July 2025 MEE Questions

MEE Question 1

Lin and Bo are chemists. Over the course of two years, working together, they invented a new kind of antibacterial soap that reduces bacteria on skin for much longer than ordinary antibacterial soap. They shared ownership of the soap formula equally.

Lin and Bo agreed to start a business to manufacture, distribute, and sell their antibacterial soap. First, they formed a limited liability company (LLC) in State A, which has enacted the current version of the Revised Uniform Limited Liability Company Act (RULLCA). Lin and Bo did not enter into a written operating agreement for the LLC and did not discuss altering any of the default rules for limited liability companies. After forming the LLC, they contributed their soap formula to it; they agreed that the formula was worth $20,000 at the time of their contribution. Bo also contributed $5,000 to the LLC, which the LLC used to buy soap ingredients and advertise its product.

During the LLC's first year of operations, Bo contributed an additional $2,000 to it. After this contribution, neither Lin nor Bo made any other contributions to the LLC.

During its first two years of operations, the LLC made a total profit of $5,000. Through the end of the second year of its operations, the LLC made no distributions to Lin or Bo.

At the start of its third year of operations, the LLC had $5,000 in cash, the proprietary soap formula now worth $40,000, supplies worth $1,000, and no debt. At that point, Lin and Bo disagreed about the company's direction. Lin did not want to expand the business beyond soap. Bo wanted to expand the business into other consumer products.

Lin and Bo are at an impasse about whether to expand the business.

1. Whose preference will prevail—Lin’s preference not to expand the business into other products or Bo’s preference to expand the business? Explain.

2. If the parties agree to dissolve the LLC, how would the LLC distribute its assets between Lin and Bo? Explain.

3. If the parties do not agree to dissolve the LLC and one party seeks judicial dissolution, is a court likely to order a dissolution? Explain.

MEE Question 2

Pete lives in the northern United States. In the winter months, he earns his living by clearing snow from driveways and parking lots.

One morning, following a particularly heavy snowfall, Debbie contacted Pete and asked him to come to her residence and clear the snow from her driveway. Debbie was not a regular customer of Pete's. They had the following exchange via email:

> Debbie: Hi, Pete. Can you come to my house and clear the snow from my driveway? I live at 10 Arbor Lane, right here in town. What would you charge?
>
> Pete: I'm pretty busy today clearing snow for all my regular customers. I'm not sure I could get to you at all today, but if things go well, I could be there around 4 p.m. I charge $300 for a normal-size driveway.
>
> Debbie: Well, I have a plane to catch tonight, and I must leave the house by 5 p.m. I'm desperate. If you can get the snow cleared from my driveway before 5 p.m., I'll pay a premium price of $500.
>
> Pete: I will do my best, but I can't make any promises.

Pete worked extra hard and fast that day to finish clearing snow for his regular customers. To further ensure that he got to Debbie's house in time to get her driveway cleared by 5 p.m., he passed up an opportunity to clear a parking lot for $400. He was able to finish all his work for regular customers by 3:30, which left him plenty of time to get to Debbie's house and clear her driveway.

However, when Pete arrived at Debbie's house at 4 p.m., he saw that the driveway had already been cleared.

Pete left his truck, went to the front door of Debbie's house, and rang the doorbell. When Debbie appeared, he said, "I'm Pete. I accept your offer to clear your driveway. I'll get started right away." Debbie said, "Sorry, someone came by and offered to do the job for $300, so I paid him to do it. As you can see, it's already done." Pete replied, "I still want my $500." Debbie told Pete that she owed him nothing, and she shut the door.

Pete believes that, in light of the email exchange with Debbie, the fact that he passed up the opportunity to clear the parking lot, and the fact that he showed up at Debbie's house in time to clear her driveway by 5 p.m., he was entitled to clear Debbie's driveway and be paid $500.

1. Did the exchange of emails form a contract? Explain.

2. When Pete traveled to Debbie's house and said to her, "I accept your offer to clear your driveway," did that form a contract? Explain.

3. Assuming that no contract was formed under Question 1 or 2, does Pete have a claim based on his reliance on Debbie's statement that she would pay a premium price of $500 if he cleared the snow from her driveway by 5 p.m.? Explain.

4. Assuming that Pete has a valid claim against Debbie under Question 3, how much could he recover? Explain.

MEE Question 3

Testator was born in 1880 in a rural area of State A. At the age of 5, he was enrolled in the local one-room schoolhouse and remained in school there until he graduated at age 18. There were no more than 30 students in the school at any one time. All four students in Testator's graduating class attended State A University. In 1902, Testator graduated from State A University with a degree in business. Over the next 20 years, he was extremely successful financially.

In 1922, Testator died leaving a substantial estate. He had never married and had no children. His closest living relative at his death was his first cousin, with whom he'd had little contact since his childhood.

Under his probated will, Testator bequeathed a total of $500,000 to several art museums throughout the United States, $250,000 to Capital City Concert Hall, and $1,750,000 to the business college at State A University. He bequeathed the balance of his estate ($2,500,000) to a valid perpetual charitable trust, with Bank X in State A named as trustee. Under the terms of the trust, all trust income was distributable annually to pay the education expenses of any persons, as selected by the trustee, who had graduated from a one-room schoolhouse in State A and were attending State A University while under the age of 25.

For many years, the trustee had no difficulty identifying potential beneficiaries under the terms of the trust. Over time, however, there was a substantial decrease in the number of students graduating from one-room schoolhouses in State A. By 2010, there were no such students attending State A University, and the remaining one-room schoolhouse in State A permanently closed. There are now no longer any persons to whom the trustee can distribute trust income in accordance with the terms of the trust.

The value of the trust assets is $10 million, earning roughly $500,000 of trust income annually.

Bank X would like to resign as trustee and recommends that a court appoint Bank Y as trustee. Bank Y is a reputable bank with extensive experience in trust administration and is willing to assume the trusteeship but only if the terms of the trust are modified to allow it to distribute trust income to graduates of any rural public high school in State A attending State A University.

Fred, the closest relative of Testator now living and the sole surviving descendant of Testator's first cousin, believes that the trust can no longer continue and should be terminated, and that the principal should therefore be distributed to him.

Capital City Concert Hall, having recently learned of these facts, believes that the trust principal of $10 million should be held exclusively for its benefit with trust income payable only to it.

State A has adopted the Uniform Trust Code. There are no other applicable statutes.

1. Does Bank X need judicial approval to resign as trustee? Explain.

2. Does Fred have any interest in the trust? Explain.

3. Can the trust's terms be judicially modified? Explain.

4. Assuming that Bank Y has been appointed trustee and that the trust terms can be judicially modified, between the suggestions offered by Bank Y and Capital City Concert Hall, which suggestion would a court be more likely to adopt? Explain.

MEE Question 4

Last year, Congress passed the "Economic Incentive Act" (Act), which the President signed into law. The preamble of the Act states that it was passed pursuant to Congress's power to regulate interstate commerce, and no legislative history indicates any other purpose.

The Act contains two substantive provisions. First, the Notice Provision prohibits "any employer with more than 100 employees from terminating an employee's employment without cause on less than 30 days' notice." The Notice Provision states that it applies to employees of both private businesses and state and local governments.

Second, the Housing Provision of the Act creates a federal program that provides grants to private developers of new low-income housing projects meeting the Act's requirements. The Housing Provision directs designated municipalities to administer this federal grant program by accepting applications for grants, reviewing the applications, making decisions, and enforcing the Act's requirements. The Housing Provision authorizes the United States to impose monetary penalties on a municipality that does not administer the grant program.

The last section of the Act provides:

> Any person who is harmed by the failure of any state or municipality to adhere to any provision of this Act may recover actual damages suffered as a result of that failure and may bring an action to recover those damages in federal court. A state or municipality shall not be immune, under the United States Constitution, from suit in federal court under the Act.

A man worked for State A, which employs more than 100 people, and a woman worked for City, a municipality in State A, which employs more than 100 people. State A and City recently terminated the employment of the man and the woman due to budget cuts. The man and the woman each received only one week's notice from their employers.

The man and the woman have filed separate lawsuits in federal district court against State A and City seeking damages for violations of the Notice Provision of the Act. In the suits against them, State A and City have each moved to dismiss on two grounds: (1) sovereign immunity recognized by the United States Constitution bars the lawsuits, and (2) the Notice Provision of the Act commandeers state and local governments in violation of the Tenth Amendment. No provision of State A law indicates that State A consents to lawsuits in federal court.

County is a municipality in State A that has refused to accept grant applications for federal funding as required by the Housing Provision of the Act. The United States, therefore, recently applied that provision to impose a substantial monetary penalty on County. County has filed a federal lawsuit seeking a declaration that the Housing Provision of the Act is unconstitutional because it commandeers municipalities in violation of the Tenth Amendment.

1. Does sovereign immunity bar the man's lawsuit against State A? Explain.

2. Does sovereign immunity bar the woman's lawsuit against City? Explain.

3. Does the Notice Provision of the Act commandeer State A in violation of the Tenth Amendment? Explain.

4. Does the Housing Provision of the Act commandeer County in violation of the Tenth Amendment? Explain.

MEE Question 5

A public high school in City, State A, has a rule that prohibits students from going to the gas station across the street from the school during school hours because the police have identified that gas station as the site of frequent drug dealing. The school includes the rule in the student handbook that the school provides to all students and their parents at the beginning of each school year. The school's principal also orally informs all students of the rule.

On October 10, at 2:30 p.m., during the last class of the day, the school principal looked out a window of the school building and observed a student walking from the school toward the gas station across the street. Once at the gas station, the student walked close to a car, talked to the driver through the open driver's-side window, and handed something to the driver. The principal could not see whether the student took anything from the driver, but after the car drove away, the principal saw the student put his hands in the front pockets of the jacket he was wearing.

The student returned to the school. About 10 minutes later, the principal ordered the student into the principal's office. When the student arrived, the principal reached into the front pockets of the student's jacket, which he was still wearing, and removed three $20 bills and a small, clear plastic bag containing two white pills. As set forth in the student handbook, possession of any kind of medication in school is prohibited unless permission has been given by the school. The student did not have the school's permission to possess any medication. The principal informed the student that the money would be returned to him if it was not connected with a crime. The principal told the student to return to class.

The principal decided to search the student's assigned locker. The school's locker policy provides that lockers are the property of Local Public School District (LPSD), that an assigned locker may be searched at any time, and that the school administration has a master key to all lockers. This policy is written in the student handbook. In addition, on the outside of every locker is a sticker stating, "This locker is the property of LPSD and may be subject to search." The principal unlocked the student's assigned locker with the master key. On the locker's top shelf was a clear plastic bottle containing white pills that appeared to be identical to the pills found in the student's jacket pocket. There was also a small, clear plastic bag containing a green, leafy material that looked and smelled like marijuana, possession of which is a crime in State A. The principal confiscated both the bottle of pills and the plastic bag of leafy material.

The principal phoned City police. An officer arrived at the school and took into custody the items seized by the principal from the student and the locker. Chemical testing of these items determined that the white pills were methamphetamine and the leafy material was marijuana.

That evening, City police obtained a valid warrant to arrest the student for possession of controlled substances in violation of State A law.

The next day, two City police officers arrived at the school during the school day and arrested the student, who was wearing his backpack. The officers searched the student and his backpack, from which an officer removed the student's unlocked cell phone. One of the officers looked through the cell phone's text messages and found a series of messages that set meeting times and places and listed "number of units" and "cost." A message from 10:00 a.m. on October 10 referred to a meeting in the gas station parking lot at 2:35 p.m. and mentioned a "cost" of $60.

State A charged the student with possession of controlled substances.

1. Did the principal's search of the student's jacket pockets violate the student's rights under the Fourth Amendment? Explain.

2. Did the principal's search of the student's locker violate the student's rights under the Fourth Amendment? Explain.

3. Did the officer's search of the student's text messages violate the student's rights under the Fourth Amendment? Explain.

MEE Question 6

After a homeowner's curbside mailbox was damaged, the homeowner phoned Quick Mailboxes, a small corporation that installs and repairs mailboxes. The homeowner told the Quick Mailboxes receptionist, "I don't care how you fix it; I just want it done by the end of the week." The receptionist said that the company would charge $220 for the repair, and the homeowner agreed to hire Quick Mailboxes to perform the job.

Quick Mailboxes has 10 local employees. It conducts background checks on all its employees, verifies that they have appropriate driver's licenses, and trains them as needed. After receiving the homeowner's call, Quick Mailboxes promptly sent Jane, one of its part-time employees, from its main office to the homeowner's property to perform the repair. Jane works 20 hours each week for Quick Mailboxes. She drives to work sites in a small, old pickup truck owned by Quick Mailboxes.

When Jane arrived at the homeowner's address, she stopped the pickup truck along the curb on the hilly street so that she could survey the mailbox's damage from her window. As she was about to exit the truck, she answered a personal call on her cell phone. The call lasted about three minutes. Distracted by the call, Jane left the truck without shifting it into "park" and did not engage the parking brake before she walked to the homeowner's front door to introduce herself and explain the work she planned to perform.

While Jane and the homeowner were talking at the front door, the Quick Mailboxes truck began rolling down the street. The homeowner saw it and stared in surprise but said nothing. Seconds later, the truck rolled partly off the pavement into a street sign. The post holding the street sign collapsed, sending the sign crashing onto a vintage luxury car worth $430,000 that a neighbor had parked on the public street.

The neighbor had the car repaired. Because of the special parts needed and the difficulty of finding them, the repairs cost $55,000. The neighbor also suffered serious emotional harm, requiring medical attention, because he had happened to look out his living room window just as the sign fell and damaged his car, which had significant sentimental value to him.

1. Is Jane directly liable to the neighbor in a negligence action? Explain.

2. Is Quick Mailboxes liable to the neighbor either directly or vicariously? Explain.

3. Is the homeowner liable to the neighbor because the homeowner hired Quick Mailboxes? Explain.

4. (a) Assuming that any of the parties is liable, can the neighbor recover the cost to repair the car even though the repairs were unusually expensive? Explain.
   (b) Assuming that any of the parties is liable, can the neighbor recover damages for emotional harm? Explain.

July 2025
MPT-1 Item

Lowe v. Jost

Lowe v. Jost

FILE

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LOPEZ & NICHOLS LLP
Attorneys at Law
12 Main Street
Centralia, Franklin 33705

To: Examinee
From: Sydney Nichols
Date: July 29, 2025
Re: Lowe v. Jost

We represent Dr. Emil Jost in a medical malpractice action. The complaint alleges that Dr. Jost was negligent in performing a hip replacement on Alice Lowe. Dr. Jost's defense is that he was not negligent and that any injuries suffered by Ms. Lowe were caused by her failure to follow post-surgery precautions and her subsequent fall.

We have retained an expert witness: Dr. Ariel Shulman, professor of orthopedics at Olympia University Medical School. Ms. Lowe has also retained an expert witness: Dr. Robert Ajax, a practicing orthopedic surgeon. Each party has filed a motion to exclude the testimony of the opposing party's expert witness; the motions were argued last week. We have also filed a motion for summary judgment. The judge will be deciding the motions to exclude expert testimony and our summary judgment motion at the same time.

I need you to draft the section of our brief arguing that

(1) the Court should qualify Dr. Shulman as an expert and admit her opinion testimony;

(2) the Court should not find Dr. Ajax to be a qualified expert, but even if he is qualified, should exclude all of his proffered opinion testimony; and

(3) even if the Court qualifies Dr. Ajax as an expert, the Court should grant our motion for summary judgment because the plaintiff has failed to offer any admissible evidence on elements of her malpractice claim.

Do not draft a separate statement of facts but incorporate the relevant facts into your argument. Using appropriate headings, you should persuasively argue that both the facts and the law support our position. Contrary authority and facts should also be cited, addressed in the argument, and explained or distinguished. Be sure to anticipate and respond to opposing arguments as we may not be allowed to submit a reply brief.

EXCERPTS OF VERIFIED COMPLAINT

Alice Lowe,
Plaintiff,
v. **Case No. 2024-CV-534**
Emil Jost, MD,
Defendant.

STATEMENT OF FACTS

. . .

4. Ms. Lowe consulted with Dr. Jost because she had severe pain in her left hip. Dr. Jost diagnosed Ms. Lowe with arthritis and recommended that she undergo a hip replacement. Ms. Lowe agreed to the procedure, and Dr. Jost performed a hip replacement of Ms. Lowe's left hip on March 1, 2022, in Centralia, Franklin.

5. Ms. Lowe followed all post-operative requirements set by Dr. Jost. She went to physical therapy and followed the prescribed limitations on twisting and bending.

6. On March 16, 2022, Ms. Lowe was walking with the aid of a cane around her condominium complex. She suddenly felt a sharp and excruciating pain that caused her to drop her purse. She fell to the ground in pain.

7. Ms. Lowe was rushed to the emergency room of Franklin General Hospital. The examining physician told Ms. Lowe that she had a small fracture of the femur (thighbone) and a dislocated hip.

8. On March 20, Ms. Lowe had a surgery consult with Dr. Harry Nix, who determined that Ms. Lowe had a small fracture of her femur and a severely dislocated left hip. Dr. Nix told Ms. Lowe that she needed a hip revision surgery (a second hip replacement) as soon as possible.

9. Ms. Lowe had revision surgery on March 21, 2022. Dr. Nix removed the original prosthetic hip, which was out of place and damaged, and replaced it with a new prosthetic.

10. Ms. Lowe followed all post-operative requirements set by Dr. Nix and is now fully recovered.

11. As a result of the improperly placed prosthetic hip, Ms. Lowe suffered severe pain. In addition, she incurred costs for the revision surgery and missed work for six weeks.

* * * *

AFFIDAVIT OF KAREN BAINES

STATE OF FRANKLIN **SURREY COUNTY**

1. I, Karen Baines, first being duly sworn, make oath that I am a resident of Cloverdale Condominiums in Centralia in the State of Franklin.
2. Alice Lowe is my neighbor.
3. On March 16, 2022, I was walking my dog around the condominium complex. I saw Ms. Lowe walking with the assistance of a cane. I was about 25 feet away from Ms. Lowe.
4. I saw Ms. Lowe drop her purse, which landed on the pavement. I yelled to her that I would be happy to pick it up for her. She said that she didn't need my help and then she bent over to pick up her purse. To pick up the purse, she bent forward at the waist and touched the ground with her hands.
5. Immediately after picking up the purse and then standing back up, Ms. Lowe cried out in pain. She then fell to the pavement. I called 911, and an ambulance came and took her away.
6. Further affiant saith not.
   Dated and signed this 2nd day of April, 2025.

AFFIDAVIT OF DR. EMIL JOST

STATE OF FRANKLIN **SURREY COUNTY**

1. I, Dr. Emil Jost, first being duly sworn, make oath that I am a physician licensed to practice in the State of Franklin. I graduated from Franklin University Medical School, and I am a board-certified orthopedic surgeon, having completed a residency in orthopedic surgery at Franklin General Hospital.
2. On February 12, 2022, Alice Lowe came to my office to discuss a hip replacement. I ordered X-rays of Ms. Lowe's hips and, after examining the X-rays, told Ms. Lowe that she had serious osteoarthritis in her left hip and recommended that she have a hip replacement. I then scheduled the surgery. As best I could determine, Ms. Lowe complied with pre-surgical preparations and tests.
3. On March 1, 2022, Ms. Lowe was admitted to Franklin Medical Center for a hip replacement of her left hip. I performed the surgery, replacing her damaged hip with a prosthetic hip. After I completed the surgery, Ms. Lowe went to the post-anesthesia care unit where she underwent a single anteroposterior ("front-to-back view") X-ray. I did not request, and Ms. Lowe did not undergo, any additional X-rays after the surgery.
4. The day after the surgery, I told Ms. Lowe that, for six weeks, she should not bend more than 90 degrees at the waist and should not twist at the hip. She was scheduled for six weeks of physical therapy. At the first meeting, the physical therapist reminded Ms. Lowe of the precautions against bending and twisting.
5. Immediately after surgery, as directed by me and the physical therapist, Ms. Lowe used a walker to assist her when she walked. Two weeks after Ms. Lowe began physical therapy, the physical therapist (in consultation with me) told Ms. Lowe that she could begin using a cane instead of a walker, thus allowing her hip to be more weight-bearing. She was reminded again about the precautions against bending and twisting.
6. I had no further contact with Ms. Lowe. She failed to appear for her scheduled checkup six weeks after the surgery.
7. Further affiant saith not.

Dated and signed this 2nd day of April, 2025.

EXCERPTED HEARING TESTIMONY OF DR. ARIEL SHULMAN

Direct Examination by Defendant's Attorney Sydney Nichols

Q: Could you state your name and your educational background for the Court?

A: My name is Ariel Shulman. I am a 2000 graduate of Franklin University, and I graduated from the University of Franklin Medical School in 2004. I completed a residency in orthopedic surgery at Franklin Medical Center. I was a resident from 2004 to 2009. I am board-certified in orthopedics. I am currently a professor of orthopedics at Olympia University Medical School.

Q: What does it mean to be "board-certified"?

A: It means that I have finished my residency in orthopedics and that I have passed the board certification exam.

Q: Are you currently practicing orthopedics?

A: No, I am teaching orthopedics at the Olympia University Medical School.

Q: Do you have any specialties within orthopedics?

A: I teach students how to do knee and hip replacements.

Q: Does your practice currently involve any actual hip replacements?

A: Currently I teach a simulated joint replacement class to medical students. In the past, from 2009 to 2019, I was in private practice in Olympia, and my practice was limited to hip and knee replacements. I probably performed an average of 100 knee and hip replacements per year during that time.

Q: Does the standard of care in Olympia equate with the standard of care in Franklin?

A: Well, Olympia has a much smaller medical community than Franklin. But the practice of orthopedics is pretty much the same in both states.

Q: Have you written any articles in the medical field?

A: Yes, I have written three articles on the proper procedures for knee replacement.

Q: Have you reviewed the records of Ms. Lowe's hip replacement that was performed by Dr. Jost?

A: Yes, I have reviewed all the surgical and medical records. I have also performed a physical examination of Ms. Lowe.

Q: Are you aware of the issues in this litigation?

A: Yes, I have reviewed the complaint and answer in this case.

Q: What is your opinion as to the surgery? Do you believe that Dr. Jost's performance of the hip replacement met the standard of care for an orthopedic surgeon in the community of Franklin?

A: Yes, I believe his care was well within the standard of care in the community**.**

Q: What is the basis of your opinion?

A: I base my opinion on my long experience performing hip replacements. And I keep up with the medical literature in the area.

Q: Is there any literature that you would refer to in this area?

A: I just follow all the articles on joint replacement that are in the *Journal of the American Medical Association (JAMA)* and *The New England Journal of Medicine*. They are considered the most up-to-date and reliable sources of information in medicine.

Q: Do you attend conferences on joint replacement?

A: I attend them regularly. I also present lectures at conferences annually discussing the appropriate procedures for joint replacements.

Q: Could you elaborate on your opinion that Dr. Jost's treatment met the standard of care in the area?

A: I reviewed the notes from the surgery. Once all the permanent prosthetic components were in place, the hip was taken through range-of-motion testing and stability testing in the operating room while the patient was still under anesthesia. After that testing confirmed that range of motion and alignment of the components were acceptable, Dr. Jost closed the incision. He ordered and reviewed a post-operative X-ray to confirm that the new hip was properly situated. Dr. Jost's surgical management of the patient, the manner in which he carried out the surgery, and his medical assessment of the patient's condition were at all times appropriate and fully comported with accepted standards of surgical care. In my opinion, no act or omission attributable to Dr. Jost proximately caused any of the injuries that the patient sustained.

Dr. Jost also gave Ms. Lowe specific instructions not to bend or twist for six weeks after surgery. The reason for these precautions is that twisting and/or bending can cause a dislocation of the hip and possible injury to the femur. Giving

such instructions comports with the recognized standard of medical care for hip replacements.

In my opinion, Ms. Lowe's fracture did not occur during the original hip-replacement surgery. During surgery, Dr. Jost was able to fully observe the prosthetic joint, and there is no evidence that the pieces were improperly placed. The joint was stable at the conclusion of the surgery, and the X-ray done in the surgical suite supports this finding. I reviewed that X-ray myself, and there was no evidence of a fracture or of dislocation at that time.

Thus, it is my conclusion that the fracture and dislocation did not occur during or immediately after the surgery but occurred two weeks later when Ms. Lowe fell. At no time did Dr. Jost's treatment depart from good and accepted standards in the community.

* * * *

Cross-Examination by Plaintiff's Attorney Jeffrey Mansfield

Q: So, to be clear, you have not practiced orthopedics in Franklin since your residency in 2009, is that correct?

A: Yes.

Q: And the 10 years you were in practice from 2009 until 2019, you practiced exclusively in Olympia, right?

A: Yes.

Q: And since 2019, you have not performed even one hip replacement on a living patient?

A: That is correct.

Q: And you have not made a thorough comparison of the population and availability of medical care in Olympia and Franklin.

A: That is correct.

* * * *

EXCERPTED HEARING TESTIMONY OF DR. ROBERT AJAX

Direct Examination by Plaintiff's Attorney Jeffrey Mansfield

Q: What is your name and educational background?

A: I am Robert Ajax. I completed my bachelor's degree in biology at Franklin State University in 1998 and received my MD degree from Franklin State University in 2002. I completed my residency in orthopedics at Olympia General Hospital in the state of Olympia in 2007. I have a practice in orthopedics in Franklin, and I am board-certified in orthopedics.

Q: Are you familiar with the standard of care in hip replacements in the state of Franklin?

A: Yes, I currently practice in Franklin.

Q: Do you specialize in any type of orthopedics?

A: I do all of it—fractures, knee replacements, hip replacements.

Q: How many hip replacements have you done since you finished your residency?

A: Probably 50.

Q: Did you do any during your residency?

A: I assisted in over 100. I probably did about 20 myself.

Q: What is your opinion about the care that was given to Ms. Lowe during the hip-replacement surgery performed by Dr. Jost?

A: Dr. Jost departed from good and accepted medical practice in failing to order another X-ray from a different position. A second X-ray, from a different angle, might have shown that the prosthesis was out of place or that there was a broken bone. Because he did not order X-rays from different positions, he could not see whether there was a bone break or a misplaced prosthesis.

Q: On what evidence do you base this conclusion?

A: Dr. Jost did just one X-ray after surgery. That X-ray was front-to-back. That practice did not comport with the standard of care in Franklin.

* * * *

FRANKLIN RULES OF EVIDENCE

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

FRANKLIN RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

. . .

Jacobs v. Becker
Franklin Court of Appeal (2020)

Elise Jacobs has sued Dr. Carl Becker, a surgeon, for malpractice claiming that Dr. Becker failed to properly treat her post-surgical wound and that, as a result, she needed additional surgery and suffered intense pain. The trial court granted summary judgment to Dr. Becker. We affirm.

In support of his motion for summary judgment, Dr. Becker presented the affidavit of an expert witness, Dr. Otto, a surgeon practicing in the state of Franklin. In the affidavit, Dr. Otto stated that Dr. Becker's treatment of Ms. Jacobs at all times met the standard of care in the community. Dr. Otto concluded that the wound became infected, which is a common post-surgical occurrence. It was undisputed that Dr. Becker had prescribed antibiotics for Ms. Jacobs, and by the patient's admission, she failed to use them as prescribed. Ms. Jacobs did not present any expert testimony regarding her malpractice claim.

We have consistently held that a plaintiff must prove three elements to establish a prima facie case for negligence: (1) that a duty existed requiring the defendant to conform to a specific standard of care for the protection of others against harm, (2) that the defendant failed to conform to that specific standard of care, and (3) that the breach of the standard of care caused the harm to the plaintiff. There is no question that Dr. Becker owed a duty to Ms. Jacobs. The standard of care for physicians is to act with that degree of care, knowledge, and skill ordinarily possessed and exercised in similar situations by the average member of the profession practicing in the field.

Therefore, to succeed on a motion for summary judgment, the defendant must show that the plaintiff has failed to establish a factual basis for any of these elements. In ruling on summary judgment, the court must view the evidence in the light most favorable to the nonmoving party.

In addition, the Franklin Supreme Court has held that a Rule 56 motion for summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" should be granted. *Alexander v. ChemCo Ltd.* (Fr. Sup. Ct. 2003). In such a situation, there can be "no genuine issue as to any material fact,"

since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Id*. A material fact is a fact that is essential to the establishment of an element of the case and determinative of the outcome. “The moving party is ‘entitled to a judgment as a matter of law’ because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.” *Id.* In other words, if a plaintiff fails to produce any evidence to prove an element of the case on which that plaintiff bears the burden of proof, then the defendant is entitled to summary judgment.

Expert testimony is required in medical malpractice cases because only expert testimony can demonstrate how the required standard of care was breached and how the breach caused the injury to the plaintiff. A party’s failure to provide any expert testimony on causation or the standard of care justifies an adverse ruling on summary judgment.

Because Ms. Jacobs failed to present expert testimony in support of her claim, the trial court properly granted summary judgment to Dr. Becker.

Affirmed.

Smith v. McGann
Franklin Court of Appeal (2004)

The only issue before us in this medical malpractice case is how to properly utilize a newly enacted statute, Franklin Civil Code § 233. This statute was enacted to clarify the law surrounding the introduction of expert testimony following the Franklin Supreme Court's determination that Franklin would adopt the United States Supreme Court's approach in *Daubert v. Merrell Dow Pharmaceuticals*, *Inc.*, 509 U.S. 579 (1993), in interpreting our own evidentiary rules. *Park v. Green* (Fr. Sup. Ct. 1999). In *Daubert,* the Supreme Court clarified that "general acceptance" was no longer the standard for determining the reliability of expert testimony. Instead, the trial court had broader latitude to determine whether an expert's "reasoning or methodology properly can be applied to the facts at issue." Under *Daubert*, the trial court is the "gatekeeper" to determine whether expert testimony is admissible.

Following the decision in *Park,* Franklin Rule of Evidence 702 was amended to be consistent with *Daubert*. Three years later, the legislature passed Franklin Code § 233, which echoed the *Daubert* criteria for determining the reliability of expert testimony.

In the case before us, the plaintiff, Manuel Smith, alleged that defendant Dr. Jenna McGann, an orthopedist, failed to diagnose a fracture of Smith's tibia, causing him great pain until the fracture was properly diagnosed. Smith went to Dr. McGann on June 1, 1999, claiming leg pain. Dr. McGann took one X-ray of his leg and found nothing wrong. Two months later, Smith saw another physician, who took further and more extensive X-rays and found the tibial fracture. Smith claimed that Dr. McGann's care fell below the standard of care in Franklin for this type of condition.

At the *Daubert* hearing, where the trial court determined whether each party's experts were sufficiently qualified to testify, the plaintiff proffered two physicians: Dr. Jeff Adams, an orthopedist who practiced medicine in the state of North Brunswick, which is over 800 miles from Franklin; and Dr. Sylvia Brown, an internal medicine specialist in the state of Franklin. Because the trial court refused to admit the testimony of either physician, the trial court dismissed the plaintiff's case. This appeal followed.

First, we turn to the testimony of Dr. Adams. Generally, experts can testify about the standard of care for a specialist only if the experts specialize in the same or a similar

specialty that includes the performance of the procedure at issue. Although it is not necessary for the expert witness testifying to the standard of care to have practiced in the same community as the defendant, the witness must demonstrate familiarity with the standard of care where the injury occurred. Dr. Adams, an orthopedist, testified that he had studied the demographics of Franklin and of North Brunswick. His study demonstrated that the population and the availability of medical care were quite similar. He also testified that the standard of care in orthopedics was virtually the same in Franklin and in North Brunswick. He was properly qualified as an expert in orthopedics.

But what Franklin Code § 233 reminds us is that qualifications and reliability remain separate and independent prongs of the *Daubert* inquiry. A witness is *qualified* as an expert if he is the type of person who should be testifying on the matter at hand. An expert opinion is *reliable* if the opinion is based on a scientifically valid methodology. Conflating the inquiries is legal error.

Under *Daubert*, the question remains whether Dr. Adams's testimony was reliable. Dr. Adams testified that the fracture was not visible in the X-ray taken on June 1, 1999. He based that opinion on his many years of experience in orthopedics, the many articles he had read and conferences he had attended, and the fact that other physicians relied on his diagnoses of fractured bones. While these factors do not fit neatly into the categories listed in the statute, we must remember that the statute only provides examples and that courts are instructed to "utilize any other factors" we deem appropriate. We conclude that Dr. Adams was qualified and that his testimony was reliable. He should have been allowed to testify as an expert.

As for the plaintiff's second witness, Dr. Brown, her specialty was internal medicine, not orthopedics. We have held that a physician does not have to practice in, or be a specialist in, every area in which she offers an opinion, but the physician must demonstrate that she is "sufficiently familiar with the standards" in that area by her "knowledge, skill, experience, training, or education" to satisfy Rule 702.

Under Franklin Rule of Evidence 702, to be qualified as an expert the witness must possess scientific, technical, or specialized knowledge on all topics that form the basis of the witness's opinion testimony. Accordingly, in *Wyatt v. Dozier* (Fr. Sup. Ct. 2000), the Franklin Supreme Court held that the trial judge did not abuse his discretion by excluding

the testimony of a pediatrician who attempted to testify about the standard of care for an obstetrician. Because the pediatrician was not sufficiently familiar with the standards of obstetrics by knowledge, skill, experience, training, or education, she was not qualified to give expert opinion testimony about that specialty. Similarly, here we agree with the trial court and find that Dr. Brown was not qualified as an expert in orthopedics.

Even though we find that Dr. Brown was not qualified and could end our analysis there, we feel that this case provides fertile ground for analyzing the reliability of expert testimony. Our cases recognize many different factors courts can use to assess the reliability of expert testimony. One of these factors is the degree to which the expert's opinion and its basis are generally accepted within the relevant community. We have also considered whether experts in that field would rely on the same evidence to reach the type of opinion being offered. *See Ridley v. St. Mark's Hospital* (Fr. Ct. App. 2002) (expert's opinions were based on sufficiently reliable methodology when he based his conclusions on medical records, CT scans, medical notes, and deposition testimony). Speculation about what might have occurred had the facts been different can never provide a sufficiently reliable basis for an expert opinion. The opposing party bears responsibility for examining the basis for the opinion in cross-examination. However, "if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury, it must be excluded." *Park v. Green*. An expert opinion is fundamentally unsupported when it "fails to consider the relevant facts of the case." *Id*.

Even when an expert is qualified and the expert's testimony is based on reliable methods, the trier of fact must still—as with any other witness—determine whether the witness is credible. The factual basis of an expert opinion in the particular case before the court goes to the credibility of the testimony, not its admissibility. Likewise, even if a court finds that an expert's qualifications satisfy the baseline for admissibility, the extent and substance of those qualifications can affect the credibility of that expert.

Here, Dr. Brown testified that, although not an orthopedist, she did treat many bone fractures. She said that, in her reading of the initial X-ray, there was the possibility of a fracture. She also testified that Dr. McGann fell below the standard of care in not ordering further X-rays on June 1. We affirm the finding of the trial court that Dr. Brown was not qualified as an expert in orthopedics. In addition, she did not demonstrate that her

methods were reliable. Her testimony as to causation was both speculative and without reliable basis.

The decision of the trial court dismissing the case is reversed based on the trial court's erroneous exclusion of the testimony of Dr. Adams. We, however, affirm the decision of the trial court excluding the testimony of Dr. Brown.

July 2025
MPT-2 Item

In re Gourmet Pro

In re Gourmet Pro

FILE

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Robinson Hernandez LLP
Attorneys at Law
30 South Point Plaza
Milton, Franklin 33705

MEMORANDUM

To: Examinee
From: Anita Hernandez, partner
Date: July 29, 2025
Re: Gourmet Pro response to CPSC

Our client Gourmet Professional Grilling Co. (Gourmet Pro) has been served with a subpoena by the Consumer Product Safety Commission (CPSC), a government agency. The subpoena seeks our client's business records related to the design, manufacture, and safety of certain of its products. Many of the documents within the broad scope of the subpoena involve communications between company employees and the company's lawyers, including its general counsel, Trisha Washington.

I have attached three representative documents (marked Documents One through Three) that are responsive to the subpoena. Please prepare a memorandum to me addressing how attorney-client privilege may apply to all three documents. For each document, indicate whether some or all of it is protected from disclosure by the attorney-client privilege. If the attorney-client privilege applies only to part of the document, be specific as to the paragraphs or individual sentences covered by the privilege protection.

Your memorandum should begin with a description of the legal standard to be applied. Do not repeat that standard as you apply it to the three documents; rather, for each document, focus on the pertinent aspects of that standard and explain how they support your conclusion as to whether the content is protected from disclosure by the attorney-client privilege.

Our client asked that we protect as many documents as possible from disclosure, but we need to take care to honor our professional responsibilities as attorneys and officers of the court. If there are close calls, clearly state your conclusion one way or the other and explain your reasoning.

You should confine your work to the application of the attorney-client privilege. Any other issues related to the subpoena will be handled by another associate.

Robinson Hernandez LLP
Attorneys at Law

File Memorandum

From: Anita Hernandez, partner
Date: July 15, 2025
Re: Gourmet Pro response to CPSC subpoena

Gourmet Professional Grilling Co. (Gourmet Pro), a leading manufacturer of state-of-the-art gas grills and accessories, has been a client since its founding as a family business 75 years ago. Gourmet Pro operates in all 50 states and in 22 countries. It prides itself on the high quality of its products and its strong safety record.

One of its principal competitors is Main Street Cookers Inc. (Main Street). Main Street has not had a good safety track record—it is in the middle of a class-action lawsuit over injuries caused by gas leaks from its grills. That litigation has led the Consumer Product Safety Commission (CPSC) to open a parallel administrative investigation of Main Street. The CPSC is a federal government agency that develops uniform safety standards and conducts research into product-related injuries; at times, it also conducts investigations to determine if it should order a product recall, impose penalties, or take other government action.

Gourmet Pro has been served with a subpoena from the CPSC seeking all of Gourmet Pro's business records related to the design, manufacture, and safety of its propane tank hoses and fittings, as well as its ignition system. We believe this is related to the investigation of Main Street. The CPSC investigator advised that Gourmet Pro is not a target of the investigation. The CPSC seeks Gourmet Pro's business records to gain information about the propane grill industry and its safety practices, and presumably to contrast the design and manufacture of Gourmet Pro products with those of Main Street.

Despite the CPSC assurances, our client wants to take care as it cooperates with the government investigation. If this investigation results in an enforcement action against Main Street, Main Street may have access to the records we produce to the CPSC. Also, despite Gourmet Pro's fine safety record, it has experienced some issues and has had

its lawyers involved in assessing its practices. Gourmet Pro wants to cooperate in good faith in producing documents, but in doing so, it needs to make sure that it does not produce documents protected from disclosure by the attorney-client privilege.

We have identified around 20,000 documents potentially responsive to the CPSC subpoena. A significant number of them involve communications with lawyers—both Gourmet Pro's in-house legal team and the outside law firm of WatsonSmith that Gourmet Pro retained to conduct a safety audit, that is, a review of the safety of its products and business practices.

The line between what is a privileged communication with counsel and what is a nonprivileged business communication is complicated by the fact that Gourmet Pro's lead in-house lawyer—its general counsel, Trisha Washington—is a trusted member of the executive team, and she is often involved in high-level business discussions that are not limited to legal issues. Thus, she serves two functions—at times offering privileged legal counsel about business matters, and at times offering business advice without legal implications or privilege.

Document One: Email from general counsel to CEO of Gourmet Pro

To: Maria Johnson, CEO
From: Trisha Washington, General Counsel
Date: March 25, 2025
Re: Main Street class-action litigation

Good morning, Maria. I'm glad you are back from your vacation. As you requested, I have given some thought as to the implications for Gourmet Pro of the high-profile litigation against our competitor Main Street.

The complaint against Main Street is centered on Main Street's highly publicized problems with its propane tank hoses that are cracking prematurely and leading to potentially dangerous propane leaks. It is a class-action lawsuit. The plaintiff's counsel will be asking the court to certify a class that includes a large number of Main Street customers at risk due to the safety defects. You can expect that the media in Franklin and elsewhere will be reporting on the dangers of the Main Street defects and interviewing concerned customers. We should ask our marketing department to track those media reports.

Legal considerations also suggest that we redouble our efforts to ensure the safety of our products. The WatsonSmith safety audit identifies several concerns that, if made available in litigation, would create sources of liability. That would be especially true if we fail to take steps to implement the safety recommendations in the report. I recommend that I meet with the department heads to make sure they understand the risks.

To help insulate us from legal liability, we should also advertise our commitment to quality. Besides contrasting our practices to those of Main Street at this time for marketing purposes, informing the public about our emphasis on quality will serve us well in the event someone is thinking about Gourmet Pro as a target of a similar class-action lawsuit. It may also help us navigate the regulatory standards on quality set by the Federal Trade Commission. We can't afford any problems given that the spotlight is now on Main Street and the grill industry generally.

Trisha Washington
General Counsel
Gourmet Professional Grilling Co.

Document Two: Executive summary of report from outside law firm

"Embracing Safety as a Business Priority"
Executive Summary to a Privileged and Confidential Report
Prepared by the Law Firm of WatsonSmith
for the Management and Board of Directors of Gourmet Pro
June 30, 2024

Overview

1. Over the course of the past six months, WatsonSmith has undertaken an extensive review of the safety record and related policies and processes of Gourmet Pro to ensure that it maintains its reputation for safe, high-quality grills and grilling accessories. Our work has been prompted by the high-profile controversy over several accidents and related injuries associated with propane grills manufactured by one of Gourmet Pro's competitors. While our law firm has not been hired in connection with any pending litigation or government investigation, we are always mindful that in the heavily regulated arena of consumer safety, the risk of liability looms large. Accordingly, we deem this report to be "privileged and confidential" and have so marked each page.

2. Our main goal is to learn the company's processes and practices and develop business recommendations to make the company even better when it comes to dealing with safety concerns. What follows is a privileged and confidential assessment of the current state of the safety processes and procedures, including recommendations for operational improvements.

3. Gourmet Pro is the second-leading manufacturer of outdoor cooking products and accessories in the world. Gourmet Pro has sales approaching $1.5 billion per year and over 2,500 employees throughout the United States and in 22 other countries. By our measure, over 250 employees have duties dedicated to the company's safety mission, such as safety inspectors, safety policymakers, engineering staff, assembly line supervisors, and in-house legal counsel.

4. Gourmet Pro's manufacture and sale of propane gas grills finds it subject to the risks of claims due to design defects or faulty manufacturing practices. Our audit of the company's safety record reveals that in the past three years, the company has received 52 reports from grill owners complaining of product defects, and the company has been the subject of seven lawsuits from grill owners seeking compensation for personal injuries. Most of the complaints center around the hoses, fittings, and ignition system for the company's Happy Chef line of gas grills. In every case, the compliance department

reports confirm that the complained-of incidents involve consumer misuse, incorrect third-party assembly, improper maintenance, or faulty propane tanks. The company has not been found liable in any lawsuit that has gone to trial, and the company's public financial reports confirm that payments for legal settlements have not been substantial.

Business Recommendations

1. The company has much to be proud of with regard to its safety track record and its reputation for high-quality products. That performance should be the foundation for a concerted campaign by Gourmet Pro to develop and promote a culture of ethics and compliance. A Code of Business Conduct and Ethics should be adopted to promote good business practices and require all employees to report any actual or potential violations of law, rules, regulations, or ethics.

2. Training targeted to safety and corporate ethics should be provided to employees around the globe.

3. The company should maintain a hotline, maintained by a third party, which employees could use to anonymously raise concerns or ask questions about safety or business behavior.

4. The risks and liabilities stemming from the consumer safety laws in the United States, the European community, and elsewhere are substantial. Given that, we recommend that you have our firm conduct a survey of the safety laws and regulations of those jurisdictions and report back on their provisions and the steps Gourmet Pro can take to honor its legal responsibilities.

Document Three: Email from Gourmet Pro's chief auditor to general counsel

To: Trisha Washington, General Counsel
From: Lionel Alexander, Chief Auditor
Date: January 15, 2024
Re: Audit results, etc.

Hi, Trisha. The auditors in my department are running into some questions with regard to our employees in our neighboring State of Olympia. I am hoping you can help.

Issue One: I know you're the general counsel and not an accountant and auditor like me, but because I am new to my Gourmet Pro position, I would like your take on how best to present the five-year summary of our safety audit results in the company's next annual report that, as you know, we publish on our public website. Do you think a narrative summary or a mix of charts and graphs would be a better fit for the style of the company's annual report? I could also see a breakdown by product or by production unit of how many personnel perform safety compliance work. What's your opinion? FYI, if we build in graphics, that will slow down the completion of the report by a week or so. The audit staff would really appreciate your take on this.

Issue Two: Also, we're noticing an uptick in consumer complaints about products manufactured in our facility outside of Olympic City. We've been tracking them for a while now because of the potential exposure resulting from faulty products being shipped from that facility. We want to sit down and talk with a few select employees at the facility and see what we can learn. Since you used to work with some of the managers there, do you have any advice for us? I know that sitting down with employees to talk about this kind of thing can make them uncomfortable. You might also have some other thoughts for us.

Franklin Dep't of Labor v. ValueMart
Franklin Supreme Court (2019)

The underlying litigation in this case involves an enforcement action instituted by the Franklin Department of Labor (FDOL), alleging that ValueMart has routinely violated the state's workplace safety regulations with regard to fire exits in its stores.

In response to an FDOL media campaign over fire safety and other workplace practices, ValueMart retained outside counsel to conduct an audit of its facilities, documenting all the fire exits in each of the company's stores. After completing the audit, the lawyers provided the company with a 65-page report (the Middleton Report), which included an executive summary of their findings, as well as recommendations to improve compliance performance. The FDOL subsequently commenced the underlying enforcement action against ValueMart.

The FDOL moved the trial court to compel ValueMart to turn over the outside counsel report in discovery. ValueMart opposed the motion, contending that the report is protected by the attorney-client privilege. Finding that the predominant purpose of the report was business advice, not legal advice, the trial court granted the motion to compel and ordered the report to be produced. ValueMart appealed. The court of appeal affirmed, and ValueMart then sought further review from this court.

We conclude that the trial court did not err by finding that the predominant purpose of the report is business advice. Nevertheless, we remand to the trial court for its further consideration of whether certain portions of the report contain legal advice that should not be ordered disclosed.

The Middleton Report

After learning of the FDOL's safety campaign, ValueMart retained the law firm of Middleton & Lewis to conduct a compliance audit. The resulting report is titled "Promoting Workplace Safety." Each page of the report is marked "PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION." Middleton & Lewis was asked to interview key witnesses and review the fire exits in all the company stores. The bulk of the report analyzes the ingress and egress to all of these stores. The report includes recommendations in the areas of fire safety training, building modifications, and

revisions to instructions to new employees and to supervisors. Additionally, portions of the report address the state's regulatory requirements, including the interpretation of certain FDOL regulations. The report was distributed to senior management and the board of directors.

The Governing Law of Privilege

In Franklin, the attorney-client privilege applies to "communications made between a client and their professional legal adviser, in confidence, for the purpose of seeking, obtaining, or providing legal assistance to the client." *Franklin Mut. Ins. Co. v. DJS Inc*. (Fr. Sup. Ct. 1982). In the corporate context, the privilege typically extends to such communications between the company's lawyers and its board of directors, executives, and managerial employees who seek legal advice on behalf of the company.

The purpose behind the attorney-client privilege is to "promote open and honest discussion between clients and their attorneys." *Moore v. Central Holdings, Inc*. (Fr. Ct. App. 2009). The threshold inquiry in a privilege analysis is determining whether the contested document embodies a communication in which legal advice is sought or rendered. "A document is not cloaked with privilege merely because it bears the label 'privileged' or 'confidential.'" *Id*. Because the attorney-client privilege is a barrier to disclosure and tends to suppress relevant facts, we strictly construe the privilege.

A key question is often whether legal advice is being sought. It is common for company executives to seek the advice of their counsel on matters of public relations, accounting, employee relations, and business policy. That nonlegal work does not become cloaked with the attorney-client privilege just because the communication is with a licensed lawyer. For example, the privilege does not typically extend to accounting work performed by a lawyer, such as preparing tax returns and financial statements and calculating accounts, or to occasions when a lawyer performs a financial audit or is advised of its results. *Peterson v. Xtech, Inc.* (Fr. Ct. App. 2007). However, the privilege typically extends to a lawyer's advice interpreting tax regulations or assessing the legal liabilities arising from the results of a tax audit. *See Franklin Dep't of Revenue v. Hewitt & Ross LLP* (Fr. Ct. App. 2017).

The advice given by corporate counsel can serve the dual purposes of (1) providing legal advice and (2) providing business information and advice. Here, there is no dispute that the Middleton Report contains both legal advice and business advice. When a report contains both business and legal advice, the protection of the attorney-client privilege "applies to the entire document only if the predominant purpose of the attorney-client consultation is to seek legal advice or assistance." *Federal Ry. v. Rotini* (Fr. Sup. Ct. 1998). If the predominant purpose is business advice, however, a more tailored assessment is required. In such cases, the attorney-client privilege will still protect any portions of the document that contain legal advice. *See Franklin Machine Co. v. Innovative Textiles LLC* (Fr. Sup. Ct. 2003) (legal advice regarding tax implications of business decision protected from disclosure despite being embedded in an otherwise nonprivileged business strategy document from a lawyer). Accordingly, when assessing a document where the predominant purpose is business, care must be taken to identify any distinct portions that are protected by privilege because they concern legal advice or information. *Id*. If such portions of legal advice are easily severable, they should be withheld from disclosure to preserve the protection of the attorney-client privilege.

Application of the Law to the Middleton Report

Determining the predominant purpose of a document is a "highly fact-specific" inquiry, which requires courts to consider the "totality of circumstances" surrounding each document. *See In re Grand Jury*, 116 F.3d 56 (D. Frank. 2016). Relevant factors are (1) the purpose of the communication, (2) the content of the communication, (3) the context of the communication, (4) the recipients of the communication, and (5) whether legal advice permeates the document or whether any privileged matters can be easily separated and removed from any disclosure. *See* J. Proskauer, *Privilege Law Applied to Factual Investigations,* 78 UNIV. OF FRANKLIN L. REV. 16 (Spring 2018). Applying the five-factor test of *In re Grand Jury*, we hold that the predominant purpose of the Middleton Report is business advice.

First, while the report looked into workplace safety practices driven by legal requirements, its stated purpose was to "gather information about ValueMart's facilities" and offer "business recommendations" to upper management to facilitate "provision of appropriate fire exits." By contrast, the report prepared by outside counsel in *Booker v.*

ChemCo, Inc. (Fr. Sup. Ct. 2002) was primarily intended to assist the company in complying with state tax regulations.

Second, the content of the Middleton Report was largely an analysis of each of ValueMart's facilities and other factual information. Again, this is distinguishable from *Booker,* where the report was predominantly a legal analysis of state tax statutes and regulations.

Third, with regard to the context, the FDOL enforcement action was not yet pending when the Middleton Report was written. While this is not dispositive, it is also significant that the Middleton firm does not represent ValueMart in the enforcement action itself, even though its report is likely relevant to it. A different result might be compelled if the enforcement action were pending when counsel was retained to produce the report and if counsel represented the client in the pending enforcement litigation.

Fourth, we look at the recipients of the communication. Here, even though the report was prepared for management and the company's board—typically the core privilege group for corporate legal advice—the focus of the report is on analysis of the facilities themselves, rather than on the legal implications of the facilities. The identity of the recipient does not determine the predominant purpose of the document.

Fifth, it is also significant that the legal portions of the report, such as those interpreting the applicable fire safety regulations, are not "intimately intertwined" with or "difficult to distinguish" from the nonlegal portions. It is often the case that legal recommendations are based on and mixed with business facts and considerations upon which the legal advice hinges. Indeed, Rule 2.1 of the Franklin Rules of Professional Conduct recognizes that, "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." In that case, courts take care to protect the "intertwined" content from disclosure. On the other hand, in some documents, the legal advice is in discrete sections or separate paragraphs of a lawyer-client communication that also covers business or other nonlegal issues in other parts of the document. In these situations, courts will order disclosure of the nonlegal portions and protect the legal portions from disclosure by allowing them to be redacted, that is, not disclosed.

Our conclusion from the application of the five-factor test that the Middleton Report is "predominantly business advice" is not the end of the matter, however. The respect for privileged advice requires that a second step be taken. Any paragraph or other portion of the document that carries distinct legal advice (such as identified when applying the fifth factor above) can be withheld from disclosure. Accordingly, on remand, the trial court must take care to identify those distinct portions of the report that provide legal advice and authorize ValueMart to produce the Middleton Report with those sections removed.

In reaching our conclusion, we are mindful that lawyers are often asked by clients for advice that reaches beyond the technicalities of the law. *See* Rule 2.1 of the Franklin Rules of Professional Conduct. Nevertheless, in this case, the Middleton firm's report was primarily focused on business advice to ValueMart, as opposed to gathering information for the primary purpose of providing legal advice in connection with representation in a pending government enforcement action or for purposes of other regulatory advice.

Remanded for further proceedings consistent with this opinion.

Powell County District Court
State of Franklin

Infusion Technologies Inc.,
Plaintiff,

v.

Order
December 15, 2021

Spinex Therapies LLC,
Defendant.

This order addresses the motion of plaintiff Infusion Technologies Inc. (ITI) to compel production of documents. The plaintiff's complaint alleges that defendant Spinex Therapies LLC (Spinex) breached a contract to supply components for implantable pumps used to deliver pain medication. During discovery, Spinex's internal review identified over 100,000 records that might be subject to ITI's request for document production. On two prior occasions, Spinex refused to disclose certain documents, claiming attorney-client privilege. This Court reviewed 987 documents *in camera* and compelled disclosure of 686 documents not protected by attorney-client privilege.

This third motion concerns a new collection of 132 documents for which Spinex claims privilege. ITI again requested and the Court again performed an *in camera* review. These three motions address barely 1% of the 100,000 documents potentially subject to ITI's motion to produce. Review of these documents places a substantial burden on the Court and court staff. Accordingly, the time has come to provide guidance on how counsel should handle disclosure of potentially privileged documents.

Most of the documents reviewed so far represent so-called "dual purpose" documents, i.e., documents communicating both legal and business advice. The contours of the attorney-client privilege are governed by state law. This Court must apply the "predominant purpose" standard adopted by the Franklin Supreme Court in *Fr. Dep't of Labor v. ValueMart* (2019). In that case, the court applied the "predominant purpose" standard to the blending of business and legal advice in an integrated audit report and concluded that pure legal advice included within such a "predominantly business" report could still be entitled to protection if it could be easily separated.

Spinex has misinterpreted the *ValueMart* standard by suggesting that it allows an "all-or-nothing" conclusion: Spinex argues that if a document carries *any* legal advice from a lawyer, then Spinex need not disclose any part of that document. Spinex is incorrect. With dual-purpose documents, Spinex must apply the five-factor analysis of *ValueMart* and determine if the "predominant purpose" of the document is to provide legal advice. Only then can the entire document be withheld. On the other hand, if the "predominant purpose" is determined to be "business advice," Spinex should take the second step of examining each paragraph or other distinct portion of the document to determine if it is legal advice. If so, that distinct section of the document can be withheld, but only that distinct portion.

Here, one of the documents at issue (Item 77) contains a summary review by Spinex's corporate counsel of issues related to this litigation. Some issues entail little more than descriptions of Spinex's efforts to find buyers for an unrelated product, while others offer statistics on Spinex's economic performance. The document does contain two distinct paragraphs offering legal advice, but that does not mean that the entire document can be withheld. The document is "predominantly" for a business purpose, allowing only the two paragraphs of legal advice to be withheld.

Another example is Item 43, an email that addresses a mix of topics, each topic covered by a separate paragraph. In cases of pedestrian emails, unlike the formal report in the first example, counsel should address each paragraph separately to determine if it is "predominantly" legal or business. In short, the legal analysis should follow the practical reality that the author of the email wrote each paragraph to cover a separate topic.

ITI has requested that the Court impose sanctions on Spinex for its failure to properly apply these principles. While sympathetic, the Court declines to do so—this time. From now on, counsel for Spinex must tailor what is withheld to only those portions of a document deserving of protection from discovery. To be sure, privilege determinations entail difficult factual assessments. That said, defendant Spinex and its counsel are on notice that this Court will not countenance the misuse of the attorney-client privilege in a way that burdens the Court when judicial resources are thin.

So ordered.

June Fredrickson,
District Court Judge

July 2025

New York State
Bar Examination

Sample Essay Answers

JULY 2025 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

1. The issue is whether Lin or Bo has more power to decide on the decision about expanding the business than the other.

Under RULLCA, an LLC is presumed to be member-managed. Unless otherwise agreed, each member has equal power make decisions regarding the LLC's management. For matters involving ordinary course of business, a majority vote of the members is required. For matters involving extraordinary course of business, each member must consent.

Here, Lin and Bo formed the LLC in State A which has adopted RULLCA. Lin and Bo did not enter into a written operating agreement for the LLC and did not discuss altering any of the default rules for limited liability companies. Hence, default rules of RULLCA governs. Their LLC is presumed to be member-managed under equal power of each member. Although Bo contributed more money to the LLC, Bo does not have more power in the management of the LLC than Lin. The decision to expand the business beyond soap is not a matter within ordinary course of business. Both Lin and Bo must consent to it.

Therefore, Lin's preference not to expand the business into other products will prevail.

2. The issue is the way of distributing LLC's assets between Lin and Bo after dissolution.

Under RULLCA, unless otherwise agreed, the profit of an LLC will be equally shared among the members. After dissolution, the process of winding-up governs. Winding-up process will convert the assets of an LLC into cash and distribute in the following order: (1) creditors, (2) member's capital contribution, and (3) the remaining profits.

Here, at the start of its third year of operations, the LLC had $5,000 in cash, the proprietary soap formula worth $40,000, supplies worth $1,000, and no debt. After forming the LLC, Lin and Bo agreed that the formula worth $20,000 and they shared ownership equally. So as to the formula, each of them contributes $10,000. Later, Bo also contributed $5,000 and $2,000 to the LLC. Lin did not make any other contributions to the LLC. As a result, at the time of dissolution, Bo has a contribution capital of $1,7000 and Lin has a contribution capital of $10,000.

At winding-up, after converting these assets into cash, the LLC has a total of $46,000 in cash. Since the LLC has no debt, the cash will first pass to members based on their capital contribution. Bo would take $17,000 and Lin would take $10,000 based on their respective contribution. The remaining profits would be $19,000. Since Bo and Lin do not have agreement as to profit sharing, the profits would be shared equally between them. Each of Bo and Lin would get $9,500. As a total, Bo would get $26,500 and Lin would get $19,500.

Therefore, the LLC would distribute its assets by giving Bo $26,500 and giving Lin $19,500.

3. The issue is whether the court likely to order a judicial dissolution when the parties disagree to dissolve the LLC.

Under RULLCA, a court may order a dissolution if there is deadlock in the management of the LLC, the member engaged in illegal conduct or fraud, the property of the LLC has been misused or wasted, or the LLC has no profits for a amount of time. Instead of dissolution, A court may order the LLC or members to purchase the petitioner's shares in a fair value.

Here, there is no indication that Lin or Bo engage in illegal conduct or fraud and no indication that the LLC's property has been misused or wasted. The mere fact that Lin and Bo disagreed on the expanding decision does not render the LLC in deadlock. In fact, the LLC has made sound profits and its property value has grown up.

Therefore, the court will not likely to order a dissolution. If either Lin or Bo petitions, the court may likely order the other to purchase the petitioner's shares in a fair value.

ANSWER TO MEE 1

1. Whose preference will prevail- Lin's preference not to expand the business into other products of 8o's preference to expand the business? Explain

At issue is whether a LLC's fundamental purpose can be changed without consent of its members.

Unless otherwise specified in their operating agreement, under the RULLCA, in order for an LLC to adopt fundamental changes outside the scope of its ordinary course of business, there must be unanimous consent by the governing members. Members of an LLC, unless otherwise specified in their operating agreement, under the RULLCA equally share in the rights of managing and decision-making for the company. An LLC that has been validly formed but has not created its own operating agreement between its members is governed by the RULLCA. A decision to change the company's business venture or to adopt a new business different from its original purpose counts as a fundamental change to the company, which must be agreed on unanimously in order to take effect. Furthermore, such a change must also be accompanied by an amendment to the filing articles, so that they accurately represent the new scope and business of the company.

Here, Bo and Lin are the only members running their LLC. It was formed with the express purpose of manufacturing, distributing, and selling their antibacterial soap. As they have no written operating agreement, they are governed by the RULLCA Expanding their company beyond the sale of soap would be a fundamental change to the company - it would exceed the company's fundamental purpose as intended at its inception and as described in their filing statements when officially forming the LLC. In order to adopt this fundamental change, they would need to both agree to it.

As Lin is not in agreement about expanding the company's scope, Bo's preference for expansion does not have the requisite votes to be adopted by the RULLCA, and so Lin's preference to not expand will prevail.

2. If the parties agree to dissolve the LLC, how would the LLC distribute its assets between Lin and Bo? Explain

At issue is whether Bo and Lin's differing personal contributions to the LLC would impact how its assets are distributed upon dissolution.

When an LLC dissolves, its assets are first distributed to any creditors it may have. Its assets then are distributed to the interested members according to the operating agreement if one was existing, or if not, according to the RULLCA's distribution rules. Under the RULLCA's dissolution rules for LLC's, each member receives what they had contributed, if there are enough company assets to do so. Profits and losses, however, unless otherwise

specified, are split equally among the members. This does not change even if one member contributes more to the company or spends more time working on the property.

Here, Bo's initial contributions were $15,000- half of the formula worth 20,000 and attributed equally to both of them, as well as his personal additional $5,000 contribution. He contributed another $2,000 in the company's first year, bringing his total contribution to $17,000. Lin only contributed his half of the formula, which would be $10,000. At the time of dissolution, the company has no debt, $5,000 in cash, a $40,000 formula, and $1,000 in supplies, totaling $46,000 in assets. As there are no creditors, these assets go straight to Lin and Bo. Once Bo gets his $17,000 back and Lin gets his $10,000 back, there remain $19,000 to split up between them. They would split this equally, so they each get $9,500 on top of their original contributions.

As Lin and Bo would each get their individual contributions back plus half of the profits of the company, Lin ends up with $19,500, and Bo ends up with $26,500.

3. If the parties do not agree to dissolve the LLC and one party seeks judicial dissolution, is a court likely to order a dissolution? Explain

At issue is whether a court will grant judicial dissolution without the consent of both parties.

A member can petition a court for judicial dissolution of an LLC when it is not agreed to voluntarily by all members of the LLC. A court may grant an individual member's request for dissolution under a number of circumstances, including when the parties are at such an impasse that the company can no longer function as it was intended to. This means that the members' lack of agreement impairs the company's ability to function in its day-to-day activity.

Here, although Lin and Bo are at a disagreement about what direction to take their company in, it does not appear that their disagreement is so big as to fundamentally impair the day to day operations of their company. There is no showing that the company is unable to continue with its original function of making and selling soap, or that Lin and Bo's stalemate has detrimentally hurt the company. The company is actually profiting and doing well, indicating that even though Lin and Bo are disagreeing, it is still able to run and function properly. Although the parties might be unhappy with their situation, it has not risen to the level of severity needed in order to warrant a granting of judicial dissolution.

As Lin and Bo's LLC is still able to function as intended, despite their disagreement, a court is not likely to order a dissolution.

ANSWER TO MEE 2

1. Whether the exchange of emails formed a contract

The first issue here is whether the initial emails between Debbie and Pete formed a contract. A valid contract requires an offer, consideration, and acceptance. An offer is a statement by an offeror that creates a power of acceptance in the offeree; consideration must be bargained for, and acceptance must be according to the offeror's terms and create a legal detriment to the accepting party. An illusory promise, one that is vague and overbroad, is not an offer because the promisor may change his or her mind with respect to the promise, therefore creating no legal detriment to the promising party.

Here, Debbie's initial email was not an offer but rather an inquiry into how much Pete charged for snow clearing services. Pete's reply also did not constitute an offer because though he revealed his price for snow clearing services, he did not state that he would perform those services for Debbie at said price. If anything, Pete made more of an illusory promise; he said he'd try his best to be at Debbie's driveway , but wasn't sure if he could make it. Of course, Pete likely had good intentions in writing this email. Nevertheless, his communication was vague and did not create any legal detriment to himself and was thus not an offer.

Debbie's subsequent reply did constitute an offer: with sufficient particularity, she said that she was willing to pay $500 if Pete shoveled her snow before 5 PM. (Note that as this was a contract for services rather than goods, the $500 UCC Statute of Fraud requirement does not apply and the offer and any subsequent acceptance did not need to be in writing). However, Pete's final email, stating that he would do his best and couldn't make any promises, was not clear enough to be an acceptance. Thus, by the end of the emails, no contract was formed.

2. Whether Pete's travel and words formed a contract

The next issue is whether Pete's travel to Debbie's house and words of acceptance created a contract. An offeror may revoke his offer in certain scenarios, one of them being if the offeror does so before the offeree accepts the offer. Once the offeree finds out that the offer has been revoked, he or she can no longer accept it.

Here, when Pete arrived at Debbie's house, he saw that the driveway had already been cleared. Only following this discovery did he attempt to accept the offer by ringing Debbie's doorbell and literally saying "I accept." However, because at that point, Pete already knew that Debbie had hired someone else to clear her driveway, he knew that the offer had been revoked, and he could no longer accept it. Thus, no contract was formed upon Pete's "acceptance."

As a side note, a party can accept a unilateral contract by beginning performance. So, had Debbie not hired someone else to clear snow from her house, Pete likely could've accepted the contract via unilateral performance, so long as Debbie had the opportunity to observe the beginning of his performance. Of course, this doesn't apply to these facts; Pete couldn't have begun performance because someone else had already cleared Debbie's house.

3. Whether Pete can recover damages in the absence of a contract

The third issue here is assuming that no contract was formed under Question 1 or 2, whether Pete has a claim based on his reliance on Debbie's statement that she would pay a premium price of $500 if he cleared the snow from her driveway by 5 PM. In the absence of a contract, a party may still recover under promissory estoppel, which states that a party may recover if an offeror made an offer, it was foreseeable to the offeror that the offeree would take steps in reliance on said offer, and the offeree suffered losses as a result of his or her reliance on the offer.

Here, on one hand, it was foreseeable to Debbie that Pete may take steps in reliance on her offer: she offered $200 above his normal price just to get him to shovel her house before 5 PM. However, Pete's responses stating he wasn't sure he could get to her house on time make his later reliance less foreseeable. "I'll do my best, but I can't make any promises," in other words, is arguably not enough for Debbie to think that Peter was going to rely on her offer and suffer losses as a result. Thus, I think it'll be difficult for Pete to recover damages under a theory of promissory estoppel.

4. How much Peter could recover in reliance damages

The final issue is assuming Pete can establish a claim under Question 3, presumably under the theory of promissory estoppel, how much he could be entitled to recover. Pete can pursue damages in two ways. Under expectation damages, Pete could recover damages to place him in the position he would be in had the contract been performed. Expectation damages usually equal the value of the contract minus the value of any replacement contract. Here, because Pete lost out on a $500 contract and had no replacement contract in place, he would be entitled to $500 in expectation damages.

Pete is however more likely to recover reliance damages, which are more common in cases of promissory estoppel. Reliance damages are meant to place a party in the same position they would be in had they never entered into the contract to begin with. Here, if Pete had never attempted to enter into the contract with Debbie, he wouldn't have passed up the opportunity to clear a parking lot for $400, and would have thus been $400 better off. Thus, Pete is likely to recover $400 if he pursues reliance damages.

ANSWER TO MEE 2

Formation of Contract

At issue is whether at any point in the email exchange between Debbie and Pete there was mutual assent that would form a contract.

To form a valid contract, there must be mutual assent (offer and acceptance) and consideration (a bargained-for exchange of something of legal value). An offer is a communication that invites an offeree to enter into a contract with the offeror on definite and certain terms set by the offeror. An acceptance is a manifestation of assent to the terms of the offer and willingness to enter into a contract on those terms. Common law governs the rules on contracts relating to services, whereas Article 2 of the Uniform Commercial Code governs sales contracts (sale of goods). At common law, the mirror image rule applies to acceptances: the acceptance must mirror the terms of the offer in order for there to be a valid acceptance and mutual assent. The terms of an acceptance must be unambiguous, clear, and certain to be valid acceptance.

Here, there is no problem as far as consideration: Debbie is offering money in exchange for Pete's snow-shoveling service. Debbie's first email to Pete was not an offer, but rather an invitation to offer, because while she asked Pete to come to her house to clear snow, she did not provide a price term, which is an essential term in a personal services contract, so there is no offer for the offeree, Pete, to accept. Pete's first response is an offer (with a condition precedent): if Pete's schedule allows for it and business moves quickly, he will come to Debbie's house around 4pm for $300. Debbie never accepted this offer: instead, she provided a counteroffer (which effectively rejects the first offer) for Pete to clear the driveway before 5pm for $500. Pete did not accept this offer by saying "I will do my best, but I can't make any promises," because this is not an unambiguous and clear manifestation of intent to enter into Debbie's provided terms of contract.

Therefore, the exchange of emails did not form a contract.

Pete's Statement at Debbie's House

At issue is whether Pete had the ability to accept the terms of Debbie's earlier email at 4pm when he arrived after sending the last message "I will do my best, but I can't make any promises."

A rejection of an offer terminates the offer and makes it no longer something the offeree can accept to form a contract. A counteroffer or clear rejection to the terms of an offer amount to a contract. Contracts are generally revocable, unless it is an options contract, so long as the offeree receives notice either directly from the offeror that the offer has been

terminated or the offeree indirectly learns that the offer has been terminated from a reliable source. Once an offer has been revoked it can no longer be accepted.

Here, Debbie never created an option contract. At common law, the option itself to keep an offer open for a certain period of time must be supported by consideration. However, Debbie never intended to keep an offer open for Pete by offering $500: instead, she offered $500 to entice Pete to change his plans and come shovel the snow out of her driveway. This is not an option contract offer, but just a typical, revocable common law offer. Debbie never directly notified Pete that the offer had been terminated; however, when Pete arrived to Debbie's house, he saw that the driveway had already been cleared. This provided Pete with indirect notice that the offer was terminated: there no longer was a need for his services, and clearly given Debbie's rush to get to the airport, she found another way to get the driveway shoveled. \/\/hen Pete saw the cleared driveway, the offer became revoked by his notice of it, so he had no power to accept Debbie's earlier offer from the emails.

Therefore, Pete's "I accept your offer to clear your driveway" did not form a contract.

Reliance on Debbie's Statement

At issue is whether promissory estoppel provides a claim for Pete based on his reliance on Debbie's statement.

In lieu of consideration, the doctrine of promissory estoppel exists to protect parties that detrimentally rely on the statements of others in contract formation when no contract was actually formed. Such actions are called quasi-contract actions. Even though no contract was actually formed, a party may recover under a theory of promissory estoppel when they reasonably and detrimentally relied on the statements of a counterparty, and the counterparty had reason to foresee that the party might rely on their statements, and the party suffers harm as a result.

Here, Debbie should have known from the email exchange that Pete was likely to rely on her statement that she would pay him $500 if he could get the snow cleared by 5pm because Pete responded by saying "I will do my best, but I can't make any promises." When she received that message, she knew that Pete was going to make efforts to meet her offer. Pete already told Debbie that he was "pretty busy today clearing snow for all my regular customers," so Debbie knew that if Pete did alter his schedule to accommodate her, that might mean cancelling jobs with regular customers, which would mean that Pete would lose money from those jobs in order to provide the service to Debbie. Debbie, fully knowing that her offer and Pete's response might lead to Pete relying on those statements in order to get to her house before 5pm, did nothing to stop Pete from relying to his detriment. She could have emailed back "You know what, Pete, don't bother, I need to find someone else who can come with certainty today. Maybe next time." But she did not

do that, and as a result, Pete relied to his detriment (he passed up an opportunity to clear a parking lot for $400, so missed out on $400 and then never made up for it at Debbie's).

Therefore, Pete has a quasi-contract claim against Debbie under a theory of promissory estoppel or detrimental reliance.

Pete's Remedy

At issue is what type of remedies are available to Pete under a theory of promissory estoppel/detrimental reliance against Debbie.

The typical remedy for damages at common law are compensatory damages, which are measured often by expectation damages. Expectation damages seeks to provide the injured party the benefit of the bargain, or to put them in the position they expected to be in had that contract been performed. Alternatively, reliance damages may be more likely under a cause of action for detrimental reliance. Reliance damages are measured by the damage that the injured party incurred as a result of the relying on the statements and conduct of the other party. Further, consequential damages may be awarded to a party for any damages that arose out of the harm from the original misconduct that is reasonably foreseeable to the defendant.

Here, reliance damages seem most likely to be the best fit for a cause of action for detrimental reliance, so Pete would be able to recover the amount that he was damaged as a result of relying on Debbie's statement. By relying on her statement, he turned down an opportunity that was reasonably foreseeable to Debbie (she knew he had a busy docket and she was trying to rush him) that was worth $400. It is less likely that Pete will be able to recover the $500 for the job that Debbie offered because she did effectively revoke that offer, and this cause of action is for detrimental reliance, not breach of contract.

Therefore, Pete will be able to recover $400 in reliance damages from Debbie.

ANSWER TO MEE 3

(1) Does Bank X need judicial approval to resign as trustee?

Generally, a valid express trust requires the following: (1) a settlor with intent and capacity to create a trust; (2) a designated trustee; (3) determinable or definite beneficiaries; (3) trust property; and (4) a valid purpose. Testamentary charitable trusts do not need to meet the definite beneficiary requirement to the same decree as private trusts, so long as beneficiaries are generally determinable.

For changes in a trust (especially a testamentary trust for which the settlor is no longer available to consent to changes), changes may be made to the trust with the consent of all beneficiaries, or with court approval.

Here, the beneficiaries of the trust likely cannot be ascertained such that all beneficiaries (including future beneficiaries) would be able to consent to the change in terms of the trust, namely who the trustee is. As a result, Bank X may need to petition the court to grant a modification to the trust instrument such that Bank X could resign and Bank Y could take its place, also subject to court approval. The court's approval would be especially important in this case, given that Bank Y only intends to take trusteeship if it can change the terms of the trust.

In conclusion, Bank X likely would have to obtain judicial approval to resign as trustee.

(2) Does Fred have any interest in the trust?

Generally, property not disposed of by will passes by law of intestacy. Even if a testator has a valid will, any property not distributed explicitly in that will will pass by "partial intestacy." Intestacy laws require that property be passed to heirs based on statutory rules, including to distant relatives if no other heirs are alive to take. Courts generally construe wills so as to avoid intestacy based on understandings of testators' intent, including based on extrinsic evidence.

The only way in which Fred could have an interest in the trust is (1) if he was a graduate of a one-room schoolhouse attending state A university and under the age of 25, or (2) if the trust property was deemed not to pass by testamentary trust in the will and thus pass to him by intestacy as Testator's only living heir.

Here, there are no facts to suggest that the trust can be terminated, as its purpose can be carried on if a cy pres order is granted. Moreover, a trust can only be terminated with consent of beneficiaries and by court order. No facts here suggest that Fred would be able to convince the court to terminate the trust (likely over a trustee's objection), and especially that the trust property should pass to him, since that would be inconsistent with

Testator's intent.

Thus, Fred likely does not have any interest in the trust, aside from the most remote future interest in the event the trust purpose *truly* cannot be carried out. However, based on the likelihood of a cy pres grant (as discussed below), it is highly unlikely that a court would find the trust property to pass by intestacy at any point.

(3) Can the trust's terms be judicially modified?

At issue is likely the cy pres doctrine, which allows courts to intervene at the request of the settlor, beneficiaries, or trustee (or some combination of the three, depending on the trust) to grant a change in the purpose of the trust or allow the trustee to carry on the trust in a manner other than that described in the trust. Cy pres orders are often granted when the trust no longer has a valid purpose (that is, when the purpose is illegal or contrary to public policy), or when the purpose is impracticable or no longer possible.

Here, the issue is whether the purpose of the trust--to provide for graduates of one-room school houses attending the university--is practicable or possible any longer. Given the facts, there are zero such students at this point and it seems unlikely that there will be more students to whom the trust income can be distributed. Thus, a court could be likely to grant a cy pres motion by finding that the purpose of the trust is no longer possible or substantially impracticable.

In conclusion, the trust's terms can be judicially modified.

(4) Assuming Bank Y has been appointed trustee and that the terms can be judicially modified, between the suggestions offered by Bank Y and Capital City Concert Hall, which suggestion would likely prevail?

When granting a cy pres motion and allowing the modification of the terms of a charitable trust, the court will prioritize the intent of the settlor as evidenced by her or his writings, the terms of the original trust, or extrinsic evidence when needed. The court will generally allow a modification or deviation in line with the settlor's intent as closely as possible. Generally, courts also prefer to grant modifications that are as minimal as possible, staying close to the original trust purpose when that is an option.

Here, Testator specifically executed the testamentary trust in question as a "perpetual charitable trust," indicating an intent that the trust property be put to use for charitable purposes for its perpetual duration. The trust corpus was put to use for the benefit of students in one- room school houses, which is commonly a rural phenomenon. Bank Y's suggestion, that the income be distributable to graduates of rural public high schools in state A attending State A university (the same university designated in the original trust) is very close to Testator's original trust instrument.

Capital City Concert Hall's suggestion, on the other hand, is somewhat consistent with the intent communicated in other terms in testator's will, but is not relevant to the intent communicated specifically in the charitable trust instrument. To grant the entire trust income to Capital City CH would be a considerable deviation from the original trust purpose.

Thus, because Bank Y's suggestion more closely reflects Testator's original intent in creating the testamentary trust, a court would probably be more likely to adopt Bank Y's suggestion.

ANSWER TO MEE 3

1) The issue is whether Bank X needs judicial approval to resign as trustee

Typically, a trustee may resign without judicial approve. A trustee must simply provide notice to the beneficiaries of the trust. However, with a charitable trust, which exists when the trust has a charitable purpose and benefits the community, there is often no ascertainable beneficiary to whom notice can be provided. Moreover, charitable trusts are overseen by the state's Attorney General. Therefore, judicial approval is required for the trustee of a charitable trust to resign as trustee. In this case, the trust is a charitable trust, because it has a valid charitable purpose -helping to fund education- and it benefits the community by supporting students from rural areas. Therefore, Bank X needs judicial approval to resign as trustee.

2) The issue is whether Fred has any interest in the trust

Trusts can have both life beneficiaries and remainder beneficiaries. Life beneficiaries are entitled to trust income, whereas remainder beneficiaries, who have future interests in the trust, are entitled to trust principal. Traditionally, trust income refers to value received for use of the trust, whereas trust principal refers to value received for a conveyance of trust property. However, under the Uniform Trust Code a trustee can be more flexible with the allocation of income and principal to life and remainder beneficiaries, so long as such allocation is fair.

In this case, Fred asserts that he has an interest in the trust principal. However, Fred was not made a remainder beneficiary by Testator, so is not entitled to the principal after the completion of the charitable use of the trust. Moreover, since Testator created a perpetual charitable trust, it is clear that Testator's intention was for the trust assets to remain for charitable use, not to return to his estate. Consequently, Fred does not have an interest in the trust.

3) The issue is whether the trust's terms can be judicially modified

If a settlor is dead, the terms of a trust can be modified when an unforeseen circumstance occurred that frustrates a material purpose of the trust. In this case, the trust's original charitable purpose was to pay the education expenses of any persons who graduated from a one-room schoolhouse in State A and were attending State A University while under the age of 25. However, the remaining one-room schoolhouse in State A has now permanently closed. This frustrates the material purpose of the trust because there will no longer be any new students who graduated from a one-room schoolhouse in State A and are attending State A University while under the age of 25. Moreover, this circumstance was unforeseen at the time the trust was created under Testator's will, because at the time of Testator's death in 1922 one-room schoolhouses were fairly common. It has only been

over time after Testator's death that there was a substantial -and now total -decrease in the number of students graduating from one-room school houses in State A. Therefore, there has been an unforeseen circumstance that frustrates a material purpose of the trust, Consequently, the trust's terms can be judicially modified.

4) The issue, assuming that Bank Y has been appointed trustee and that the trust terms can be judicially modified, whether a court would be more likely to adopt Bank Y's **suggestion or Capital City Concert Hall's suggestion**

When the specific charitable purpose of a charitable trust is no longer possible to achieve, the *cy pres* doctrine is applicable. Under the *cy pres* doctrine, a court will modify the charitable purpose of a trust to an alternative charitable purpose, preferably as similar as possible to the original charitable purpose, when the original charitable purpose can no longer be achieved (for example if there is a specific charity named as beneficiary and that charity then closes down).

In this case, the trust's original charitable purpose was to pay the education expenses of any persons who graduated from a one-room schoolhouse in State A and were attending State A University while under the age of 25. However, this purpose has become impossible to achieve because by 2010 there were no students who graduated from a one-room schoolhouse attending State A University and the remaining one-room schoolhouse in State A has now permanently closed. Under the application of the *cy pres* doctrine, a court could thus modify the trust's charitable purpose to one very similar - for example, as Bank Y suggested, for the trust to distribute trust income to graduates of any rural public high school in State A attending State A University. This is very similar to the original charitable purpose, the only difference being the size of the rural school in State A. In contrast, Capital City Concert Hall suggested that the trust principal of $10 million should be held exclusively for its benefit. This is very different from the trust's original purpose - it has no focus on education of State A students or on education of rural students. Moreover, Testator already provided for Capital City Concert Hall in his will by bequeathing $250,000 to the Hall, and he demonstrated no intention to want to further support the Hall. Therefore, a court would be more likely to adopt Bank Y's suggestion as it applies the *cy pres* doctrine.

ANSWER TO MEE 4

1. The issue is whether sovereign immunity bars the man's lawsuit against State A.

The Eleventh amendment provides states with sovereign immunity against suits by private citizens for monetary and injunctive relief. States can dismiss an action brought by a private citizen on the basis of Eleventh Amendment sovereign immunity. A state may consent to suit and abrogate sovereign immunity. If the suit is brought under one of the civil war amendments (13, 14, and 15) congress may abrogate state immunity and create a private cause of action for private citizens to bring suit against a state. However, congress may not abrogate state immunity using its commerce clause power.

Here, the Man is suing State A for money damages. The man is a private citizen and the defendant is a state government. Therefore, State A may dismiss the claim on the basis of 11th Amendment sovereign immunity. Congress, despite the provision in the act, may not abrogate state sovereign immunity in this situation because congress enacted the Act using its commerce clause power, not its power under the 13th, 14th, or 15th amendments. Additionally, State A has not consented to suit. *Therefore, the Man cannot sue State A under this act.*

2. The issue is whether sovereign immunity bars the woman's lawsuit against City.

While state governments are generally immune from suits brought by individuals, local governments and municipalities do not enjoy state sovereign immunity under the 11th Amendment. The state need not consent to such suits so long as the individual has a viable claim against the municipality.

Here, the woman is an individual bringing a suit for damages against a municipality, rather than the State government. There is no constitutional prohibition on suits by private individuals against municipal governments so long as all other requirements for standing and justiciability are met. Therefore, State A need not consent to suit by the woman and the woman's claim should not be dismissed on the basis of 11th Amendment state sovereign immunity.

3. The issue is whether the Notice Provision of the Act commandeers state A in violation of the 10th amendment.

Congress has broad discretion to regulate the items and instrumentalities of interstate commerce. A congress may regulate both private and public actors engaging in economic activity in interstate commerce. Even if an activity wholly occurs within the confines of one state, the Supreme Court has held that, if in the aggregate, the economic activity

affects interstate commerce, then congress can regulate that activity pursuant to its commerce power. State and Local governments are not immune from following the regulations congress enacts pursuant to its commerce power in so far that it applies to the government actor.

However, in regulating commerce congress cannot commandeer a State government to enact legislation or enforce a federal regulatory scheme. Congress may withhold funding under its taxing and spending power to incentivize states to enact certain legislation, but under congress's commerce power, congress cannot force states to enact or enforce federal law or penalize them for not doing so.

Here, the notice provision of the Act is valid use of congress's commerce clause power to regulate interstate commerce. The act, applying equally to all employers employing over 100 people, applies to the state government in so far that the state government acts as an employer. Therefore, it is a proper use of congress's power to require the state government to provide such notice pursuant to the act. The Notice Provision does not require the state to enact a law enforcing the Notice Provision nor does it require state law enforcement officials to enforce the Notice provision. Therefore, the Notice Provision does not commandeer the State G government in violation of the 1Oth amendment.

4. The issue is whether the Housing Provision of the Act commanders County in violation of the 10th amendment.

As discussed above, under the 10th amendment, congress may not commandeer state or local governments to enact certain legislation or enforce federal law. An act that penalizes a state or local government for failing to enact certain legislation is unconstitutional under the 1Oth amendment anti-commandeering principal.

Here, the housing provision directs designated municipalities to administer a federal grant program and enforce the Act's requirements. Additionally, the housing provision penalizes the designated municipalities if they fail to administer the federal grant program. The housing provision is an unconstitutional exercise of congress's power because the provision forces the municipalities to both administer a federal program and enforce a federal statute's requirements or be subject to federal penalties. Therefore, the housing provision improperly commandeers the designated municipalities and should be severed from the rest of the Act if severable.

ANSWER TO MEE 4

1) The issue is whether sovereign immunity bars the man's lawsuit against State A.

The issue is whether the Eleventh Amendment bars the man's lawsuit against State A in federal court. The Eleventh Amendment prohibits private individuals from suing states (not cities or municipalities) in federal court for damages or injunctive relief, absent an exception. These exceptions include consent by the state, suits for money damages against state officials in their individual capacity (not to be paid out from the state's treasury), suits seeking injunctions for violations of federal law, and matters involved the 13th, 14th, and 15th amendment, among a few others (such as bankruptcy matters).

Here, no provision of State A law indicates that State A consents to lawsuits in federal court. Further, because the Eleventh Amendment is an explicit constitutional protection granted to the stated, it cannot be abrogated by the last section of the Act which authorizes suits against states in federal court. This is in direct contravention to the Eleventh Amendment, and the constitution is the supreme law of the land and therefore trumps statutes in the hierarchy of authorities. Congress only has the power to abrogate state sovereign immunity for matters related to the Reconstruction Amendments (13th-15th), not for legislation that Congress has passed pursuant to its commerce clause powers. In conclusion, the man's suit against State A is likely barred by the Eleventh Amendment.

2) The issue is whether sovereign immunity bars the woman's lawsuits against City.

As noted above, sovereign immunity pursuant to the Eleventh Amendment covers states, not cities or municipalities. As such, the woman's suit against the City (a municipality within State A)would not be barred by sovereign immunity. The portion of the last section of the Act that authorizes suits against municipalities in State A is likely valid.

3) The issue is whether the Notice Provision commandeers State A in violation of the Tenth Amendment.

The Tenth Amendment stands for the proposition that the powers not explicitly granted to the federal government are reserved for the states. The implication of this is the anti-commandeering principle: the federal government may not coerce state and local governments to either enact legislation or enforce federal legislation (which includes directly forcing states to advance federal policies). However, Congress has the power to regulate the means and instrumentalities of interstate commerce, which includes employers with more than 100 employees (because such employers, in the aggregate, are likely to have a substantial effect on interstate commerce).

Here, the Notice Provision does not (i) coerce states into adopting legislation nor (ii) does it force states to enforce federal legislation. Instead, the Notice Provision merely governs state and local governments in their capacity as employers and market participants (not in their capacity as equal sovereigns in our system of federalism). As such, it seems unlikely that the Notice Provision violates the anti-commandeering principle.

4) The issue is whether the Housing Provision commandeers County in violation of the Tenth Amendment.

Unlike the Notice Provision, the Housing Provision does raise potential anti-commandeering issues. As a preliminary matter, Congress does have the right to incentivize local governments to enact federal policies pursuant to grants that are issued under Congress' spending powers. This, however, is not the situation here. Under the Housing Provision, Congress is not providing grants to local governments in order to incentivize them to carry out the policy priorities of the Economic Incentive Act. Instead, Congress is coercing municipalities into (1) administering grants to private developers, (2) reviewing applications, (3) making decisions, and (4) enforcing the Act's requirements. In other words, Congress has passed legislation pursuant to its interstate commerce powers and has told municipalities that they must enforce this legislation or be subject to monetary penalties. This is likely a blatant violation of the Tenth Amendment's anti-commandeering principle because it coerces local governments into enforcing federal legislation.

ANSWER TO MEE 5

1. Search of Student's Jacket Pockets

The search of the student's jacket pocket did not violate the Fourth Amendment. At issue is whether the principal had a reasonable basis for the search.

The Fourth Amendment, as applied to the states through the Fourteenth Amendment, prohibits unreasonable searches and searches by the government. Although the Fourth Amendment applies only to government actors, school officials in public schools are considered government actors. For the Fourth Amendment to apply, the person must have a reasonable expectation of privacy in the place searched or the government actor must have trespassed into a constitutionally protected area (like a house). Typically, for a government actor to search someone's person, there must be probable cause that the person is carrying a weapon or the search must be incident to a valid arrest. However, students in public schools have a reduced expectation of privacy. Accordingly, school officials may search a student's person when they have a reasonable basis to believe that the student has contraband or other evidence on their person. The reasonable basis standard is similar to a reasonable suspicion standard, which requires that the searching actor have more than a hunch that contraband will be found. The government actor must have an individualized and particularized basis for the search. In determining whether the search is valid, courts will weigh the government's interest in the search against the person's privacy interest and the intrusiveness of the search.

Here, the principal reached into the student's front pockets of their jeans to recover the money and a bag containing bills. The Fourth Amendment applies because the student had a reasonable expectation of privacy in their body and jeans pocket. However, because this search took place at school by a school official, the principal only needed a reasonable basis that evidence or contraband would be found. Here, the principal had a sufficient basis: the student went across the street to a gas station that he was prohibited to go to during school hours, that gas station was the site of frequent drug deals, the principal observed the student walking from the school to the gas station, observed the student talk to someone in a car, hand the river something, and saw the student put his hands in the front pockets of his jeans. Even without seeing what the student put in his jeans, the principal had a sufficient basis for suspicion. Further, the search was not more invasive than it needed to be, as the principal only put his hands in the jeans pockets.

Because the principal had a reasonable basis, the search did not violate his Fourth Amendment rights

2. Search of Student's Lockers

The search of the student's lockets likely does not violate the Fourth Amendment. At issue is first whether the student had a reasonable expectation of privacy in the locker.

As discussed above, for the Fourth Amendment to apply the person must have a reasonable expectation of privacy or the search must trespass into one of the constitutionally enumerated places (like a home). The test is an objective one. Courts vary on whether students have a reasonable expectation of privacy in school lockers. Courts will look at factors such as school rules and whether school officials have access to the locker.

Here, a court is likely to find that that the student does not have a reasonable expectation of privacy in the locker. The school's locker policy states that lockers are property of the district, that they may be searched at any time, and that the school has a master key to the lockers. All of this information is in the student handbook. Further, there is a sticker on the outside of every locker explicitly stating that the lockers is school property. All of these factors suggest that an objective student would not have a reasonable expectation of privacy in the locker. However, even if the student had a reasonable expectation of privacy, the principal likely had a reasonable basis for the search because he found the prohibited medicine in the student's pocket, and there could be more of such medicine in the pocket.

At issue next is whether the bill bottle and leafy material could be seized because they were in plain view. Government actors may seize any evidence or contraband that they find in plain view. Evidence is in plain view if the government actor sees the evidence from a place they had a legal vantage to be in and the contraband nature of the evidence in immediately apparent. Here, assuming the principal had a basis to search the locker, the pill bottle and "green, leafy material" were in plain view because the principal had a right to be there and their contraband nature was immediately apparent. The pills were identical to the ones that the principal already found in violation of the school policy and the leafy material appeared to be marijuana, in violation of State A law.

Accordingly, the search of the student's lockets likely did not violate the Fourth Amendment.

3. Search of Student's Text Messages

The officer's search of the student's texts were in violation of the Fourth Amendment. At issue is whether officer can search a phone incident to a lawful arrest.

Under the Fourth Amendment, after police officers carry out a valid arrest, they may conduct a search incident to that arrest. This search extends to the arrestee's person and

their wingspan or lunging distance. This right to search is automatic with every valid arrest. However, the Supreme Court has held that police may not automatically search a cellphone pursuant to an arrest. To search the cellphone, police must obtain a valid search warrant. This is because a search of a cellphone is significantly more invasive than a search of other items on one's person.

Here, the police arrested the student pursuant to a valid arrest warrant. Accordingly, they could carry out a search incident to arrest. The officers were free to search his backpack because it was on his person. However, the officers could not search the cellphone, including its text messages, without a search warrant. They could only search the physical phone itself, not its contents Although the officers may argue that the phone was unlocked, the officers would still need a search warrant.

Thus, the officer's search of the text messages violated the student's rights under the Fourth Amendment.

ANSWER TO MEE 5

1) Principal's Search of Student's Jacket Pockets Violating Student's Rights under 4th A

The issue is whether the principal's search of the student's jacket pockets violated the Student's Fourth Amendment Rights. The answer is likely no, because in school students have a lowered expectation of privacy, and the principal's search was reasonable.

Under the Fourth Amendment of the US Constitution, individuals have a right against unlawful search and seizure. Whether a person has a fourth amendment right depends, however, on whether there is state action (i.e., it is the government who is searching or seizing) and whether the person had a reasonable expectation of privacy in the area searched. Typically, a warrant, or probable cause, is needed to make a search of a person. An individual has a reasonable expectation of privacy in their person, and thus warrantless searches, or searches of the person without probable cause, violate the 4th Amendment. However, in public schools, the Supreme Court has held that students have a lowered expectation of privacy. When a school official conducts a search, the standard is not whether there was probable cause, but rather whether the (1) search was based on a reasonable suspicion of illegal/illicit activity; (2) whether the search was reasonable in terms of scope; and (3) whether the search was reasonable in light of the age and sex of the child/student being searched.

Applied here, the search was valid under the Fourth Amendment. As a cursory matter, there is state action here sufficient to apply the Fourth Amendment. Student attends a public high school in City, State A. The principal is a public employee, and thus is a state actor for purposes of the Fourth Amendment. However, despite the Fourth Amendment's applicability, students in school have reduced expectations of privacy, and the Fourth Amendment's protections are not as rigorous when a public school official conducts a search. Further, it is important to note that despite all the policies regarding the prohibition on visiting the gas station, the student still has a reasonable expectation of privacy in his person. But because Student was in school and because principal is the one who conducted the search, a lower standard applies.

In this case, the principal's search was entirely reasonable. First, the search was based on the principal's legitimate suspicion the student had committed illicit or illegal activity. The school in City prohibits in their handbook the students' visits to the gas station across the street because it is a local spot where drug dealing is frequent. Teacher observed student through the window cross the street, during the school day, and go to the gas station. The student further engaged in some suspicious activity because the student talked to a driver and handed something to the driver. In school searches, reasonable suspicion that there is a likelihood of illegal activity is sufficient to justify a search, and the first prong is met here.

Second, the search was reasonable in terms of the scope. The principal was looking for potential illegal drugs, on the basis that he observed the student lean over and hand something to the driver at the gas station. While the principal could not see whether the student took anything from the driver, he observe the student put something in his front pockets of the jacket he was wearing. And here, the principal's search was of the student's front pockets - in other words, the principal was not baselessly expanding the scope of the search. Instead, the principal's search was reasonable in terms of its scope- it was limited to the jacket.

Last, the search was reasonable in light of the student's age and sex. The student is a high school aged boy. Reaching in the front jacket pockets of a high school aged boy's jacket is not unreasonable in light of the student's age and sex.

For these reasons, the principal's search did not violate the student's rights under the Fourth Amendment.

2) Principal's Search of the Student's Locker and the 4th Amendment

The issue is whether the principal's search of the student's locker violated the student's rights under the Fourth Amendment. The answer is likely no, because the student likely had no reasonable expectation of privacy as to the locker.

The Fourth Amendment's protections against unreasonable search and seizure applies only to the extent that an individual has a reasonable expectation of privacy in the area searched. With no expectation of privacy, there can be no Fourth Amendment violation. The same school search rules as noted in (1) similarly apply here.

Applied to this case, the student likely had no reasonable expectation of privacy in his locker. The facts indicate that upon the principal's discovery of the two white pills, suggesting drugs, the principal preceded to the student's assigned locker. While normally a locker could suggest a reasonable expectation of privacy, the school's locker policy states that an assigned locker can be searched "at any time." Importantly, this policy is noted in the student handbook, and even more blatantly on the outside of every locker. Specifically, every locker exclaims that "this locker is the property of LPSD and may be subject to search."

Accordingly, although the principal searched the locker, there was no violation of the Fourth Amendment, because the Fourth Amendment does not apply when there's no reasonable expectation of privacy. A student who is aware of the student policy, in conjunction with the explicit warnings on the outside of every locker via the sticker, no student would have a reasonable expectation of privacy in the contents of the locker.

Anything the principal found in the locker, therefore, is not a violation of the 4th Amendment because there is no reasonable expectation of privacy. Furthermore, even if there were somehow a reasonable expectation of privacy, the same rules noted in (1) would apply- the principal's search would still be reasonable in light of his reasonable suspicion, and in light of the reasonableness of the search of the locker. Based on the information the principal had, through seeing the student go to the gas station and finding pills from the reasonable jacket search, a search of the locker would nevertheless be reasonable.

The principal's search of the locker did not violate the student's Fourth Amendment Rights.

3) Officer's Search of the Student's Text Messages

The issue is whether the officer's search of the student's text messages violated his Fourth Amendment rights. The answer is likely yes, because the police would have needed a warrant to search the contents of the phone.

Under the Fourth Amendment, action by the police, even within a school, is subject to the full provisions of the Fourth Amendment. In other words, there is no reduced standard to apply to searches made by police officers. Searches must either be based on a warrant, or one of the exceptions to the warrant requirement. A warrant requires probable cause, issued by a neutral and detached magistrate, and which is specific in scope and content to be searched. Once the contents of the warrant have been found/seized, the police may generally not continue a further search. However, when a lawful arrest is made, no warrant is needed to search the person or anything in his wingspan. Police are entitled to observe and inspect a phone physically, but may not open into such a telephone without a warrant.

Applied here, the officer's search of the student's text messages violated the student's Fourth Amendment rights because the search was conducted without a warrant. Although it is true the police had a valid warrant for the arrest of the student for possession of controlled substances in violation of State A law, the officer's search went beyond the scope and particularity of the warrant when they inspected the student's phone. Because it is officers conducting the search, and not the principal, full fourth amendment protections apply.

In this case, the officers validly arrested the student at the school, two days after obtaining the warrant. \/\/hen they arrested the student, the officers were entitled to conduct a search incident to a lawful arrest, which includes anything in the student's arm-span or on his person. The student was wearing his backpack, which would likely be considered on his person for the purposes of the Fourth Amendment, and thus subject to search. While the officers were entitled to search the backpack pursuant to the lawful arrest, and therefore find the phone, the officers overstepped by searching the student's cellphone.

The officers may argue that because the student's phone was unlocked, there was no reasonable expectation of privacy. However, that is likely not true. Courts have held that a person has a reasonable expectation of privacy in their cellphone, and thus apart from physically inspecting it, the police need a warrant to search the phone. The officers had no such warrant in this case.

Accordingly, the officers' discovery of the text messages were obtained in violation of the student's rights under the Fourth Amendment.

ANSWER TO MEE 6

1. The issue is whether Jane is directly liable to the neighbor in a negligence action.

Negligence is a tort which requires proof of four elements: (i) duty, (ii) breach, (iii) causation, and (iv) damages. The general standard of care in a garden-variety negligence action is to act as a reasonably prudent person would under the same circumstances. The majority (Cardozo) view is that a defendant owes a duty to all foreseeable plaintiffs in the zone of danger, whereas the minority (Andrews) view is that a defendant owes a duty to anyone who was harmed if anyone could have foreseeably been harmed. Causation must be both actual and proximate. Actual causation is factual causation-- the conduct of the defendant must be the but-for cause of the harm. Proximate cause is wrapped up in foreseeability; an act is the proximate cause of a harm if it was foreseeable that such a harm could be done by virtue of the act or omission. An employee is directly liable for their own negligence if they engaged in conduct regarding which the four elements of negligence can be proven.

Here, under either view of duty, Jane owed a duty to act as a reasonably prudent driver would while parking their car along a curb on a hilly street. Jane breached this duty when she answered a personal call on her cell phone as she was about to exit the truck. Because she was distracted by the three minute call, Jane left the truck without shifting it into "park" and did not engage the parking brake. This constitutes a breach of duty. Here, Jane's negligent actions (i.e., breach) resulted in the car rolling down the hill, and hitting the street sign, which collapsed and crashed onto the neighbor's car. Jane's actions are both the actual cause and the proximate cause. But for Jane's breach of duty (negligently answering the phone), the truck would not have rolled down the hill and hit the sign which hit the neighbor's car. Furthermore, it's foreseeable that a car that is not properly parked on a hill could roll down that hill and hit a street sign which would further damage property. The truck hitting the street sign which itself hit the neighbor's car can be argued to be an intervening cause, but it's not a superseding cause that cuts off causation/liability, because it is foreseeable that a car rolling down a hill could hit a street sign, and that that street sign could in turn hit something else causing damage. Therefore, there is proximate cause. Finally, damages are evident. The neighbor's car was damages and needed to be repaired at a cost of $55,000.

Therefore, yes, Jane is directly liable to the neighbor in a negligence action because the four elements of negligence are present.

2. The issue is whether Quick Mailboxes is liable to the neighbor either directly or vicariously.

An employer is liable directly, when its employee's engage in torts, only if they themselves were negligent in the hiring of the employee. However, an employer can be

responsible for an employee's torts vicariously under the theory of respondeat superior. If an employee is acting within the scope of their employment when committing a tort such as negligence, the employer can be held vicariously liable. The scope of employment is defined as acting under the time, place, and conditions of the job you were hired to do by the employer. A small deviation from the scope of employment (e.g., answering a personal cell phone call) is called a detour and does not cut off liability. This is opposed to a frolic, which is a major derivation from the duties/scope of employment.

Quick mailboxes could be liable to the neighbor directly only for negligent hiring, because Quick Mailboxes did not itself commit the tort that Jane committed. However, there is no evidence that Quick Mailboxes was negligent in hiring. It conducts background checks on all its employees, verifies that they have appropriate driver's licenses, and trains them as needed. Therefore, Quick Mailboxes is likely not liable to the neighbor directly (for negligent hiring).

On the other hand, Quick Mailboxes could be held liable vicariously for Jane's conduct under the theory of respondeat superior. Jane was undoubtedly acting in the scope of her employment when she committed negligence. She was parking the truck along the curb in order to survey the mailbox's damage from her window, and then proceed to talk to the homeowner and explain the work she planned to perform. The answering of the personal call on her cell phone is a detour (a minor derivation), not a frolic, that does not take Jane out of the scope of employment. Therefore, Quick Mailboxes is liable to neighbor vicariously through the doctrine of respondeat superior.

3. The issue is whether the homeowner is liable to the neighbor because the homeowner hired Quick Mailboxes.

Generally, employers are responsible vicariously for the torts of their employees (when committed within the scope of employment). This is rooted in the principle that employers retain a large degree of control over the when, where, and how under which employees do their work for the employer. On the contrary, one who hires an independent contractor to perform a task or service is generally not liable for that independent contractors' torts. That is because the independent contractor is generally hired on a case-by-case basis, retains control over its own work, is largely "independent" form the person who hired them, in a way that is dissimilar from the employer-employee relationship. There are however cases when a person can be liable for the torts of an independent contractor they hired. For example, if the contractor is engaging in abnormally dangerous activities, or the individual hired the contractor to perform non-delegable duties.

Here, the homeowner hired Quick Mailboxes as an independent contractor. They did not hire them to perform abnormally dangerous activities or to perform nondelegable duties. They hired them for a one-off job to fix their mailbox. In fact, in hiring them, they explicitly said "I don't' care how you fix it." This supports the proposition that the

homeowner truly exercised very minimal control over Quick Mailboxes, and emphasizes the independent contractor relationship. Because no exception applies and homeowner is not an employer of Quick Mailboxes-- but instead, Quick Mailboxes is an independent contractor-- the homeowner is not liable to the neighbor.

4(a). The issue is whether the neighbor can recover the cost to repair the car even though the repairs were unusually expensive (assuming that any of the parties are liable).

The eggshell-skull rule in torts says that the tortfeasor takes their plaintiff as they come. This means that a defendant tortfeasor is liable for the full extent of damages caused by their tort (i.e., negligence), even if those damages were not immediately apparent or were not otherwise foreseeable to the defendant.

Here, the car was repaired at a cost of $55,000 because of the special parts needed and difficult of finding them. Despite this unusually expensive cost, the neighbor can recover the full cost of its property damage because of the eggshell-skull rule.

4(b). The issue is whether the neighbor can recover damages for emotional harm (assuming that any of the parties is liable).

There are two applicable theories here. Intentional infliction of emotional distress (IIED) and negligent infliction of emotional distress (NIED). IIED requires the defendant to cause emotional harm in the plaintiff by intentional severe and outrageous conduct. To recover for NIED, someone's negligence must have extreme emotional distress, and importantly one must have been in the zone of danger, or under a bystander theory, if a human is involved, one must have been related to the individual and seen the injury.

There is no evidence that any party intentionally caused harm to the neighbor's care. Furthermore, the homeowner was not them self in the zone of danger of the car when it was hit by the street sign, because although the neighbor was looking out of his living room window from his home and saw the sign fall and damage the car, he was far enough away to be considered outside the zone of danger. Finally, despite having significant sentimental value to him, and having witnessed the sign falling on it, the car is personal property and not a human being --so the neighbor cannot recover under the bystander theory either. Therefore, the neighbor cannot recover any damages for emotional harm in this case.

ANSWER TO MEE 6

1. The issue is whether Jane is directly liable to the neighbor for negligence.

To prevail on a negligence action, the plaintiff must show that the defendant owed the plaintiff a duty of care, that the defendant breached that duty of care, that the defendant's breach directly and proximately caused the plaintiff injury, and that the plaintiff suffered an injury.

A defendant owes a duty of care to anyone that could be foreseeably harmed by the defendant's conduct. Under the Cardozo/majority view, a defendant only owes a duty of care to reasonably foreseeable victims of the defendant's harm. Under the Andrews/minority view, a defendant owes a duty of care to anyone harmed by the defendant's conduct, whether they are foreseeable or not. A defendant breaches that duty when the defendant fails to act as a reasonable person would under like circumstances. The defendant's breach must be the legal but-for cause of the plaintiff's injury as well as the proximate cause of the plaintiff's harm, meaning that the plaintiffs harm was a foreseeable consequence of the defendant's conduct. Finally, the plaintiff must suffer an actual injury, such as property damage as a result of the defendant's conduct.

Here, Jane owed a duty to care to the neighbor as he could be foreseeably harmed by Jane's carelessness in parking her car. Under the Cardozo/majority view, the neighbor and his car were foreseeable victims of Jane's carelessness in parking along a hilly road. Moreover, Jane breached her duty of care when she failed to act as a reasonable person by putting her car in park or engaging the parking brake when she parked on a hilly street. A reasonable person under like circumstances would realize the importance of ensuring their car is parked safely on a hill when it is possible to roll down and injure others and their property. Jane's breach of her duty of care was the but-for cause of the damage to the car because the car would not be damages had Jane parked her car properly.
Moreover, it was a foreseeable consequence of Jane's failure to properly park her car that the car would roll down the hill and hit cars or street signs that could fall and cause damage to other property. Finally, since the neighbor's car was damages as a result of Jane's breach, he neighbor has suffered an injury. Therefore, Jane can likely be held directly liable to the neighbor is a negligence action.

2. The issue is whether Quick Mailboxes can be held directly or vicariously liable for the negligence of Jane.

Under the theory of respondeat superior, an employer can be held vicariously liable for the torts of her employees when there is an (1) employee-employer relationship and (2) the employee's tortious conduct occurred within the scope of their employment. An act is within the scope of employment when it is an act the employee was hired to perform or done for the benefit of the employer. Commuting to work falls outside the scope of

employment, however, commuting to a job is within the scope of employment. Minor deviations from the scope of employment are not enough to release the employer from liability, however, major deviations are.

Here, Jane was a part-time employee of Quick Mailboxes (QM). Although Jane only worked 20 hours a week, her conduct on the job is controlled by QM and she is provided the tool necessary for her job by QM. Thus, an employer-employee relationship exists. Jane drove to the homeowner's house in a pickup truck owned by QM in order to perform the repair for QM. Jane did get distracted when she picked up her phone to take a personal call, however, this call lasted three minutes and was not a major deviation that would release QM from liability for Jane's conduct. Jane was performing an act she was employed to perform and acting for OM's benefit. Therefore, Jane's negligent conduct occurred within the scope of her employment and QM can be held vicariously liable for Jane's negligence.

An employer can also be held directly liable for torts committed by their employees based on negligent hiring, supervision, or training. To be liable for negligent hiring, supervision, or training, the employer have knowledge of certain negligent behavior of their employee and fails to take steps to remedy that behavior.

Here, QM conducts background checks on all of their employees, verifying that they have valid driver's licenses. Moreover, QM trains their employees as needed. The facts do not indicate that QM had any prior awareness of negligent action by Jane or that she was incapable of properly driving a car. Therefore, since QM acted reasonably in hiring and training Jane, QM cannot be held directly liable to the neighbor.

3. The issue is whether homeowner is liable to the neighbor for hiring QM.

As stated above, to hold an employer vicariously liable for the torts of her employees, there must be an employee-employer relationship and the tortious conduct must have occurred within the scope of employment. An employer is generally not liable, however, for tortious conduct carried out by independent contractors (IC). An independent contract is someone who is not controlled by the employer is a sufficient manner to create an employer-employee relationship. The more control, the more likely an employer-employee relationship exists. However, an IC brings her own tools, is paid by the job rather than by a fixed rate, and is in control of her own conduct.

Here, with respect to the homeowner's employment of QM and Jane, Jane operated as an independent contract. The homeowner had no control over Jane's work. On the phone, the homeowner stated that she did not care how they fixed it just that they fix it by the end of the week. Moreover, the homeowner would pay QM for $220 for the repair, not a salary like an employee. Finally, Jane arrived in a QM truck and brought her own supplies.

Therefore, Jane was an IC and the homeowner cannot be held vicariously liable for Jane or QM's negligence.

4(a) The issue is whether the neighbor can recover the cost to repair his car despite the repair being unusually expensive.

Under the eggshell skull rule, a defendant is liable for all harm caused to the plaintiff, even if the extent of damages are unforeseeable. Here, although the cost of the repair of the car is unusually expensive, Jane and QM are required to take the neighbor and his car as they are, even if the extent of the damage is unforeseeable. Therefore, QM and Jane can be required to cover the cost of repair to the neighbor's car.

4(b) The issue is whether the neighbor can recover damages for negligent infliction of emotional distress.

While recovery under a negligence action does allow for parasitic damages (emotional damages) on top of damages for physical harm caused by negligent conduct, relief for emotional damages caused by property damages cannot be recovered unless a theory of negligent infliction of emotional distress applies. A plaintiff can recover for NIED if they are within the zone of danger (i.e., they anticipate imminent harm towards themselves). Under the bystander theory of NIED, a bystander not within the zone of danger can recover if they are related to the victim and perceive the injury inflicted on the victim. In both cases, the plaintiff must prove that they suffered physical manifestations of emotional harm.

Here, the neighbor was not within the zone of danger. The neighbor was in his living room when he looked outside and saw the sign fall, causing damage to his car. Since the neighbor did not anticipate imminent harm to himself, he cannot recover. Moreover, despite the neighbor's sentimental attachment to the car, the car was not a human and the neighbor was not related to the car in a way sufficient to provide him relief for NIED. Therefore, although the neighbor had to seek medical attention due to the stress caused by Jane's negligent conduct, he will be unable to recover for emotional damages on a theory of negligent infliction of emotion distress.

ANSWER TO MPT 1

Alice Lowe, Plaintiff,

v.

Case No. 2024-CV-534

Emil Jost, MD, Defendant.

MOTION BRIEF IN SUPPORT OF DEFENDANT'S COMBINED MOTION FOR (1) MOTION TO INCLUDE EXPERT TESTIMONY OF DR. ARIEL SHULMAN, (2) MOTION TO EXCLUDE EXPERT TESTIMONY OF DR. AJAX, AND (3) MOTION FOR SUMMARY JUDGMENT TO DIMISS PLAINTIFF'S CLAIM

1. DR. SHULMAN IS QUALIFIED TO TESTIFY AS AN EXPERT AND HIS TESTIMONY IS RELIABLE, AND AS SUCH, HIS TESTIMONY SHOULD BE ADMITTED.

Because Dr. Shulman is qualified to testify as an expert under Rule 702 of the Franklin Rules of Evidence, and because his testimony is based on the application of reliable principles and methods, his testimony should be admitted. Rule 702 states that a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion if they demonstrate that (a) their specialized knowledge will help the trier of fact understand the evidence or determine a fact in issue, (b) the testimony is based on sufficient facts or data, (c) their testimony is the product of reliable principles and methods, and (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

A. DR. SHULMAN IS AN EXPERT BY KNOWLEDGE, SKILL, EXPERIENCE, TRAINING, AND EDUCATION IN THE FIELD OF ORTHOPEDIC MEDICINE.

Because of Dr. Shulman's extensive education in orthopedic medicine, combined with his years of practice in orthopedic surgery, Dr. Shulman is qualified to testify as an expert. In *Smith v. McGann,* the Franklin Court of Appeal defined qualification as a determination of whether the witness is "the type of person who should be testifying on the matter at hand." *See Smith v. McGann,* (2004). In order to testify as to the medical standard of care in a jurisdiction, any such witness needs be "sufficiently familiar with the standards" in that area by his "knowledge, skill, experience training, or education." *See id.* As a baseline matter, experts can only testify about the standard of care for a specialist if they specialize in "the same or a similar specialty that includes the performance of the procedure at issue." *See id.* Relying on the Franklin legislature's Civil Code section 233, the Court was responding to the Supreme Court's new approach in *Daubert,* which gave the trial court

broader latitude in determining the reliability of expert testimony. In *Smith,* the Court reversed the disqualification of one Dr. Adams, an orthopedist seeking to testify on an alleged misdiagnosis of a fracture of the plaintiff. *See Smith v. McGann.* In support of its holding, the Court ruled that Dr. Adams was properly qualified to testify as he (1) practiced in the same specialty as the defendant, and (2) testified his familiarity with the region of Franklin and its standard of care.

Here, Dr. Shulman is board certified in orthopedics, have completed a residency in Franklin Medical School for orthopedic surgery. *See Shulman Direct Examination.* He is seeking to testify on the appropriate standard of care used by defendant orthopedic surgeon, Dr. Jost. He testified as to performing on average about 100 knee and hip replacements a year for 10 years, and testifies that the practice of orthopedics in Olympia, where he practiced, and Franklin, are essentially the same. *See id.* Because Dr. Shulman (1) practiced in the same area of medicine for 10 years, performing the same procedure hundreds of times, (2) testified to his familiarity with the standard of care in Franklin as being nearly identical to that of Olympia, (3) attended medical school and was a resident in Franklin, performing the same procedure in this jurisdiction , and (4) attends lectures regarding the specialty as well as follows its current literature, Dr. Shulman is qualified to testify as an expert based on his knowledge, skill, experience, training, and education in orthopedic medicine. The fact that he no longer practices is irrelevant, as he currently teaches the specialty to students and performs mock surgeries, and the fact that the majority of his practice occurred in Olympia is equally irrelevant due to the nearly identical practice of orthopedic medicine in both states. *See Shulman Direct Examination.*

B. DR. SHULMAN'S TESTIMONY IS RELIABLE, AND SHOULD BE ADMITTED.

Rule 702 of the Franklin Rules of Evidence mandates that the testimony be based on sufficient facts or data, be the product of reliable principles and methods, and reflect a reliable application of the principles and methods to the facts of the case. In *Smith,* Dr. Adams's testimony was found to be reliable when (1) he based his opinions on his years of experience in orthopedics, combined with relevant articles and conferences, and (2) the fact that other physicians relied on his diagnoses of fractured bones. *See Smith v. McGann,* (2004). The Court also based its ruling on its mandate to "utilize any other factors" deemed appropriate to determining reliability, meaning that the approach is holistic. Other factors listed regarding reliability generally include "general acceptance of the expert's opinion within the relevant community, and whether other experts would rely on the same evidence when offering a similar opinion.

Here, Dr. Shulman based his opinion on the notes of the surgery, which is the same basis as other experts would seek to base their testimony. His expert opinion derives from (1) his long record in performing hip replacements, (2) his long tenure as both as a practitioner and as a professor in orthopedic medicine,(3) reliable journals considered authoritative in

the field, and (4) the specific facts of the case described in the surgery notes. This is similar to the facts in *Smith,* where the practitioner was similarly experienced in the field he was offering an opinion in, kept abreast of developments in the field by reading the appropriate literature, and relied his opinion on data provided by the surgery. *See Smith v. McGann.* Considering that *Smith* is binding precedent on this Court, being the relevant case interpreting Franklin's application of *Daubert* into its Rules of Evidence, and the similarity of qualification and reliability by the expert in *Smith* and Dr. Shulman, Dr. Shulman's testimony should be admitted as being reliable, thus meeting the elements of Rule 702. The Statute itself allows courts to utilize any factor appropriate to its analysis, and Dr. Shulman's testimony reflects the opinion of a highly experience, qualified expert, deeply familiar with the case through reliable information provided to him.

2. DR. AJAX SHOULD NOT BE QUALIFIED AS AN EXPERT DUE TO HIS FAILURE TO APPLY RELIABLE PRINCIPLES TO THE FACTS OF THIS CASE.

A. DR. AJAX IS NOT QUALIFIED AS AN EXPERT.

Rule 702 requires the expert to be qualified to testify as to the jurisdiction's standards, as well as apply reliable methods to the fact of the case. In *Smith,* an extensive history of performing the procedure in question qualified Dr. Adams to testify as to the appropriate standard of care. In *Smith,* an internal medicine practitioner who was not sufficiently familiar with the standards of obstetrics by knowledge, skill, experience, and training was not qualified to testify. *See Smith.*

Here, Dr. Ajax lacks the relevant qualifications as he testifies as to only having performed 50 hip replacements since his graduation from residency, a far cry from Dr. Shulman's rate of 100 per year following graduation. He testifies as to being able to "do it all", indicating that he is more of general practitioner of orthopedics, as opposed to a specialist specializing in hip surgeries. He is more akin to the second witness in *Smith,* who may have some knowledge of the field in question by virtue of his specialty, but lacks the necessary experience and training to give an expert opinion. Simply being a practitioner does not automatically signify qualification, as remaining abreast on the appropriate literature and extensive experience are essential elements of qualifications, which Dr. Ajax seems to lack in the case at hand. As such, Dr. Ajax is not qualified to testify as an expert, despite his practice in the jurisdiction within the relevant field.

B. EVEN IF DR. AJAX IS AN EXPERT, HE FAILED TO APPLY ANY RELIABLE METHODS TO THE CASE AT HAND.

Rule 702 requires experts to base their testimony on the "reliable application of their chosen principles and methods to the facts of the case. Factors include general acceptance in the community, whether other experts would rely on the same evidence, and support

from the facts of the case. *See Smith.* In *Park,* the court found that "if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury, it must be excluded." *See id.*

Here, at no point does Dr. Ajax relay the basis for his opinion that Defendant failed to meet the appropriate standard of care; his opinion was based on "speculation of what might have occurred had the facts been different", *see Smith,* which is never a ground for providing a sufficiently reliable basis for an opinion. He does not testify as being abreast of relevant literature on the subject, and his only opinion with respect to the defendant's standard of care is based purely on a speculatory opinion of another procedure that should have been taken. He did not even admit to having seen the X-Ray in question, but instead bases his opinion on the fact that only one X- Ray was taken, showing complete unfamiliarity with the facts of the case. As such, his testimony should be excluded as being unreliable.

3. BECAUSE PLAINTIFF OFFERED NO EVIDENCE WITH RESPECT TO DEFENDANT'S BREACH OF THE STANDARD OF CARE OR CAUSATION, PLAINTIFFS MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED.

Rule 56 of the Franklin Rules of Civil Procedure state that a court shall grant a motion for summary judgment if there "is no genuine dispute as to any material fact", entitling the movant to judgment as a matter of law. In deciding whether to grant a motion for summary judgment, the Court must do so against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *See Alexander v. ChemCo Ltd ,* (2020). The elements for a finding of negligence is that (1) a duty existed requiring the defendant to conform to a specific standard of care for the protection of others against harm, (2) that the defendant failed to conform to that specific standard of care, and (3) that the breach of the standard of care caused the harm to the plaintiff. *See Jacobs v. Becker* (2020). In *Jacobs v. Becker ,* a plaintiff failed to admit any admissible expert testimony on the defendant surgeon's appropriate standard of care. Because the Plaintiff failed to provide expert testimony in a medical malpractice case where expert testimony is required to show how the appropriate standard of care was breached, as well as causation, the Court affirmed the trial court's grant of summary judgment. *See Jacobs v. Becker.*

Here, Plaintiff has failed to admit any reliable expert testimony with respect to the appropriate standard of care in this action, as well issues of causation. Dr. Ajax's testimony is inadmissible as being pure speculation, and being irrelevant to the facts of this case, and in no part does it mention the appropriate standard of care beyond the accusation that a second X-Ray from a different angle may have been appropriate. Because this constitutes a complete failure to establish the existence of an element essential to plaintiffs' case, being the breach of the appropriate standard of care, as well as what the standard of care is, this motion for summary judgment should be granted in favor of defendant.

ANSWER TO MPT 1

LOWE V. JOST

DEFENDANT'S MOTION TO EXCLUDE EXPERT TESTIMONY AND MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Dr. Emil Jost was not negligent in performing a hip replacement on Alice Lowe. Any injuries suffered by Ms. Lowe were caused by her failure to follow post-surgery precautions and her subsequent fall. Both parties have retained expert witnesses, and have filed and argued a motion to exclude the testimony of the opposing party's expert witnesses. Dr. Jost has also filed a motion for summary judgment. This brief will demonstrate that (i) the court should qualify Dr. Shulman as an expert and admit her opinion testimony; (ii) the court should not find Dr. Ajax to be a qualified expert, but even if he is qualified, should exclude all of his proffered opinion testimony; and (iii) even if the Court qualifies Dr. Ajax as an expert, the Court should grant our motion for summary judgment because the plaintiff has failed to offer any admissible evidence on the elements of her malpractice claim.

II. ANALYSIS

First, as a general matter, Rule 702 of the Franklin Rules of Evidence governs testimony by expert witnesses. According to Rule 702, a witness who is qualified as an expert by "knowledge, skill, experience, training, or education" may testify "in the form of an opinion or otherwise" if the proponent demonstrates to the court that it is more likely than not that: "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." (Rule 702). This rule is consistent with Daubert, in which the Supreme Court changed the standard for the reliable of expert testimony from "general acceptance" to giving trial courts more discretion to determine whether an expert's "reasoning or methodology properly can be applied to the facts at issue." (Smith, quoting Daubert). Franklin code§ 233 reflects the Daubert criteria for determining the reliability of expert testimony. (Smith).

II. A. The court should qualify Dr. Shulman as an expert and admit her opinion testimony because she is qualified and her testimony is reliable and credible.

First, Dr. Shulman's is qualified to testify. There are two key prongs to the Daubert inquiry: qualification and reliability. The inquiry in regard to whether a witness is qualified as an expert turns on whether "he is the type of person who should be testifying under the matter at hand." (Smith). In Franklin, experts can generally only testify about the standard of care for a specialist "if the experts specialize in the same or a similar specialty that includes the performance of the procedure at issue." (Smith). However, it is not necessary for the testifying witness to have practiced in the same community as the defendant. (Smith). The witness just must be able to "demonstrate familiarity with the standard of care where the injury occurred." (Smith). Per Franklin Rule of Evidence 702, to be qualified as an expert, the witness must "possess scientific, technical, or specialized knowledge on all topics that form the basis of the witness's opinion testimony." (Smith).

In Smith, the Franklin Court of Appeal held that an orthopedist, Dr. Adams, who practiced medicine in the State of North Brunswick over 800 miles away from Franklin was properly qualified as an expert in orthopedics. Dr. Adams had testified that he had studied the demographics of Franklin and North Brunswick, and his study had demonstrated that "the population and availability of medical care were quite similar." (Smith). He also had testified that the standard of care in orthopedics was "virtually the same" in both jurisdictions. (Smith). On the other hand, in. the Franklin Supreme Court found that the trial judge did not abuse his discretion in excluding the testimony of a pediatrician who sought to testify about the standards of care for an obstetrician because she was "not sufficiently familiar with the standards of obstetrics by knowledge, skill, experience, training, or education." (Smith, citing- Additionally, in Smith, the court found that a specialist in internal medicine did not have sufficient familiarity with orthopedics to testify as an expert witness as to the standard of care for orthopedics. (Smith).

In the instant case, Dr. Shulman is qualified to testify based on the standard of care for an orthopedic specialist because he specialized in the same specialty that includes the performance of hip replacements, and has familiarity with the standard of care in Franklin. First, Dr. Shulman is an expert in orthopedic surgery on hips. Dr. Shulman graduated from the University of Franklin Medical School, completed a residence in orthopedic surgery at Franklin Medical Center, was a resident there from 2004 to 2009, is board-certified in orthopedics, is currently a professor or orthopedics at Olympia University Medical School, and has written three articles in the field on the proper procedures for knee replacement. (Direct Examination). As a professor, Dr. Shulman teaches students how to do hip and knee replacements, which includes a simulated joint replacement class for medical students. (Direct Examination). Also, when she was in private practice for 10 years, from 2009 to 2019, she exclusively focused on hip and knee replacements, and testified that he probably performed "an average of 100 knee and hip replacements per year during that time." (Direct Examination). Although her private practice was in Olympia, as plaintiff's counsel emphasized on cross-examination, Dr. Shulman indicated that although Olympia is a smaller medical community than Franklin, the "practice of orthopedics is pretty much the same in both states." (Direct Examination). Additionally, while the plaintiff may argue

that Dr. Shulman has not practiced orthopedics in Franklin since her residency there in 2009 and had not performed a hip replacement since 2019 (see Cross- Examination), the standards of care are sufficiently similar in the two states, and it has only been three years since she performed a surgery on a living person, and continues to do simulated joint replacements. Thus, Dr. Shulman is qualified to testify.

Second, Dr. Shulman's testimony is reliable. In Franklin, the reliability inquiry turns on whether the opinion is based on a "scientifically valid methodology." (Smith). While Rule 702 includes a set of factors, the Smith court explained that the statute only provides examples, and courts are qualified to "utilize any other factors we deem appropriate." (Smith). Franklin case law uses a variety of factors, such as the degree to which the expert's opinion and methods are "generally accepted within the relevant community" and whether experts in the field would "rely on the same evidence to reach the type of opinion being offered (see Ridley). However, mere speculation about "what might have occurred had the facts been different can never provide a sufficiently reliable basis for examining the basis for the opinion in cross-examination. (Smith). While the opposing party bears responsibility to for examining the basis for the opinion during cross examination, the court *must* exclude the opinion if it is "so fundamentally unsupported that it can offer no assistance to the jury." (Park). The Park court defined a fundamentally unsupported opinion as one that "fails to consider the relevant facts of the case." Park.

In Smith, flexibly utilizing the Daubert factors, the court found that an expert's testimony was reliable because the opinion was based on "his many years of experience in orthopedics, the many articles he has read and conferences he had attended, and the fact that other physicians relied on his diagnoses of fractured bones. Smith. In Ridley, the court found that an expert's opinions were based on "sufficiently reliable methodology" when they were based on "medical records, CT scans, medical notes, and deposition testimony." (Smith, summarizing Ridley). However, in Smith, the court found that an expert's testimony that a doctor fell below the standard of care in not ordering further X-rays because, "in her reading of the initial X-ray, there was a possibility of a fracture. Smith. The court reasoned that she did not demonstrate that her methods were reliable, and that her testimony as to causation was speculative and failed to have a reliable basis. Smith.

Here, Dr. Shulman has based her opinion on very thorough analysis of the case that comported with a scientific valid methodology and that has presented significant evidence on the issue, unlike the expert it Smith. She has reviewed all the surgical and medical records, physically examined the plaintiff, and reviewed the complaint and answer in the case. (Direct Examination). Similar to the expert in Ridley, she also based her opinion on her long experience performing hip replacements, keeping up on the medical literature in the area, such as following all the articles in the *JAMA* and *New England Journal of Medicine,* which are the two most up to and reliable journals, and regularly attends and lectures and conferences and annually discussing the appropriate procedures for joint replacements. (Direct Examination). Thus, based on her experience and research efforts,

she reviewed the notes from Dr. Jost's surgery, and found that "Dr. Jost's surgical management of the patient, the manner in which he carried out the surgery, and his medical assessment of the patient's condition were at all times appropriate and fully comported with accepted standards of surgical care." (Direct Examination). She also found that Dr. Jost specifically instructed Ms. Lowe not to bend or twist six weeks aft after the surgery, which "comports with the recognized standard of medical care for hip replacements. (Direct Examination). The plaintiff may contend that Dr. Shulman has not made a thorough comparison of the population and availability of medical care in Olympia and Franklin. (see Cross-Examination). However, the Daubert factors are flexible, and do not require a thorough comparison between the jurisdictions as the expert in Smith did. It is sufficient that Dr. Shulman studied and served as a resident in Franklin, and was aware of what would be generally accepted in both communities, especially because they had a very similar standard of care. Thus, Dr. Shulman's opinion should be admitted because it is reliable.

Finally, the court must still determine whether the expert is credible. See Smith. The factual basis of the particular case "goes to the credibility of the testimony, not its admissibility," as do the extent and substance of the expert's qualifications. Smith. Again, Dr. Shulman has demonstrated that she has undergone very significant analysis in making her opinion - both in generally maintaining her knowledge as an expert in a field, but also by thoroughly reviewing the cases' documentation and surgery notes. Thus, Dr. Shulman is credible.

II. B. The court should not find Dr. Ajax to be a qualified expert because he does not have sufficient expertise in hip surgery, but even if he is qualified. should exclude all of his proffered opinion testimony because it is neither credible nor reliable.

First, the same expert rules apply to Dr. Ajax as Dr. Shulman: he must be deemed qualified, reliable, and credible. Dr. Ajax is not a qualified expert in hip surgery, despite his qualifications as an orthopedic surgeon, because he has limited experience performing hip replacement surgery. While Dr. Ajax completed his education in Franklin, he completed his residency in Olympia, where he finished his residence in 2007. (Dr. Ajax Direct Examination). He currently practices in Franklin, with a broader practice including fractures, knee replacements, and hip replacements. (Dr. Ajax Direct Examination). Since 2007, he has only done about 50 hip replacements, and while he had some experience during his residency in Olympia, Dr. Ajax only did about 20 surgeries himself. (Dr. Ajax Direct Examination).. He did not present any other evidence about whether he attends conferences, keeps up to date in the literature, is familiar with standards of care, among other factors, as were relevant in Ridley and Smith. Thus, while he is certified to practice in Franklin and has limited experience in hip replacements, he is not qualified to testify as an expert as to what should have been done in this case because he is more of a general orthopedist.

Second, even if Dr. Shulman is qualified, his proffered testimony should be excluded because it is neither reliable nor credible. Rather than having based his testimony on an extensive view of the files, surgery notes, records, and best practices, he instead made the bare assertion that "Dr. Jost departed from a good and accepted medical practice inf ailing to order another X-ray from a different position." (Dr. Ajax Direct Examination). Like the expert in Smith whose testimony was not admitted, Dr. Jost made testified as to his speculations about the X-ray, stating "A second X-ray, from a different angle, *might* have shown that the prosthesis was out of place or that there was a broken bone." (Dr. Ajax Direct Examination, emphasis added). He only based this opinion on the fact that Dr. Jost only did one X-ray from front-to-back. (Dr. Ajax Direct Examination). This was not sufficiently based on the facts of the case. (cf. Park). There is an insufficient basis to find that this testimony was reliable because it was just based on mere speculation and opinion. Furthermore, the lack of factual basis, coupled with his limited experience with hip surgeries, renders the testimony not credible. Thus, the court should exclude all of his proffered opinion testimony.

II. C. Even if the Court qualifies Dr. Ajax as an expert. the Court should grant our motion for summary judgment because the plaintiff has failed to offer any admissible evidence on elements of her malpractice claim because she has failed to make a showing of sufficient evidence to establish the existence of two essential elements of her case - standard of care and causation.

According to the Franklin Rules of Civil Procedure, a party may move for summary judgment, "identifying each claim or defense-or the part of each claim or defense-on which summary judgment is sought." (Rule 56). The court shall grant summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. (Rule 56). With respect to moving for summary judgment based on negligence, in Franklin, the prima facie case for negligence includes three elements: (1) that a duty requires the defendant "to conform to a specific standard of care for the protection of others against harm," (2) that the defendant "failed to conform to that specific standard of care," and (3) the breach of the standard of care "caused harm to the plaintiff." (Jacobs). Thus, to succeed on summary judgment, the defendant must show that the plaintiff failed to establish a "factual basis" for any of these elements, with the court viewing the evidence in the light most favorably to the nonmoving party. (Jacobs). Specifically, with respect to physicians, the standard of care is to "act with that degree of care, knowledge, and skill ordinarily possessed and exercised in similar situations by the average member of the profession practicing in the field." (Jacobs).

The Franklin Supreme Court has also held that summary judgment should also be granted against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." (Alexander). In this situation, there can be "no genuine issue as to a material fact"

because the lack of proof concerning the material fact renders all non-material facts immaterial. (see Alexander). Jacobs defines a material fact as one that is "essential to the establishment of an element of the case and determinative of the outcome." Smith. In short, if a plaintiff fails to produce "any evidence on to prove an element of the case in which the plaintiff bears the burden of proof, then the defendant is entitled to summary judgment. (Jacobs). With respect to medical malpractice cases, expert testimony is required because "only expert testimony can demonstrate how the required standard of care was breached and how the breach caused the injury to the plaintiff." (Jacobs). Thus, if a party fails to provide expert testimony on either causation or the standard of care, then an adverse ruling could be justified against it. (Jacobs).

In Jacobs, the Franklin Court of Appeal granted summary judgment for a defendant doctor in a medical malpractice case, who presented expert witness testimony stipulating that the doctor, Dr. Becker's, treatment of the plaintiffs "at all times met the standard of care in the community." (Jacobs). Rather, it was undisputed that Dr. Becker had prescribed antibiotics to the plaintiff, and the plaintiff admitted that she failed to use them as prescribed. (Jacobs). Furthermore, the plaintiff did not present any expert testimony in support of her claim. (Jacobs).

Here, the facts are clear that Dr. Jost met the standard of care in the community, and instead, Ms. Lowe was responsible for her injuries. Indeed, as the plaintiff, Ms. Lowe must make a showing to establish the existence of an issue as to a material fact, which here in a medical malpractice case, the how the required standard of care was breached and how the breach caused the injury to the plaintiff. In contrast to Dr. Shulman's robust testimony, research, and qualifications, in his sparse testimony, Dr. Jost made bare assertions that Dr. Jost "departed from good and accepted medical practice" based on his speculation about what might have happened if Dr. Jost had taken another X-Ray. This is not enough to demonstrate a standard of care. Additionally, his testimony failed to establish how the breach caused the injury to Ms. Lowe. All he stated was that because Dr. Jost did not take another X-ray, he could not see that there was another bone break or a misplaced prosthesis, which is insufficient. But assuming for argument's sake that this could be the case, as the plaintiff may argue, Dr. Ajax's testimony has failed to rebut that Ms. Lowes's failure to show up to her scheduled check in (Statement of the Facts) and her bending over with the cane to pick something up from the ground did not cause the injury (Affidavit of Karen Baines). Indeed, after having consulted Dr. Jost because of severe pain in her left hip, Dr. Jost diagnosed Ms. Lowe with arthritis and recommended she undergo a hip replacement, which he performed. (Statement of Facts). Although Dr. Jost told Ms. Lowe not to bend more than 90 degrees at the waist or twist at the hip for six weeks after the operation, (Affidavit of Dr. Emil Jost), about two weeks after the operation, Ms. Lower bent down forward at her waist to pick up her purse from the ground (Affidavit of Karen Baines), suffered severe pain, and ultimately needed hip revision surgery as her prosthetic hip had been damaged. (Statement of Facts). Thus far in the case, Ms. Lowe has failed to rebut these facts. Thus, the plaintiff has simply failed to provide evidence concerning

material facts of the case, which entitles Dr. Jost to a motion for summary judgment because there is no genuine issue of material fact.

III. CONCLUSION

In conclusion, we respectfully request that the court qualify Dr. Shulman as an expert and admit her opinion testimony and the court not find Dr. Ajax to be a qualified expert, but even if he is qualified, should exclude all of his proffered opinion testimony. We also request that the Court grant our motion for summary judgment because the plaintiff has failed to offer any admissible evidence on elements of her malpractice claim, even if Dr. Ajax is qualified as an expert.

ANSWER TO MPT 2

To: Anita Hernandez

From: Examinee

Date: July 29, 2025

Re: Gourmet Pro response to CPSC and protection of documents via attorney-client privilege

I. Introduction

The following memorandum discusses the application of attorney-client privilege to three documents that the Consumer Product Safety Commission seeks in a subpoena from Robinson Hernandez's client, Gourmet Professional Grilling Co., in connection with a CPSC investigation as to one of its competitors. The memorandum discusses the applicable standard of law in Franklin as to attorney-client privilege, including the jurisdiction's test from *ValueMart,* and thereafter applies said test to three representative documents from GourmetPro.

II. Franklin standard of attorney-client privilege to be applied

The Franklin Supreme Court has held that the attorney-client privilege applied to "communications made between a client and their professional legal adviser, in confidence, for the purpose of seeking, obtaining, or providing legal assistance to the client." *Franklin Dep't of Labor v. ValueMart* (Fr. Sup. Ct. 2019), citing *Franklin Mut. Ins.* Co. *v. DJS Inc.* (Fr. Sup. Ct. 1982). The attorney-client privilege covers communications between a corporation's lawyers and directors, executives, and managerial employees who "seek legal advice on behalf of the company." *ValueMart.* The "threshold inquiry" to determine whether a document is privileged is whether a document is covered by privilege is whether the document embodies a "communication in which legal advice is sought or rendered." *ValueMart,* emphasis added. The attorney-client privilege seeks to "promote open and honest discussions" between attorneys and their clients, however, the Supreme Court "strictly" construes said privilege because of its ability to "suppress" information that is relevant. *Valuemart,* citing *Moore v. Central Holdings, Inc.* (Fr. Ct. App. 2009).

A court determining whether the attorney-client privilege applies first inquiries into the predominant purpose of the document and whether truly *legal* advice is being sought. A lawyer preparing a document for the purpose of public relations, accounting, employee relations, or business management does not prepare a document cloaked by privilege. *ValueMart* ("[T]he privilege does not typically extend to accounting work performed by a lawyer."), citing *Peterson v. Xtech, Inc.* (Fr. Ct. App. 2007). However, the privilege *would*

typically apply to a lawyer's interpretation of tax advice or legal liabilities arising from a tax audit. *ValueMart,* citing *Franklin Dep't of revenue v. Hewitt* & Ross *LLP* (Fr. Ct. App. 2017). The predominant purpose inquiry is highly "fact specific" and considers the "totality of the circumstances." *ValueMart,* citing *In re Grand Jury,* 116 F.3d 56 (D. Frank. 2016). There is a five-factor inquiry from *In re Grant Jury* which includes: 1) the purpose of the communication, 2) the communication's content, 3) the context of the communication, 4) the communication's recipients, and 5) whether legal advice can be separated and removed from the document. *ValueMart* (analyzing the predominant purpose of the Middleton Report at issue in the case), citing J. Proskauer, *Privilege Law Applied to Factual Investigations,* 78 Univ. of Franklin L. Rev. 16 (Spring 2018).

After determining the purpose of the document according to the five-factor test, a court then determines whether to withhold certain sections of the document from disclosure. *ValueMart.* A document prepared by an attorney may be protected by the attorney-client privilege in whole or in part. *ValueMart.* When a document contains both legal and business advice, the attorney-client privilege will extend to the document in its entirety "only if the predominant purpose of the attorney-client consultation is to seek legal advice or assistance." *ValueMart,* citing *Federal Ry. v. Rotini* (Fr. Sup. Ct. 1998). If the predominant purpose of the document is for business advice, a document can claim privilege for the sections of the document that contain legal advice and that are "easily severable." *ValueMart.* For example, legal advice relating to legal tax liabilities of a business decision remains shrouded by privilege even if embedded within a document prepared for the primary nonprivileged purpose of business strategy. *Franklin Machine* Co. *v. Innovative Textiles LLC* (Fr. Sup. Ct. 2003). Thus, the attorney-client privilege inquiry is guided by 1) the application of the five-factor "predominant purpose" test, and 2) the decision as to separability of certain sections of a document that may properly claim attorney-client privilege. Order issued in Infusion Tech. Inc. v. Spinex Therapies LLC, Powell County District Court, December 15, 2021 [hereinafter Spinex Order]. In *Spinex,* the court indicated that a "summary review" of issues related to the litigation was predominantly for a business purpose, although it contained two "distinct" paragraphs of legal advice. The court indicated that only the two paragraphs of legal advice could be properly withheld. The inquiry should be a paragraph-by- paragraph determination of whether information is "predominantly" legal or business.

III. Document One's predominant purpose is legal advice being sought and rendered, and it is thus protected from disclosure

Document One, an email from Trisha Washington, general counsel of Gourmet Pro to Maria Johnson, CEO of Gourmet Pro, discusses the topic of class-action litigation against Main Street. It is a response to a request from Johnson to consider the legal implications of litigation against Main Street, a principal competitor of Gourmet Pro. Thus, the predominant purpose of Document One is to discuss the legal "implications" of the Main Street class action litigation. This is indicated by the "stated purpose" of the document

from Gourmet Pro's general counsel to provide "implication" and offer suggestions on "legal considerations" and "insulat[ion] from legal liability." Thus, the first factor indicates that the purpose of the communication was for legal advice under *ValueMart.*

Unlike the Middleton Report in *ValueMart*, which focused on an "analysis" of "facilities" and "other factual information," Document One's content, the second factor, is similar to *Booker v. Chern Co, Inc.*, which was predominantly a "legal analysis." Document One is predominantly a legal analysis because it provides information as to "sources of liability" and insulating Gourmet Pro from someone who might target it as the subject of a class action lawsuit. Document One also provides advice as to "navigating the regulatory standards of quality" of the FTC.

The context of Document One, the third factor, indicates that the document was prepared in the context of a lawsuit. CPSC seeks Gourmet Pro's documents relating to the design, manufacture, and safety of its propane tank hoses and fittings in connection with an administrative investigation of Main Street. Gourmet Pro is not a target of the investigation and thus is not itself subject to an active investigation. Although the lawsuit was not against GourmetPro itself, similar to how there was no pending enforcement action against Valuemart when the Middleton Report was written, the fact that the document is shrouded in the context of a lawsuit leans in favor of determining the document's primary purpose as providing legal advice.

The recipient of the communication, the fourth factor, is the CEO of Gourmet Pro, someone who is within the "core privilege group for corporate legal advice." Although the recipient's identity is not a dispositive factor, it indicates that the document was prepared for someone who is meant to be looking at privileged information.

The fifth and final factor, whether legal advice permeates the document, also leans in favor of finding Document One to be entirely protected by privilege. Each paragraph assesses different legal information: the first speaks to an explanation of the pending lawsuit against Main Street, the second speaks to potential sources of legal liability based on the WatsonSmith safety audit, and the final paragraph speaks to further advertising strategies to insulate GourmetPro from class-action or regulatory liability. Unlike the document in *Spinex,* which contained a summary review from Spinex's corporate counsel of issues related to this litigation with only two paragraphs in the large summary that offered legal advice, Document One contains almost entirely information regarding legal advice provided by Gourmet Pro's general counsel.

Overall, Document One is a report primarily focused on "providing legal advice in connection" with litigation, government enforcement, and "other regulatory advice," and it is likely covered by the attorney-client privilege. *ValueMart.* Thus, because the five-factor test indicates that Document One's predominant purpose was to seek legal advice, it is protected from disclosure.

IV. Document Two should be produced

Document Two is an Executive Summary to a Privileged and Confidential Report prepared by external counsel at WatsonSmith for the Management and Board of GourmetPro. Document Two should be produced, but Paragraph 4 of the Overview Section and Paragraph 4 of the Business Recommendations section should be redacted.

The first factor, the purpose of the communication, is stated to be "business recommendations to make the company even better when it comes to dealing with safety concerns." This is similar to the Middleton Report at issue in *ValueMart,* which indicated that the stated purpose was to offer "business recommendations" to the company's upper management in order to facilitate safe fire exits. Thus, the first factor indicates that the predominant purpose of Document Two is for business purposes. Although the report is marked privileged, the fact that a report is marked "PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION" is not dispositive in determining its purpose as a privileged attorney-client communication. *ValueMart* (holding that such markings in the Middleton Report were not dispositive as to the document's protection from discovery).

The second factor, the communication's content, also leans in favor of finding the predominant purpose of Document Two to be for business. The document consists primarily of an analysis of Gourmet Pros sales, number of employees, a listing of the company's safety reports received and the primary content of such reports, the company's history of litigation, and stated "Business Recommendations" for safe business practices. Document Two does not speak to "legal analysis" of GourmetPro's products under applicable statues or regulatory standards, unlike the report in Booker. Document Two is more similar to the reports ordered to be produced in both *Spinex* and the Middleton Report, where the reports included a "mix of topics," an "executive summary of their findings, as well as recommendations to improve compliance performance." Document Two closely parallels this structure, by first offering an overview of findings relating to safety and secondly offering business recommendations to develop safe practices. Thus, the second factor indicates that the predominant purpose of Document Two is for business purposes.

The third factor, the context of the communication, indicates that the Report was prepared as a response to "high-profile controversy" over accidents and injuries associated with GourmetPro's competition. The report states that the "risk of liability looms large" in the field but does not identify any particular litigation or government investigation that the report seeks to respond to. The Franklin Supreme Court has indicated that providing legal advice in connection with "pending" action is more likely to be for primarily legal purposes. Thus, the third factor leans against Document Two's protection via privilege.

Like the Middleton Report, Document Two was prepared for GourmetPro management and the company's board. Although these are properly members of the "core privilege group," the Franklin Supreme Court has held that the "identity of the recipient" does not determine the predominant purpose of the document, and the "focus of the report" and the "analysis" of facilities rather than "legal implications" of those facilities meant that the predominant purpose of the Report was for business purposes. *ValueMart.* Similarly, Document Two focuses on the analysis of Gourmet Pro's safety record, and not the legal implications of Gourmet Pro's safety practices. Thus, the fourth factor indicates that the document was likely prepared predominantly for business purposes.

Finally, the fifth factor, whether legal advice can be separated and removed from the document, mostly leans in favor of finding that the document is primarily for business purposes. Document Two discusses in its final paragraph a business recommendation that WatsonSmith "conduct a survey of the safety laws and regulations" of jurisdictions where GourmetPro could be subject to legal liability, but provides no analysis of the laws or GourmetPro's potential liability under said laws. Even if the final paragraph of the Business Recommendation section is properly understood as legal advice, it is also "easily separable" under the second part of the *ValueMart* test, which instructs that portion of a document containing legal advice that is not "intimately intertwined" with or "difficult to distinguish" from nonlegal portions. Paragraph Four of the Overview section, which discusses Gourmet Pro's lawsuits from grill owners seeking compensation for personal injury, also offers information that is arguably about an assessment of the company's liability to date, including information on legal complaints against GourmetPro, the success of the claims, the defenses involved in the legal claims. However, like Paragraph Four of the Business Recommendation section, it is easily separable. *ValueMart.* Overall, these two paragraphs *discuss* legal information but do not *render* any legal advice, making them arguably not for the predominant purpose of giving legal information.

Thus, because the final paragraphs of both the Overview Section and the Business Recommendations section of Document Two contain distinct legal advice, "such as identified when applying the fifth factor" of the five-factor test, GourmetPro may withhold those paragraphs from disclosure under *Spinex* and *ValueMart.* However, because the attorney-client privilege is "strictly construed" and the paragraphs arguably do not render any legal advice as to GourmetPro's liability, Robinson Hernandez should encourage GourmetPro to produce the document in its entirety.

V. Document Three should be produced as to Issue One, but protected as to Issue Two

Document Three is an email inquiry from GourmetPro's chief auditor to Trisha Washington, GourmetPro's general counsel. The document contains two distinct questions that present different analyses under the *ValueMarttest.* Presented below is an analysis of each factors as it relates to the distinct issues as discussed by the *Spinex* court, which

indicated that in cases of "pedestrian emails," counsel should "address each paragraph separately to determine" the predominant purpose. *Spinex.*

A. Issue One is not protected by attorney-client privilege

Issue One asks Washington's "take" on the best presentation of a five-year safety audit result summary.

The first factor of Issue One, the purpose of the communication, is clearly stated to be the best presentation of a five-year summary of safety audit results. Alexander seeks Washington's advice as to whether a "narrative summary or a mix of charts and graphs" is the best format. Thus, Issue One indicates that the purpose of the communication is for visual and not legal advice.

The second factor, the communication's content, also indicates that the information sought is not legal. Again, Alexander requests Washington's opinion as to the presentation of graphics in an annual report.

The third factor, the context of the communication, indicates that the context is the preparation of an annual report published on GourmetPro's website. There is no legal context of the communication.

Fourth, the communication is being received by the General Counsel. Although the General Counsel of a firm ordinarily is the main target of privileged information, the facts indicate that Gourmet Pro's general counsel "at times offers legal counsel about business matters, and at times offers business advice without legal implications or privilege." Robinson Hernandez File Memorandum. This communication is part of Washington's role at GourmetPro in the *second* capacity.

The fifth factor need not be analyzed here, as Issue One contains no legal advice to be separated from the document.

B. Issue Two can be protected

The first factor of Issue Two, the purpose of the communication, is stated to be techniques to discuss issues with employees at the Gourmet Pro Olympic City facility in order to learn information relating to "potential exposure resulting from faulty products being shipped from that facility." Thus, the stated purpose is at least somewhat related to legal advice, as Alexander seeks information from Gourmet Pro's general counsel as to how to conduct interviews relating to possible legal exposure. This leans in favor of finding that the predominant purpose of Issue Two in Document Three is for legal advice.

The second factor of Issue Two, the communication's content, indicates that Alexander seeks "advice," both practical and arguably legal ("You might have some other thoughts for us."), relating to employee interviews to understand consumer complaints about faulty products. This also indicates that Document Three Issue Two's predominant purpose is legal advice.

The third factor, the communication's context, indicates that the predominant purpose is for legal advice. Alexander states that the interviews will be conducted in the context of "potential exposure resulting from faulty products being shipped from that facility." Alexander seeks Washington's thoughts as General Counsel as to conducting interviews that may feed into potential legal claims against GourmetPro.

The fourth factor, as discussed above, leans in favor of finding that the Issue relates to legal purposes. The inquiry is targeted at the General Counsel of the firm, and while it asks for Washington's thoughts to ensure that employees are not made to feel "uncomfortable," it also asks for "other thoughts" from Washington, in the context of potential exposure from faulty products. Thus, unlike Issue One, which sought information from Washington in her capacity as a business advisor, Issue Two seeks information from Washington in her legal capacity as General Counsel.

Finally, the fifth factor, the separability of the communication, indicates that Issue Two is a "distinct portion" that relates to privileged legal information that is not "intimately intertwined" with the entire document. Although the legal information is mixed with business advice based on Washington's familiarity with working with managers at the Olympic City facility and advice on how to avoid making employees feel uncomfortable, the Franklin Supreme Court has indicated that a lawyer may include considerations related to law *and to* "moral, economic, social and political factors that may be relevant to the client's situation." *ValueMart,* citing Franklin Rule of Professional Conduct 2.1. Thus, because Issue One is "intertwined content" under *ValueMart,* factor five leans in favor of its protection via attorney-client privilege.

VI. Conclusion

The Franklin Supreme Court in ValueMart has indicated that documents with the predominant purpose of business advice are typically not protected in their entirety by the attorney-client privilege. However, even if a document's primary purpose is to render business recommendations, separable portions that discuss legal advice may be properly redacted. GourmetPro's Document One is protected from discovery by the attorney-client privilege, as it provides legal advice. GourmetPro's Document Two has the primary purpose of business advice and should be3 produced, but two paragraphs may be redacted from the document. GourmetPro's Document Three contains two separable issues, one that seeks exclusively business advice, and another that seeks a communication that is

intertwined with legal advice; thus, the document should be produced but redacted as to Issue Two.

ANSWER TO MPT 2

To: Anita Hernandez, partner

From: Examinee

Date: July 29, 2025

Re: Gourmet Pro Response to CPSC

OBJECTIVE MEMO

As requested, I have prepared a memorandum addressing how attorney-client privilege may apply to the three Gourmet-Pro documents requested by CPSC. The following memo contains an overview of the relevant legal standards for attorney-client privilege in Franklin. Subsequently, it applies the legal standard to all three documents and whether the communications in such documents should be protected by the attorney-client privilege.

The Relevant Legal Standard for Attorney-Client Privilege in Franklin

In Franklin, the attorney-client privilege applies to communications made between a client and counsel, in confidence and for the purpose of seeking, obtaining, or providing legal assistance. *ValueMart.* For corporations, the attorney client privilege generally applies to communications between company counsel and board-members, executives and managerial employees who seek legal advice on behalf of the company. *ValueMart.* Franklin courts typically strictly construe the attorney-client privilege narrowly because it serves as a barrier to disclosure and tends to suppress relevant facts.

Importantly, communications with corporate counsel that are unrelated to the practice of law or company liability, "do not become cloaked with the attorney-client privilege just because the communication is with a licensed lawyer." *ValueMart.* For example, the attorney-client privilege does not typically apply to matters relating to public relations, accounting, employee relations or business policy. *ValueMart.* Instead, for the attorney-client privilege to apply, the communications must relate to legal advice or assessing the legal liabilities arising from certain corporate conduct.

Certain documents may have a "dual-purpose". In other words, certain documents may contain both legal advice and advice relating to business policy or another subject. In the case of "dual- purpose" documents, the attorney-client privilege will apply to the entire document if the predominant purpose of the communication is to seek or provide legal advice or assistance. *ValueMart.* The determination of the predominant purpose of a document is a highly fact- specific inquiry, requiring courts to consider the "totality of

circumstances" of each document. Under *ValueMart,* in determining a document's predominant purpose, courts look at the following factors: (1) the purpose of the communication; (2) the content of the communication; (3) the context of the communication; (4) the recipients of the communication; and (5) whether legal advice permeates the document or whether any privileged matters can be easily separated and removed from any disclosure. If the court determines that a dual-purpose document's predominant purpose is to provide legal advice, then the document will be withheld under the attorney-client privilege.

On the other hand, if the predominant purpose is business advice or policy, the court must examine each paragraph or portion of the document to determine if it is legal advice. *Spinex.* If a specific section within a document contains legal advice, that specific section of the document can be withheld under the attorney-client privilege. *Spinex.*

Document One: Email from general counsel to CEO of Gourmet-Pro

Ms. Washington's email to Ms. Johnson was predominantly for the purpose of providing legal advice. Firstly, the purpose of the document was primarily to analyze and provide advice regarding the implications of the recent Main Street Investigation on Gourmet-Pro. A number of legal concerns arise from the investigation of Main Street. The investigation creates a similar risk of investigation and liability for Gourmet-Pro, as they are competitors in the industry. The purpose of the communication is to apprise Ms. Johnson of these implications and provide legal advice. This factor falls in favor of a finding that the predominant purpose of the document is legal.

Secondly, the content of Ms. Washington's email to Ms. Johnson indicates that the purpose is to provide legal advice. Ms. Washington fist discusses the class-action lawsuit against Gourmet-Pro. Next, Washington discusses the WatsonSmith report and its identification of several sources of liability. In response to such liability, Washington recommends that Gourmet Pro implement safety the recommendations provided in the WatsonSmith report. In addition, the final paragraph recommends that Gourmet Pro advertise its commitment to quality and safety in the interest of insulating the company from legal liability. The emphasis on quality is meant to dissuade a potential plaintiff from suing Gourmet Pro in a similar class-action. This factor falls heavily in favor of a finding that the predominant purpose of the document is legal.

The third factor likely falls in favor of document one being a non-legal document. In the Middleton Report, the court indicated that the FOOL enforcement action beginning subsequent to the creation of the document, indicated that the document was not primarily for a legal purpose. In the case at hand, the email from Ms. Washington occurred prior to the CPSC investigation beginning. While far from dispositive, this factor falls in favor of a finding for dual-purpose.

In ValueMart, the court suggests that a report prepared for management or the company's board, the core privilege group for corporate legal advice, will indicate that the document has a primarily legal purpose. In the case at hand, the document was prepared at the CEO's request. As such, this indicates that the document has a primarily legal purpose.

Finally, under the final factor, legal advice permeates the Washington email. In each paragraph, Washington examines and provides legal advice and considerations to Johnson. As such the legal advice in the document is intertwined with the non-legal topics in the document. It would be difficult to separate or sever the two topics. This factor indicates that the document has a primarily legal purpose.

To conclude, under the predominant purpose test outlined in *ValueMart,* Ms. Washington's email likely has a predominantly legal purpose. Four of the five factors find in favor of a finding for a legal purpose. The only indication that the document has a dual purpose is the fact that the document was written prior to the CPSC investigation. However, the court indicated in ValueMart that such a factor is not dispositive. As such, this document likely has a predominantly legal purpose and the attorney-client privilege should apply to the entire document.

Document Two: Executive Summary of report from outside law firm

Importantly, it should be noted that WatsonSmith attempts to deem the report "privileged and confidential" through markings on each page. However, under ValueMart, a document is not cloaked with privilege merely because it bears the label privilege or confidential. Instead the five factor analysis under ValueMart must be undertaken to determine the predominant purpose of a document and whether it is confidential.

Firstly, the purpose of the WatsonSmith report is to learn Gourmet Pro's practices and develop business recommendations relating to the company's safety concerns. Importantly, the report relates to how these safety concerns relate to the company's business, not the company's legal liability. This factor indicates that the primary purpose for document two is business advice or policy.

Secondly, the content of the WatsonSmith report contains both legal advice and business advice. For example, the document contains both an assessment of how safety concerns and how such concerns may impact the GourmetPro business. The document also contains, in paragraph 4, a description of GourmetPro's history of legal liability arising out of manufacturing defects associated with their products. As such, this factor indicates that this a dual purpose document. The majority of the document still likely relates to business interests and policy. This indicates that the predominate purpose is non-legal.

The third factor likely falls in favor of document two being a non-legal document. As previously mentioned, in the Middleton Report, the court indicated that the FOOL

enforcement action beginning subsequent to the creation of the document, indicated that the document was not primarily for a legal purpose. In the case at hand, the WatsonSmith report was drafted prior to both the investigation of Main Street and the CPSC investigation of Gourmet-Pro. Again, while far from dispositive, this factor falls in favor of a finding for non-legal purpose.

Under the fourth factor, the WatsonSmith report was prepared for Management and Board of Directors of Gourmet-Pro. As in ValueMart, a report prepared for management or the company's board indicates the document has a primarily legal purpose. As such, this indicates that the document has a primarily legal purpose.

Finally, under factor five, the legal advice provided in the WatsonSmith report does not permeate the entire document. Generally, the legal advice contained in the report arises in paragraph 4 of page 1 and paragraph 4 of page 2. These paragraphs discuss a description of GourmetPro's history of legal liability arising out of manufacturing defects associated with their products and associated recommendations. Other than these specific paragraphs, the report is mainly concerned with business policy and strategy. As such, the paragraph containing legal advice can be easily severed from the rest of the document. This factor indicates a finding for a non-legal purpose.

Four of the five ValueMart factors indicate that the WatsonSmith report does not have a predominantly legal purpose. Instead the predominant purpose is business advice or policy. Under *Spinex,* this requires to examine each paragraph to determine which paragraphs contain legal advice and should be withheld under attorney-client privilege. *Spinex.* As previously discussed, two paragraphs likely contain legal advice and should be severed. Firstly, Paragraph 4, under the Overview heading, discusses GourmetPro's history of legal liability arising out of manufacturing defects associated with their products. This paragraph also discusses the result of each case (not liable) and the presence of legal settlements to resolve such cases. As such, the attorney-client privilege should apply to this paragraph. In addition, paragraph 4, under the Business Recommendations heading, discusses the risks and liabilities that stem from consumer safety laws in the United States and abroad. This paragraph suggests that the firm conduct a survey of safety laws and regulations in the interest ensuring that Gourmet Pro honor its legal responsibilities.

To conclude, the document's predominant purpose is business policy. However, multiple paragraphs containing legal advice should still be severed and protected by attorney-client privilege.

Document Three: Email from Gourmet Pro's chief auditor to general counsel

Under the first and second ValueMart factors, the primary purpose of the document is two-fold. The chief auditor seeks advice on two specific topics. The first, relating to the

published on the company website. Here the auditor seeks advice on whether or not to use charts and other concerns relating to aesthetic style of the report. The second issue relates to the auditor's concerns over potential legal exposure arising from faulty products at the Olympic City facility. As such, there is a clear dual-purpose in this document. The purpose and content of the document is likely evenly split between business and legal purposes. This favors a severing of the business purposes section from the legal section.

Again, the third factor likely falls in favor of document three being a non-legal document. In the case at hand, the chief-auditor's email was drafted prior to both the investigation of Main Street and the CPSC investigation of Gourmet-Pro. Again, while far from dispositive, this factor falls in favor of a finding for non-legal purpose.

For the fourth ValueMart factor, the court held that while the recipient of the document is relevant, "the identity of the recipient does not determine the predominant purpose of the document." Here the email by the chief-auditor was sent to the general counsel of Gourmet-Pro. While relevant to a determination of the predominant purpose, it is far from dispositive. Instead, under TrueValue, the court should examine the focus of the report. As mentioned above, the focus of the report is two-fold: advice on the five-year presentation and advice relating to potential legal exposure arising from faulty products at the Olympic City facility.

Finally, under factor five, the legal advice provided in the chief-auditor's email does not permeate the entire document. Instead, the two issues are clearly outlined and separated into two different paragraphs. In *ValueMart,* the court held that in documents in which the legal advice is contained in discrete sections, separate from paragraphs concerning business issues, courts will order disclosure of the nonlegal portions and protect the legal portions from disclosure. Such an action is applicable to this case. Because the two issues are distinctly outlined and separated, and the document is not predominantly legal, the court should order that the two paragraphs be severed. Paragraph 1, which primarily concerns presentation of their five-year summary of safety audits should not be withheld. Meanwhile, the second paragraph, relating to the auditor's concerns over potential legal exposure arising from faulty products at the Olympic City facility, should be withheld under the attorney-client privilege.

Conclusion

To conclude, under the predominant purpose test outlined in ValueMart, Ms. Washington's email likely has a predominantly legal purpose. Four of the five factors find in favor of a finding for a legal purpose. As such, this document likely has a predominantly legal purpose and the attorney-client privilege should apply to the entire document. The WatsonSmith report's predominant purpose is business policy. As such, the court should withhold only portions of the report that contain legal advice. Those portions are paragraph 4, under the Overview heading and paragraph 4, under the

Business Recommendations heading. Finally, the email from the chief-auditor does not have a predominantly legal purpose. Instead, the document contains two issues, one legal and one not, that are clearly outlined and separated into two different paragraphs. Under ValueMart, the court should order disclosure of the nonlegal portions and protect the legal portions from disclosure.