee of AMDC, the investigators will be permitted to communicate freely with Ron without our consent.

D. Gus Bartholomew

Gus is a current employee of AMDC. Since 2003, he has been employed as the executive assistant to the president of AMDC. He is, in effect, the president's administrative assistant. He sits in on meetings and takes meeting notes, which include notes on discussions between the lawyers for AMDC and the board and AMDC's response to the *Downey* litigation. While he does not have a vote on the matters before the board of directors, he is privy to communications between the president of AMDC and counsel for AMDC.

Gus does not fall within the class of persons included in Situations 1, 2 and 3 above. Accordingly, Rule 4.2 does not prohibit the investigators from communicating with Gus without our consent.

However, given that Gus is privy to communications between us (as lawyers for AMDC) and the board which would likely be protected by the attorney-client privilege, investigators must be careful not to speak with Gus about any information that might be

protected by attorney-client privilege (*2016 Opinion*). Attorney-client privilege protects any communication between counsel and client for the purpose of obtaining legal advice. The investigators must make every reasonable effort not to breach the attorney-client privilege and is prohibited from asking directly or indirectly about any of those communications (*2016 Opinion*).

E. Agnes Corlew

Agnes is a current employee. She has been employed since January of 2017 and she is now the head of the public relations department. She is responsible for the team that responds to all media requests, writes and publishes all written materials about AMDC, and answers public inquiries about the company. This includes answering questions from the press and the public about pending litigation. However, Agnes does not make AMDC's policies and does not play any role in decisions about the litigation. She presents only the information that has been provided to her and has been approved by the president's office. She has also not met with counsel for AMDC regarding the *Downey* case.

Agnes does not fall within the class of persons covered under Situation 1, as she does not have any contact with us as lawyers for AMDC concerning the *Downey* litigation. She also does not fall within the class of persons covered under Situation 2, as she does not have the authority to make decisions regarding the *Downey* litigation. She certainly does not have actual authority and it is also unlikely that someone who is the head of the public relations department would have apparent authority to enter into binding contractual settlements on behalf of AMDC for the litigation.

It is also unlikely that Agnes belongs in the class of persons covered under Situation 3. This prong prohibits unauthorized communication with an agent or employee of the organization whose "act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability". Whether an agent's or employee's conduct may be so imputed must be determined with reference to the specific facts and circumstances of the case - the focus is on the conduct of the agent or employee and whether, based on that conduct, a fair-minded person could foresee imputation of liability. Communication is prohibited only when the agent's or employee's act or omission is obviously relevant to a determination of corporate liability. If it not reasonably likely that the agent or employee is a **central actor** for liability purposes, nothing in Rule 4.2 precludes unauthorized contact with the agent or employee. Only agents or employees whose actions or omissions are the subject of the litigation are covered (*2016 Opinion*).

Here, Agnes, as head of public relations, is not a central actor of AMDC for liability purposes. She does not make AMDC's policies and does not play any role in decisions regarding the litigation - she merely presents information that has been provided to her

and approved by the president's office. A fair-minded person would not impute her actions or omissions to AMDC for the purposes of civil or criminal liability.

Accordingly, Agnes does not fall within the class of persons included in Situations 1, 2 and 3 above and Rule 4.2 does not prohibit the investigators from communicating with Agnes without our consent.

F. Elise Dunham

Elise is a current employee of AMDC. She has been employed as the plant manager of AMDC since March of 2009. She oversees all the manufacturing at the plant and makes sure that every product meets AMDC's quality control standards. The director of quality control and director of manufacturing reports to Elise. She was manager of the plant at the time AMDC manufactured the walkers that are alleged to have been defective. Therefore, she is likely to have personal knowledge regarding the manufacturing of the walkers. She has also hired a lawyer.

It is unlikely that Elise would fall within the class of persons included under Situation 1 - while she may communicate with us as AMDC's lawyers to provide instructions on the facts of the case, it is unlikely that she would "supervise, direct or regularly consult" with us concerning the matter.

It is also unlikely that Elise would fall within the class of persons included under Situation 2. Situation 2 includes agents or employees who have authority to enter into binding contractual settlements on behalf of the organization. An agent's authority may be actual or apparent. An agent can bind a principal when given actual authority to do so, either through express words or through implication. In addition, an agent may have apparent authority if it reasonably appears to an outsider that the agent has been given authority to bind the principal. Only those agents or employees who have either actual or apparent authority to settle litigation on behalf of the organization are covered under this prong (*2016 Opinion*). Elise does not have actual authority to settle litigation on behalf of AMDC and an outsider would also not reasonably believe that a plant manager would have authority to enter into binding contractual settlements on behalf of AMDC for the litigation.

However, Elise is likely to fall within the class of persons included under Situation 3. The applicable principles are stated above (under Section E). As plant manager supervising the director of manufacturing and director of quality control, a fair-minded person would foresee that her acts or conduct would be imputed to AMDC. Her actions or omissions in relation to the manufacturing of the allegedly defective walkers would certainly be the subject of the litigation and she would be considered a "central actor" for liability purposes.

Accordingly, Rule 4.2 would prohibit the investigators from communicating with Elise without our consent. However, given that Elise has retained counsel, Comment [7] of Rule 4.2 provides that consent of her counsel to a communication will be sufficient for the purposes of Rule 4.2.

G. Penny Elis

Penny is a current employee of AMDC. From 2008 to 2016, she was the director of marketing for AMDC. From 2016, she became the chief financial officer (CFO) of AMDC. As CFO of AMDC, she manages the company's financial actions, including cash flow and budgeting and help shape the company's policy. She is also a member of the board of directors of AMDC (as treasurer) and has a vote on every issue that comes before the board, including voting on issues related to the *Downey* litigation.

Penny falls within the class of persons included under Situations 1 and 2. Even though she claims that she mainly listens during discussions between the board and lawyers about the litigation, she is nonetheless a crucial member of the board of directors who supervise, direct or regularly consult with lawyers with respect to the matter, thereby falling under the class of persons included under Situation 1. Penny also falls within the class of persons included under Situation 2. As CFO of AMDC, she certainly has actual authority to enter into binding contractual settlements on behalf of AMDC. She would also have apparent authority to do so - given her position, a reasonable person would believe that entering into binding settlements on behalf of AMDC would be within the scope of her responsibilities.

Penny may not fall within the class of persons included under Situation 3 - this would depend on her actions as director of marketing during the time of manufacturing of the allegedly defective walkers. However, it is not necessary to rely on Situation 3 as she clearly falls under Situations 1 and 2.

Accordingly, Rule 4.2 would prohibit the investigators from communicating with Penny without our consent.

II. Issue 2

Rule 4.2 prohibits a lawyer from communicating "about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order". Rule 4.2 prohibits communication only with persons the lawyer "knows" to be represented by counsel. Rule 1.0(f) provides that "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. Further, "knowledge" is a high standard - there must be more than "reason to believe" or "assumption" (*Mahoney et al. v Tomco Manufacturing* ("***Mahoney***").

In *Mahoney*, the Franklin Court of Appeal held that the trial court's order preventing Tomco's lawyers or their representatives from speaking with any current or potential members of the class without the permission of the plaintiffs' counsel to be overly broad. The court decided that while the named members of the class are known by Tomco's lawyers to be represented by plaintiffs' counsel, the court order is overly broad because it also prohibits Tomco's lawyers from communicating with potential members of the class. Until the end of the "opt out" period, only the named plaintiffs are considered to be represented by the class counsel.

The decision and reasoning in *Mahoney* is directly applicable to our case. Applying *Mahoney*, we will be prohibited from engaging in unauthorized communications only with the named plaintiffs in the lawsuit. This is because each of those named class-members has an attorney- client relationship with the lawyers representing the class and we have actual knowledge of this. However, we will not be prevented from communicating with potential members of the class without the permission of the class counsel, since there is no way we could know whether the potential class members were represented by counsel.

ANSWER TO MPT 1

To: Hiram Betts

From: Examinee

Date: February 25, 2020

Re: Downey v. Achilles Medical Device Company

You have asked me to analyze whether each individual employee of Achilles Medical Device Company (AMDC), both current and former, that the plaintiffs' investigator, Ashley Parks, as reached out to was within the bounds of the Franklin Rules of Professional Conduct (FRPC) and whether our law firm may contact named plaintiffs or potential class members. Specifically, FRPC 4.2 provides that "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Under FRPC 4.2, unauthorized communications with an agent or employee of an organization that a lawyer knows is represented by counsel is prohibited in three situations: (1) where the agent or employee of the organization supervises, directs or regularly consults with the

organization's lawyer concerning the matter; (2) where the agent or employee of the organization has authority to obligate the organization with respect to the matter; and (3) where the agent's or employee's act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. *See* Franklin Board of Professional Conduct Ethics Opinion 2016-12.

Under Section 1 are the individuals that have been contacted by Ashley Parks, and an analysis of the FRPC rules, comments and ethics opinions as they apply to such contacts. Under Section 2 is a discussion of whether we, Betts & Flores, may contact named plaintiffs in the suit against AMDC as well as any potential class members.

Importantly, for purposes of this memo, the name "Parks" is used interchangeably with plaintiff's lawyers or their agents because under FRPC 5.3, a lawyer is responsible for making sure his or her agents comply with the FRPC. Therefore, Parks, plaintiffs' attorneys or other agents must comply with the FRPC in all respects but, specifically in this case, regarding communication with represented persons.

1. AMDC Employees

A. Ron Adams (former employee)

The threshold question in determining whether Parks' communication with Adams complied with the rules and may continue to contact Adams is whether Adams is a current or former employee. Here, Adams is the former director of quality control for AMDC and as such, FRPC 4.2 does not require our consent, as AMDC's lawyers, because such consent is "not required for communication with a former constituent. FRPC 4.2, Comment 7. Moreover, the Ethics Opinion 2016-12 (the "Opinion") states the same in that "Counsel may communicate freely with former agents of an organization without the consent of the organization's lawyer...." Of course, Parks would have to obtain the consent of Adams' lawyer if there were one that was representing him in his individual capacity but there is nothing indicating that he has hired his own lawyer. Therefore, it appears that Parks may contact Adams regarding the manufacture and sale of the walkers under the rules, without having to engage with the three scenarios discussed above, because he is a former employee of AMDC.

B. Gus Bartholomew

Gus Bartholomew is the current executive assistant to the president of AMDC. Under the FRPC, Parks may contact Bartholomew because such contact would not fall within one of the three prohibited categories of unauthorized communication. With respect to the first category, although Bartholomew does see and hear communications between the president and counsel, and sometimes proofreads and types letters between the two, this does not rise to the level of a prohibited communication. In the Opinion, such an

employee must also direct the lawyer's actions and have the power to compromise or settle the matter. Moreover, the Opinion states that an employee under the first prohibited situation would generally be in the control group - i.e., the board or top management. Bartholomew is not a board member, is not a top manager as his duties to the president are mainly administrative, and he does not have a vote on the board. Therefore, Bartholomew's duties "functionally" do not include actual consultation with and the ability to direct counsel as required by the Opinion.

Bartholomew also does not implicate the second prohibited situation because he does not have the authority to obligate the organization with respect to the lawsuit at issue here. He neither has the actual authority to do so because, according to his interview, he's never been given such authority whether expressly or impliedly. However, Bartholomew could have apparent authority because such authority turns on whether a reasonable third party would believe the agent has the authority to bind AMDC in a contractual settlement. Due to his close proximity to the president and his involvement in many communications, a third party could reasonably believe that he has apparent authority but, based on the transcript, there is no such indication and it is unlikely that he has apparent authority. Therefore, Bartholomew does not implicate the second prohibited situation either.

Lastly, Bartholomew may be communicated because the third prohibited situation is not implicated. The third situation turns on the conduct of the employee - in this case Bartholomew - and whether his conduct could lead a fair-mind person to foresee imputation of liability to AMDC. Here, Bartholomew's conduct within AMDC is merely tangential and has nothing to do with the walkers class action. He is certainly not a "central actor" as called for in the Opinion because his tasks were merely administrative and were wholly unrelated to the manufacture and sale of the walkers. Therefore, the third situation is not an issue and Parks may contact him regarding the suit.

However, because Bartholomew was in the room for many discussions and has viewed the dialogue between the president and AMDC, Parks is required to use every reasonable effort not to breach any privilege Bartholomew might have and will be prohibited from asking about any of the privileged communications that Bartholomew was privy to.

C. Agnes Corlew

Agnes Corlew is the current head of public relations for AMDC and Parks may contact her without our consent because her duties and conduct do not create an issue for any of the three prohibited communications situations. Corlew is the voice of the company and may answer questions about any pending litigation, but she has no actual or apparent authority, based on the interview, to bind AMDC to settlements. Indeed, Corlew stated that she plays no role in the litigation decisions and has never met with counsel for AMDC regarding the *Downey* case. Thus, she neither actually consults with counsel, nor does she have any authority to with respect to settlements, and neither the first or second

prong will be an issue. Furthermore, Corlew's duties do not relate to the sale or manufacture of walkers and only involve communicating the company's position to the public. Therefore, the third prong is also not implicated. Parks may contact Corlew without our consent.

D. Elise Dunham

Elise Dunham is the plant manager at AMDC and Parks does need our consent before contacting her. Although this case is about the manufacture and sale of walkers and Dunham is the plant manager that oversaw the allegedly defective walkers at issue, Elise has hired her own attorney regarding this matter. Comment 7 to FRPC 4.2 requires that if an employee is represented by her own counsel, it is the consent of that counsel that is required. Therefore, because Dunham has likely implicated the third prong as a central actor in the situation regarding AMDC's potential liability, Parks will need to obtain the consent of Dunham's lawyer, rather than our consent.

E. Penny Ellis

Penny Ellis is a current employee of AMDC who has the director of marketing for eight years and has since become AMDC's chief financial officer (CFO). It is very likely that our consent will be required before the plaintiffs' lawyers or their agents may contact her. While Ellis probably doesn't "functionally" have the power to consult with and direct the lawyers as her interview demonstrates that her duties are mostly limited to financial actions, her title could give rise to apparent authority to bind AMDC in a contractual settlement. Indeed she says that she would be involved in a settlement with respect to the financial aspects and she has a vote on the board. Therefore, it's very likely that our consent will be required due to the second prohibited situation.

2. AMDC's Potential Contact

Whether we, as AMDC's attorneys, may contact named plaintiffs or potential class members turns largely on our knowledge. Knowledge is defined in FRPC 1.0(f) as actual knowledge, but that such knowledge may be inferred from the circumstances. *Mahoney et al. v. Tomco Manufacturing*, from the Franklin Court of Appeal, is instructive. There, the court held that because knowledge is a high standard, defendant's counsel could contact potential members in the class action lawsuit because only the named plaintiffs were to be considered to be represented up until the "opt out" period. However, the court also held that it was very clear that the named members of the class are known to be represented by counsel. Therefore, in this case, it appears that AMDC would certainly be deemed to have knowledge that the named members of the *Downey* class, like Marie Downey, are represented and we would therefore be unable to contact them without opposing counsel's consent. However, according to Franklin precedent, it would appear highly likely that we would be able to contact potential class members because it would

not be within our knowledge that such potential members are represented. Of course, if we had actual knowledge or it was so obvious that a potential class member was represented, we would likewise be unable to contact them without opposing counsel's consent.

ANSWER TO MPT 2

Closing Submissions

Counsel for the plaintiff is submitting these closing arguments with respect to the matter of re Eli Doran. These written submissions will not contain a statement of facts; though the material facts upon which these arguments rely will be embedded throughout these submissions.

Arguments Regarding Annulment of Marriage

Relevant Law

In the case of re the Estate of Carla Mason Green, the court held that a marriage that complies with the licensing and officiating requirements of the Franklin Marriage and Dissolution Act is presumptively valid. This presumption is consistent with public policy favoring the validity of marriage. This presumption can only be overcome by clear and convincing evidence. Evidence is regarded as clear and convincing if it shows that it is substantially more likely than not that the a party lacked the capacity to consent to marriage (Estate of Carla Mason Green).

In re the Estate of Carla Mason Green, the Franklin Court of Appeal held that consent to marriage requires that each party marrying have the ability to understand the nature, effect and consequences of marriage and its duties and responsibilities. Each party must freely decide to enter into the martial relationship and have an understanding of the nature of this relationship. Importantly, it is established that consent is to analyses at the time the marriage is entered into.

Arguments

Counsel for the plaintiff submits that Mr. Doran lacked capacity to enter into a marital relationship at the time of entry into the relationship. There is clear and convincing evidence that the presumption of validity of a marriage should not be applied in this case, and the marriage should be ruled annuity.

Mr. Doran had no understanding of the nature or effect of a martial relationship and his mental capacity was such that he was arguably incapable of freely consenting to the martial relationship. Mr. Doran's mental capacity had been declining over a long period of time. As was established in the testimony of Ms. Carol Richards, Mr. Doran started getting more forgetful roughly 2 years ago. He was forgetting to pay bills and not dressing well. Mr. Doran agreed to move into a care facility in which Paula Daws cared for the plaintiff and operated the home. Post moving into this facility, according to Ms. Richards, Mr. Doran's memory declined even further. Mr. Doran frequently needed to clarify what day it was and would repeatedly ask the same questions. This indicates that he was suffering from a mental defect.

A doctor testified that the Mr. Doran lacked the requisite capacity to enter into a marital relationship. The Dr. was a clinical psychologist and practiced as a forensic clinical psychologist. Therefore, testimony as to the nature of one's mental capacity is arguably within the specialty of this doctor. The expertise of the Doctor was specially sought for this purpose; and although the Dr is not a medical doctor his qualifications arguably indicate he is competent to testify as to ones state of mind. Mr. Doran was not orientated at either examination. He was not even able to understand basic principles such as what time it was or what the date was. Furthermore, although the Dr only examined Mr. Doran prior to entry into the marriage and post entry into the marriage, the testimony of the Dr. Established that the condition was only one that worsened and did not get better. The Dr. also indicated that the extent of the impairments Mr. Doran was suffering from were severe. Clinical assessments were performed prior to entry into the marriage and post entry into the marriage and whilst the initial results indicated that Mr. Doran required 24 hour care, the later results had deteriorated even further and There is no evidence on the record to indicate that Mr. Doran was lucid at the time of entering into the relationship. The Dr. testified that he had doubt that Mr. Duran had moments of lucidity - thereby providing more circumstantial evidence that he lacked such capacity upon entry into the marriage.

The evidence of the record also indicates that Mr. Doran did not understand the nature of a martial relationship. In accordance with Ms. Daws' testimony, Eli proposed marriage in response to her delivering him his laundry. There was no romantic relationship between the parties prior to this time. He also indicated that he wished to marry Ms. Daws because she "took good care of him". This was emphasized throughout testimony on the record by a number of the parties. As such, it appears that Mr. Doran was equating marriage with care, and did not have regard to the other legal effects of a marriage (such as the sharing of property and other spousal entitlements and rights). Furthermore, Ms. Daws called the minister and got a license straight away and the parties were parried soon afterwards. As such, although this is not conclusive, there was little time for Mr. Doran to reflect on the effects of this relationship (though such a reflection would have likely been impaired by his mental state and ability to reflect).

Although. it could be argued that none of these facts establish lack of capacity on the date the marriage was entered into, the circumstantial evidence in this case provides strong evidence to the contrary. There is no indication that, unlike in Estate of Carla Mason Green, Mr. Doran had any moments of lucidity. As the testimony of the doctor indicates, Mr. Doran was suffering from a permanent progressive condition that only gets worse. There is no testimony to suggest that he may have had periods of understanding. Furthermore, a permanent progressive condition is likely distinguishable from cancer which was the illness at issue in Estate of Carla Mason Green. A permanent progressive condition is one that affects the brain itself. It is not the medication operating as a secondary effect on the brain. In the Estate of Carla Mason Green, there was no indication that the party who entered the marriage had a brain degenerative condition (dementia) but rather that the medication affected their capacity to think. Furthermore, in that case, there was more compelling evidence to indicate an ability to understand the nature of the marital relationship and consent. The party entering the marriage had been assessed on the day as being lucid. The facts of this case are thus distinguishable from those presented in that case.

The reverend indicated in his testimony that he would not have married the parties had he had any doubts regarding capacity. However, the reverend is not qualified (and admitted as such) to diagnose mental conditions and nor pick up signs of incapacity and thus his evidence does not serve to counteract the compelling evidence of a lack of capacity that has been established on the record. Furthermore, the parties only exchanged a few pleasantries and thus the opportunity for the reverend to observe and pass accurate judgement as to Mr. Doran's mental capacity is limited.

On the basis of the above facts, counsel for the plaintiff request that the court find that the marriage should be annulled for want of the required capacity to enter into a marital relationship.

Arguments Regarding Testamentary Capacity

As established on the record, and outlined in the case of re Estate of Dade, in order to be valid, a will requires that the testator have testamentary capacity. This means that at the time of executing the will, the testator must be capable of understanding the nature of the act he is about to perform, the nature and extent of his property and the natural objects of his bounty and his relation to them. A will that is executed by a testator who lacks testamentary capacity to so execute the will is void (re Estate of Dade). The time for assessing the validity of the will is at the time the will was entered into. A party who seeks to prove the lack of testamentary capacity must do so by a preponderance of the evidence.

Counsel for the Plaintiff submits that Mr. Doran lacked the testamentary capacity to create a valid will. Although there is no evidence that the testator was examined on the

date of entry into the will, per the above analysis, there is strong circumstantial evidence to indicate that the testator did not understand the nature of the act or the extent of his property. A determination of legal incompetence is sufficient to establish a lack of testamentary capacity (Estate of Dodds) - so it is insufficient here and more needs to be proven.

As established in the arguments with respect to the capacity to enter into a marriage, Mr. Doran was suffering from dementia and severe mental defects at the time of execution of the will. There is no indication that in the lead up to such execution, or at the time of such execution, that Mr. Doran was lucid enough to be able to meet the above requirements for testamentary capacity.

Mr. Doran's medical doctor sought the advice of the testifying doctor to evaluate his state of mind and cognitive status. One would not generally seek such advice unless they had doubts as to the nature of one's cognitive statute in the first instance. Furthermore, the Dr testified that prior to entry into the will Mr. Doran could not even verbalize a reasonable understanding of a will. She also testified that he lacked the capacity to understand who his relatives were and who might have had a claim to his estate. The will was entered into after this date and all of the evidence arguably indicates that Mr. Doran's medical condition only deteriorated. Furthermore, the testimony indicates that the testator may have not even been able to understand the nature of the persons who are the objects of his bounty. He was forgetting who Carol was and was thinking deceased members of his family were still alive. Mr. Doran stated that he lived with his wife Janet on June 21, 2019. This was not the case. He also stated that his parents were alive which was also not the case. These circumstances indicate that Mr. Doran may not have even known who those were around him. Furthermore, testimony indicates that Mr. Doran loved the church very much, yet the new will executed makes no provision for the church at all. The will provides that Ms. Daws is to receive everything.

Furthermore, Mr. Doran did not make the will himself. Ms. Daws asked him if he wanted to make a will and ordered the relevant documentation. He told Mr. Doran "you do it" when she provided the will kit to him. Ms. Daws herself is the one who filled in all the provisions of the will. Although this does not necessarily invalidate the will it provides strong circumstantial evidence of a lack of intent. A will is an important document providing for distribution of property upon death. A person who had the requisite degree of capacity would likely want to maintain greater control over their will than simply relinquishing it to a third party to fill in the terms.

The facts of this case are also distinguishable from those in re the Estate of Dade. In that case, the testator was suffering from alcoholism. The disease that is affecting the testator here (dementia) is also distinguishable from alcoholism in that it is a permanent progressive brain condition. It is not one that is induced and it only worsens in severity.

Counsel for the Plaintiff also contends that although it could be argued that Ms. Daws and her daughter testimony indicates that Mr. Doran, had the relevant capacity at the time of will execution, the testimony of these parties should be afforded limited weight. Ms. Daws is the sole beneficiary of the will and if anything were to happen to Ms. Daws, Ms. Daws' daughter would also benefit from the provisions of the will. As such, both parties have an interest in the outcome of this case and their testimony thus may not be as reliable as it would otherwise be. Furthermore, although Mary Daws questioned Mr. Doran at the time of will execution asking if he wanted her mother to have his stuff, and he replied yes, this is insufficient to establish his actual intent given his limited mental capacity.

Counsel for the Plaintiff submits that the above facts are all sufficient to prove that a lack of testamentary intent on a preponderance of the evidence.

Relief Requested

Counsel for the Plaintiff request that the court enter an annulment with respect to the marriage and declare the will invalid for lack of testamentary capacity. These claims are proven on the basis of the evidence.

ANSWER TO MPT 2

1. Statement of Facts [Omitted]

2. Argument

A) Because decedent lacked capacity to consent to marriage by clear and convincing evidence, the January 2019 marriage must be annulled

i.) Finding a lack of capacity to consent to marriage is shown by clear and convincing evidence

As explained by the court in *Green*, a marriage that complies with the legal requirements set forth by the FUMDA is presumptively valid; only by clear and convincing evidence can this presumption be overcome (*Green*). The court further explains this evidentiary standard by stating "it is clear and convincing in such a case...if it establishes that it is substantially more likely than not that a party lacked capacity to consent to marriage." (*Green*). In order to have capacity to consent to marriage, the person must have the

"ability to understand the nature, effect, and consequences of marriage, and its duties and responsibilities." (*Green*). This capacity is measured at the time of marriage. (*Green*). In *Green*, the court held that the decedent had the capacity to marry because, although taking pain medication that can cause confusion, she had periods of lucidity, and was lucid at the time of her marriage as testified by her oncologist, the nurse on duty, and the hospice nurse (these persons testified about the decedent's mental capacities in various contexts that required legal capacity to make a POA, or medical treatment decisions). (*Green*). Furthermore, the decedent had been engaged to her husband for two years previously, when they "planned for marriage and a life together." (*Green*). Although they broke off their engagement, they stayed in touch, and the husband supported the decedent during her cancer treatment. (*Green*). Ultimately the court held there was not clear and convincing evidence under these circumstances to refute the presumption of the validity of this marriage. However in *Simon*, the court held there was such evidence when the decedent had known the husband for only a few weeks, the husband was employed at the care facility the decedent lived, and the decedent was incapable of consenting to marriage and did not understand what marriage was, at the time of her marriage, because of a fourth stroke that left her disabled and incapable of receiving or evaluating information (as testified by her doctor). (*Simon*).

ii.) It is substantially more likely than not that Decedent did not understand the nature, effect, and consequences of marriage, or its duties and responsibilities, at the time of marriage

At the time of his marriage, Eli Doran ("decedent") suffered from significant cognitive declines (Bush testimony). Namely, decedent saw a specialist over a period of time, first on May 3, 2018, and second on June 21, 2019. Over this time period, the specialist noted his cognitive abilities had markedly decreased, through the use of an assessment tool, the MMSE. He suffers from a permanent, progressive condition, and lacks the ability to think abstractly or make rational judgments. (Bush testimony). Furthermore, this specialist testified that she believes decedent specifically lacks the mental capacity to consent to marriage. (Bush). Bush is a medical expert that has a Ph.D. in clinical psychology and practices as a forensic clinical psychologist. She works with patients who have cognitive or mental disorders. (Bush). Furthermore, Carol has known decedent for presumably her entire life. She has worked extensively with him, helping him financially, and personally, ultimately helping him move into Daws' care home. (Carol testimony). She witnessed his mental decline over the years, becoming worried about him, and taking him to see his physician and ultimately Bush for diagnosis. (Carol). Again, per Bush, decedent came to equate marriage with simply being cared for. He completely did not understand the nature, effect, and consequences of marriage, or its duties and responsibilities, at the time of his marriage.

Daws may argue that he had the ability to understand the marriage because she cared for him for two years, and their marriage occurred before Bush's June 2019 assessment of

him. However, Daws was in a special position over decedent. Furthermore, she knew that he would not be living with her but-for his inability to provide for himself. While she may have believed in his wishes to marry, she never inquired with Carol about the situation, and Daws knew that Carol had been decedent's caretaker; Carol still handled decedent's finances and set up payments to Daws for decedent's care. Furthermore, Daws states she abruptly got married only several days after decedent first told her they should get married. Daws may also counter that the marriage was officiated by Rev. Simms. However, Simms met decedent only twice in January 2019. He has no history or training in diagnosing cognitive functioning, and did not conduct any assessments to determine decedent's cognitive abilities. Simms even stipulates that he is not a doctor and does not have the training to do so. (Simms).

There is clear and convincing evidence to annul the marriage because decedent did not understand the nature, effect, and consequences of marriage, or its duties and responsibilities, at the time of marriage. Decedent had professional diagnoses of dementia and cognitive decline. Carol, at the time of finding a place for decedent, had informed Daws that decent could not care for himself. Unlike in *Green*, decedent did not have the capacity to understand, or enter into, marriage. Daws had never planned a life with decedent, like the facts in *Green*. Instead, Daws had planned a life of taking care of decedent as his caretaker. This situation much more closely approximates *Simon* because decedent was incapable of consenting to marriage. Furthermore, he had come to identify marriage as being taken care of. (Bush). In fact, decedent had previously asked his cleaning lady, Vera, to marry him. (Carol testimony). Thus, there is clear and convincing evidence that decedent did not have the capacity for marriage.

For the foregoing reasons, the court must annul Eli Doran's January 2019 marriage to Paula Daws.

B.) Because decedent lacked testamentary capacity by a preponderance of the evidence, the October 2019 will must be set aside and the October 2016 will reinstated

i.) Finding a lack of testamentary capacity is shown by a preponderance of the evidence

As explained by the court in *Dade*, a testator must "at the time of executing the will, be capable of knowing the nature of the act he is about to perform, the nature and extent of his property, the natural objects of his bounty, and his relation to them." (*Dade*). This capacity is measured at the time of the execution of the will or codicil. (*Dade*). The standard to claim a lack of capacity is by a preponderance of the evidence. (*Dade*). In *Dade*, the testator was diagnosed with alcoholism and the challengers to his codicil claimed that this diagnosis alone "was sufficient proof of [his] legal incompetence and inability to execute the codicil." (*Dade*). However, the court held that legal incompetence alone is not enough to find a lack of testamentary capacity; a legally incompetent person may still have testamentary capacity, depending on the needs of the transaction. (*Dade*;

Tarr). Ultimately, the testator had capacity because his new will did not fundamentally change the nature of his old will in his devises to his children, and he remained informed of his family's affairs. Furthermore, he had bouts of sobriety. (*Dade*). Thus, the testator had capacity.

ii.) Decedent did not understand the nature of the act he is about to perform, the nature and extent of his property, the natural objects of his bounty, and his relation to them, by a preponderance of the evidence

As articulated by his niece, decedent progressively became more and more forgetful. His niece visited with him almost every Sunday, for years. (Carol). Eventually, decedent did not recognize Carol's husband or children. (Carol testimony). Decedent had previously left his estate to his beloved church, thus Carol also is not a biased witness and is disinterested in his will. Furthermore, Bush corroborates Carol's claims because decedent eventually denied he was related to Carol and thought she was his driver. Bush further testified that he did not have the capacity to execute the October 2019 will; he did not know who his niece was and thought he still lived with his deceased wife Janet. Furthermore, Bush testified that decedent did not understand the nature and extent of his property and estate. (Bush testimony).

Daws may counter that decedent had bouts of lucidity, or understand that he wanted to provide for her. Furthermore, there were two witnesses to attest to his will, and Daws' daughter asked decedent if he wanted to give his belongings to Daws (to which he replied he did because she cared for him). However, Daws now inherits all of decedent's estate, and Daws' daughter has an interest if Daws were to die. Again, Daws had abruptly executed the will for him after several days post-decedent's first suggestion of the matter. While decedent may have periods of lucidity, Bush stipulated that these are "not the same as having the ability to exercise judgment." (Bush testimony). Thus, the facts are dissimilar from *Dade*, where Dade kept abreast of his family's situation, had periods of sobriety, and his new codicil did not fundamentally alter his old will. Here, there is a preponderance of the evidence that the will should be set aside because decedent did not keep abreast of any issues, in fact he forgot who his family members were over time, and he did not have periods of time free from his medical conditions; his dementia was only worsening. (Bush).

For the foregoing reasons, the court must set aside Eli Doran's October 2019 will and reinstate his prior will leaving his estate to his church.

3. Conclusion

Eli Doran's January 2019 marriage must be annulled because there is clear and convincing evidence he did not understand the nature, effect, and consequences of marriage, or its duties and responsibilities, at the time of his marriage to Daws. Bush and

Carol both provided ample testimony that decedent's cognitive faculties declined, and Daws acted unreasonably and bizarrely in her hasty act to marry him. Bush is a specialist in cognitive conditions and used scientific assessments to evaluate decedent. Daws abused a special relationship of a man in her care and did not even inform the decedent's family to major life decisions she began to make for him. Finally, Eli Doran's October 2019 will must be set aside and his prior will reinstated because there is a preponderance of the evidence that he did not understand the nature of the act he is about to perform, the nature and extent of his property, the natural objects of his bounty, and his relation to them. Again, Bush and Carol testified that he was unaware of who his family members were, that he thought he lived with his deceased wife, and that he did not understand his estate.

Carol had been handling his financial affairs for years. Furthermore, Carol is disinterested as she would not inherit under his old will. Daws, again acting abruptly to create a new will, is the sole beneficiary, and her interested daughter witnessed the will.