CONNECTICUT BAR EXAMINATION

26 February 2019

PERFORMANCE TEST #1

From the Multistate Performance Test

State of Franklin Department of Children and Families v. Little Tots Child Care Center

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Lang v. Lone Pine School District, Franklin Court of Appeal (2016)

Fisher & Mason Law Office
953 N. Main St.
Evergreen Heights, Franklin 33720

MEMORANDUM

To: Examinee
From: Gale Fisher
Date: February 26, 2019
Re: Little Tots Child Care Center

We represent Ashley Baker, who became the owner and operator of the Little Tots Child Care Center eight months ago. She has received notice that, in seven days, the Franklin Department of Children and Families (FDCF) will revoke her license to operate the child care center. Because she has no administrative remedy, we have filed a complaint to challenge the license revocation and a motion seeking a preliminary injunction to prevent the revocation until a trial can be had on the merits. The court has set a date 90 days from today for a trial on the merits. The hearing on the preliminary injunction is this Friday.

At the hearing, I expect to call Ms. Baker and Jacob Robbins, a parent, as witnesses. I have attached a note Ms. Baker gave me outlining her proposed testimony. I have also attached recent communications concerning Little Tots and three Notice of Deficiency reports issued by FDCF within the last seven months. I expect that FDCF will oppose our motion and will call the inspectors to testify to what they found during the inspections.

Please prepare the argument section of our brief in support of the Motion for Preliminary Injunction to enjoin FDCF from revoking Ms. Baker's license to operate Little Tots. Follow our office guidelines in drafting your argument. Do not assume that we will have an opportunity to file a rebuttal brief; anticipate any arguments FDCF may make and address them. Be sure to address all the requirements for a preliminary injunction. Because judges must make specific findings as to the evidence relied upon in granting or denying motions for a preliminary injunction, you must marshal and discuss the evidence we have available in support of the requirements for a preliminary injunction. Do not include a separate statement of facts, but be sure to incorporate the relevant facts into your argument.

Fisher & Mason Law Office

OFFICE MEMORANDUM

To: All lawyers
From: Litigation supervisor
Date: August 14, 2016
Re: Guidelines for drafting persuasive briefs

All persuasive briefs in support of motions shall conform to the following guidelines:

Statement of the Case: [omitted]

Statement of Facts: [omitted]

Body of the Argument

Analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Supporting authority should be emphasized, but contrary authority should also be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefing. Be mindful that courts are not persuaded by exaggerated or unsupported arguments.

Organize the arguments into their major components and write carefully crafted subject headings that illustrate the arguments they cover. The argument headings should succinctly summarize the reasons the tribunal should take the position we are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, improper: "The plaintiff failed to exhaust remedies." Proper: "When the plaintiff failed to appear at the administrative hearing, after receiving notice of the hearing, and failed to request a continuance, the plaintiff failed to exhaust administrative remedies."

Do not prepare a table of contents, a table of cases, or an index.

Ashley Baker's Note on Proposed Testimony
February 25, 2019

Eight months ago, I took over the Little Tots Child Care Center to offer services no one else offered in our area. The former owner had a hard time meeting expenses because so many parents could not afford the fees. Little Tots is open more hours than most child care centers so that parents who go to work early or work late shifts can use the center. I applied for and received a government grant to subsidize the center. The grant allows me to charge reduced fees to parents whose income falls below a certain level. The grant also allowed me to hire more staff and expand the number of children Little Tots serves. Little Tots is the only child care center in this neighborhood that serves low-income families.

I have had to juggle this expansion while trying to meet all the state standards. Look at these Notice of Deficiency reports, and you will see that I have been improving all along. If I could have just a few more weeks, I would be able to comply with all the standards.

I understand the need to get completed enrollment forms so that no unauthorized persons pick up the children. We do not want predators or parents with restraining orders coming here. Most parents have completed the enrollment forms. I guess I was too patient with those five who did not complete them. I will have to sit down with these five parents and have them complete the forms when they pick up their children.

Child "A" has been with us for months. He's five; he knows he's allergic to milk and can't drink it. He's never tried to take the milk. But I will improve the supervision when food is out. I found an online education program for child care workers on food safety and will have the staff watch it.

The program we offer is excellent. In fact, since I became the owner and expanded the enrollment and improved the child care program, the State University Early Learning Center has been sending students to observe our program. The children are safe and are thriving, even if we've had some missteps while we expanded. For FDCF to come in now and close me down is too harsh.

Caring for children is my passion and my livelihood. If I'm forced to close, I will be without any income, will lose that grant, and will have to find a way to repay my business loans. I risk losing my clients if the court takes too long to resolve this. If my license is revoked, I don't

know where these children are going to go or what I will do to make a living. I'm afraid that I would not be able to reopen the child care center even if I got the license back.

STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES
Northern Regional Office
830 Highway 17
Evergreen Heights, Franklin 33720

February 22, 2019

Ms. Ashley Baker
Little Tots Child Care Center
492 Oak Street
Evergreen Heights, Franklin 33705

NOTICE OF LICENSE REVOCATION

You are hereby notified that, effective March 5, 2019, the license issued to you to operate Little Tots Child Care Center will be revoked due to numerous and repeated instances of noncompliance with critical standards for the operation of a child care center as specified in the Franklin Administrative Code and as authorized by the Franklin Child Care Center Act, Fr. Civil Code § 35.1 *et seq*. You must cease operating the Little Tots Child Care Center on or before March 5, 2019.

The instances of noncompliance are specified in the attached NOTICES OF DEFICIENCIES.

Operating a child care center without a license is a violation of the Franklin Child Care Center Act.

Signed:_____

Carla Ortiz
Director, Department of Children and Families

Served by email and in person February 22, 2019, by Cynthia Wood.

STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES
July 16, 2018, Notice of Deficiencies: Little Tots Child Care Center

This report summarizes the noncompliance with critical standards observed during the July 16, 2018, inspection of the Little Tots Child Care Center, 492 Oak Street, Evergreen Heights, Franklin. This constitutes notice pursuant to § 3 of the Franklin Child Care Center Act.

Thirty days ago, Ashley Baker became the owner and operator of Little Tots Child Care Center. Upon assuming ownership, Ms. Baker expanded the number of children in the center and changed some of its operations. This is the first inspection since Ms. Baker became owner. Because of critical deficiencies observed during this inspection, Ms. Baker was warned of the need to improve and was told that, as a result, the center will be inspected every 90 days.

Little Tots has a maximum allowable enrollment of 96 children, in eight rooms: two rooms of 2-year-old children, two of 3-year-old children, two of 4-year-old children, and two of 5-year-old children. It employs 19 persons. Children may attend from 6:30 a.m. to 7:00 p.m., Monday through Friday.

Noncompliance with Critical Standards

Enrollment procedures. Enrollment forms for 37 children were incomplete in that they lacked information identifying those persons authorized to pick up those children. 34 FR. ADMIN. CODE § 3.06. Ms. Baker promised to correct this "very soon."

Staff qualifications. A review of the employee personnel files revealed that there was no documentation indicating that a background check had been conducted on four of the teachers—Anders, Dunn, Green, and Hanes. 34 FR. ADMIN. CODE § 3.12. Ms. Baker promised to "get to it soon."

Staffing. The staff/child ratios in the 2-year-old and 3-year-old rooms exceeded what is allowed. 34 FR. ADMIN. CODE § 3.13. There were nine children and one staff member in each of the 2-year-old rooms and 11 children and one staff member in each of the 3-year-old rooms. Ms. Baker indicated that this would be corrected "very soon."

Signed: _____

Trent Banks, FDCF Child Care Center Inspector

COPY OF NOTICE OF DEFICIENCY REPORT GIVEN TO OWNER/OPERATOR

STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES
October 19, 2018, Notice of Deficiencies: Little Tots Child Care Center

This report summarizes the noncompliance with critical standards observed during the October 19, 2018, inspection of the Little Tots Child Care Center, 492 Oak Street, Evergreen Heights, Franklin. This constitutes notice pursuant to § 3 of the Franklin Child Care Center Act.

Noncompliance with Critical Standards

Enrollment procedures. Enrollment forms for 16 children were incomplete in that they still lacked information identifying those persons authorized to pick up those children. 34 FR. ADMIN. CODE § 3.06. Ms. Baker again promised to correct this "right away."

Staff qualifications. A review of the employee personnel files revealed that there was no documentation showing that a background check had been conducted on two of the teachers, Anders and Dunn, or for newly hired teacher Kane. 34 FR. ADMIN. CODE § 3.12. Ms. Baker promised to "get to it soon." She also said that Anders is a holdover from the previous owner and should have had the background check done long ago.

Staffing. There were nine children in one of the 2-year-old rooms, with one staff member. This exceeds the allowable staff/child ratio. 34 FR. ADMIN. CODE § 3.13. Ms. Baker indicated that she was still organizing her staff.

Signed: _____

Jerome Waters, FDCF Child Care Center Inspector

COPY OF NOTICE OF DEFICIENCY REPORT GIVEN TO OWNER/OPERATOR

STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES
January 23, 2019, Notice of Deficiencies: Little Tots Child Care Center

This report summarizes the noncompliance with critical standards observed during the January 23, 2019, inspection of the Little Tots Child Care Center, 492 Oak Street, Evergreen Heights, Franklin. This constitutes notice pursuant to § 3 of the Franklin Child Care Center Act.

Noncompliance with Critical Standards

Enrollment procedures. Enrollment forms for five children were incomplete in that they lacked information identifying those persons authorized to pick up those children. 34 FR. ADMIN. CODE § 3.06. Ms. Baker said that she had given the forms to these five parents but had not yet received them back.

Staff qualifications. A review of the employee personnel files revealed that there was no documentation indicating that a background check had been conducted on teacher Anders or newly hired teacher Marin. 34 FR. ADMIN. CODE § 3.12. Teacher Dunn is no longer employed at the center. Ms. Baker again said that Anders was hired by the previous owner and that the background check should have been done then.

Staffing. There were nine 2-year-old children in one room, with one staff member. 34 FR. ADMIN. CODE § 3.13. Ms. Baker said that one child was due to move out of town next week. In anticipation of that child's departure, she had enrolled another 2-year-old, but the parents needed the child to begin attending right away. The attendance of the two children overlapped by one week, putting nine children in the same room. Ms. Baker said that by next week, there will be only eight children in each 2-year-old room, and she will be in compliance with § 3.13.

Meals and nutrition. The inspector observed that as children entered the snack room, milk was available to be picked up. There was no supervision of the food area. 34 FR. ADMIN. CODE § 3.37. Child "A" is allergic to dairy products and should not have milk. The restriction is on the child's enrollment form, but teacher Kane said that she was unaware of any dietary restrictions for Child "A." Ms. Baker said that the teacher knew but must have forgotten on a busy morning.

Signed: _____

Tiffany Hall, FDCF Child Care Center Inspector

COPY OF NOTICE OF DEFICIENCY REPORT GIVEN TO OWNER/OPERATOR

Email Correspondence Regarding Little Tots Child Care Center

From: Jacob Robbins <jsdad@cmail.com>
To: Carla Ortiz <FDCFlicense@Franklin.gov>
Cc: Ashley Baker
Subject: Don't close Little Tots Child Care Center
Date: February 24, 2019, 1:15 pm

I just learned that Little Tots Child Care Center is going to close because you are revoking its license. I have talked with over a dozen parents who are upset. We do not know where to send our kids. My wife commutes to work in an office downtown, and I am a mechanic at the truck depot. The way our hours work out, we need Little Tots because it is the only child care center that meets our schedules. Plus, it is affordable.

I know families that used to rely on relatives to care for their children but were able to send them to Little Tots once Ms. Baker offered discounted rates for those who qualify. Little Tots is a better place for the children than relying on relatives who get sick or just have their own lives to live. It has a good program for the children. My kids love it there. One of my kids was really shy and hesitant to play with other kids but has overcome all that since he started attending Little Tots.

If Little Tots closes, my wife will have to quit her job. That would be bad because her job has the better health benefits. Plus, we need the money she earns to pay for the kids—their dentists' bills, their shoes, clothes, school expenses, extracurricular activities—and we save a bit for emergencies. I heard the same thing from several parents, and I promised them I would write and ask you to reconsider closing this center which we badly need.

I expect the government to care about our children. This is the only low-income child care center within 15 miles of our home. You should be advocating for us, not trying to close down such a wonderful day care.

I am going to get a petition for parents to sign to protest the closing of Little Tots, but I wanted to contact you right away.

Thank you,

Jacob Robbins

Excerpts from the
FRANKLIN CHILD CARE CENTER ACT

§ 1. Findings and legislative purpose. The legislature of the State of Franklin finds the following:

(a) It is the policy of the State of Franklin to ensure the safety and well-being of preschool-age children of the State of Franklin through the establishment of minimum standards for child care centers.

(b) There is a need for affordable and safe child care centers for the care of preschool-age children whose parents are employed.

(c) There is a need for affordable and safe child care centers for low-income parents in underserved and economically depressed communities.

(d) By providing for affordable and safe child care centers, the State of Franklin encourages employment of parents who, without these child care centers, could not be employed.

* * *

§ 3. Licensing of child care centers.

(a) No person may operate any facility as a child care center without a license issued by the Department of Children and Families upon meeting the standards established for such licensing.

(b) The Director of the Department shall establish licensing standards relating to child care centers. The Director shall inspect each licensed facility at least once each year to determine that the facility is in compliance with the standards of the Department.

…

(f) If the operator of a child care center is in noncompliance with those standards deemed critical, the Director may, after notice, impose penalties including but not limited to a civil fine of at least $500 but not more than $10,000, or revocation of the license of the operator.

Excerpts from Franklin Administrative Code
Chapter 34. Child Care Centers

§ 3.01 General

The Department of Children and Families has determined that the standards listed in this Section apply to child care centers. Because of the actual or potential harm to children, noncompliance with the following regulations will be determined to be critical violations: Enrollment Procedures, Staff Qualifications, Staffing, Program, Structure and Safety, Meals and Nutrition, and Health.

* * *

§ 3.06 Enrollment procedures

. . .

(b) A written enrollment application with the signatures of the enrolling parents shall be on file for each child. The application shall contain the following information:

. . .

(8) Name, address, and telephone number of all persons authorized to pick up the child, which includes both

(i) a primary list of persons authorized to pick up the child regularly and

(ii) a contingency list of persons authorized to pick up the child occasionally, including conditions, if any, for releasing the child to such persons.

* * *

§ 3.12 Staff qualifications

(a) Each child care center shall subject all persons who work with children to criminal background checks and shall require them to authorize the background checks and to submit to fingerprinting. No person who has been convicted of a felony shall be employed at a child care center.

. . .

§ 3.13 Staffing

. . .

(d) The group sizes and ratio of staff to children present in any classroom at any one time shall be as follows:

Children's age	Ratio of staff to children
Two years	1 staff member to 8 children
Three years	1 staff member to 10 children
Four years	1 staff member to 10 children
Five years	1 staff member to 20 children

* * *

§ 3.37 Meals and nutrition

. . .

(g) A child requiring a special diet due to medical reasons, allergic reactions, or religious beliefs shall be provided with meals and snacks according to the written instructions of the child's parents or legal guardian.

Lang v. Lone Pine School District
Franklin Court of Appeal (2016)

Blake and Olivia Lang, parents of Michael, age seven, sued the Lone Pine School District (District) for violating Michael's rights as a child with disabilities and sought preliminary and permanent injunctive relief. The trial court conducted a hearing on the Langs' motion for a preliminary injunction to allow Michael to attend school with a service animal, and granted that motion. The trial court stayed the effective date of the order three weeks to permit the District time to prepare for the presence of the service animal. The District filed an interlocutory appeal from the trial court's grant of the preliminary injunction. This action was brought under the Franklin Education Act. The parties did not raise, nor do we address, the question whether the plaintiffs also have a claim under the Americans with Disabilities Act or the Individuals with Disabilities Education Act.

We review the trial court's decision under the abuse of discretion standard and affirm.

Background

At the hearing, Blake and Olivia testified that during kindergarten and first grade at Lone Pine Elementary School, Michael received various accommodations to address his learning disability, but he still struggled. Last winter, the Langs found a service dog program for children with disabilities. In late spring, Sandy, a service dog, went home with the Langs, after which the Langs noticed a significant improvement in Michael's ability to focus and remain attentive to tasks. In June, an educational specialist recommended that the service dog should accompany Michael to school. The Langs then asked the District to permit Michael to attend school with the service animal.

Cody Black, the educational specialist, testified that he observed Michael with Sandy and found that Sandy provides comfort to Michael and eases his anxieties. This permits Michael to better focus on tasks before him. Black offered the opinion that Michael would perform better in school if Sandy were with him. Specifically, when Michael is accompanied by Sandy, his behavior and social skills improve and he is therefore less likely to be disruptive. Black also testified that service animals provide a similar benefit to disabled students at all levels of education throughout the state, as well as a positive educational lesson for all students.

MacKenzie Downs, principal of Lone Pine Elementary School, testified that the District denied the Langs' request because (1) a district-wide policy prohibits animals in school buildings other than service animals for those with vision impairments, (2) the teachers and staff at Lone Pine are not trained to handle the dog, and (3) there are children at the school who are allergic to dogs. Downs agreed that Michael needs an accommodation and said that she stands ready to support Michael with other methods of assistance. Joe Ramirez, Michael's first-grade teacher, testified that Michael has improved over the course of the past school year despite not having a service animal with him at school. He also testified that the District has purchased several new computers designed for children with learning disabilities. He offered the opinion that using the new computers would help Michael continue to improve, and he saw no need for the service animal to be at school. He confirmed that he and his fellow teachers have received no training in handling service animals.

Preliminary Injunction Standard

Preliminary injunctive relief is an extraordinary remedy and is disfavored by the courts, but this relief may be granted in appropriate cases to preserve the status quo pending a decision on the merits. A party seeking a preliminary injunction must meet this four-factor test: (1) that the moving party is likely to succeed on the merits, (2) that the moving party will suffer irreparable harm if the injunction is not granted, (3) that the benefits of granting the injunction outweigh the possible hardships to the party opposing the injunction, and (4) that the issuance of a preliminary injunction serves the public interest.

(1) Likelihood of success on the merits

First, as to the likelihood of success on the merits, the moving party need not meet the standard of proof required at trial on the merits but must raise a fair question regarding the existence of the claimed right and the relief he will be entitled to if successful at trial on the complaint for permanent relief. A party seeking preliminary relief need only demonstrate that his chances to succeed on at least one of his claims are better than negligible. *Smith v. Pratt* (Fr. Ct. App. 2001). As the court ruled, if the movant shows that his chance of succeeding on his claim for relief is better than a mere possibility, the court should grant the motion for preliminary relief.

The trial court found that there was no dispute that Michael is a child with a disability and requires an accommodation. The trial court found that while there was a dispute as to the type of accommodation needed and whether the service animal is a proper or necessary accommodation, this was an issue to be decided when the matter is tried on the merits. In the meantime, the Langs have established that the service animal may well be the sort of accommodation needed. Hence, the Langs have shown a fair question regarding the rights of their son and the likelihood of receiving a remedy at trial.

(2) Irreparable harm

An alleged harm or injury is irreparable when the injured party cannot be adequately compensated by damages or when damages cannot be measured by any certain pecuniary standard. In other words, if the moving party, the Langs, could be compensated through damages for the wrong suffered, they would not have suffered an irreparable injury. The alleged harm here is the harm to Michael of continuing to attend school without the accommodation that may be most helpful to him. While the trial court could award damages to the Langs after a trial on the merits, here it found that no amount of monetary damages could substitute for providing Michael the education he needs.

(3) Balance of benefits and hardships

The court must weigh the benefits of granting the injunction against the possible hardships to the party opposing the injunction. Put another way, the court must determine whether greater injury would result from refusing to grant the relief sought than from granting it. The District argues that the trial court failed to properly consider the costs of permitting the animal to accompany Michael.

The trial court acknowledged that the District would suffer hardships if the injunction were granted. The District's policy currently allows service animals for those with vision impairments but not for those with learning disabilities like Michael's. To permit the animal to accompany Michael, the District must expand its policy, prepare its staff for the presence of the animal, educate parents, and determine how to accommodate children with dog allergies. The trial court found that these steps would cost the District time and money—costs that may be substantial. The trial court weighed the harms cited by the District against those of Michael's loss of an accommodation that will help him overcome his learning disability. Michael is in second grade and has already experienced two years of schooling that has been stressful for him.

The sooner Michael's needs are met, the better for him, the trial court concluded, especially given that Michael is in an early formative period. In sum, the trial court weighed the hardships and found that the balance of harms favored the Langs.

(4) Public interest

Fourth, the trial court must consider whether issuance of the preliminary injunction serves the public interest. This criterion cuts both ways on the facts of this case. On the one hand, the District correctly notes that its need to conserve resources and to assure the well-being of all its students serves the public interest. On the other hand, the Langs are also correct that the injunction will serve the statutory purposes of the laws protecting disabled children by permitting the use of service animals in schools. Additionally, the presence of the service animal in Michael's classroom provides important educational lessons for his classmates and for children throughout the school. These children will learn about the important role of service animals in assisting persons with disabilities. The trial court did not err in concluding that issuance of the injunction served the public interest.

The District also argues that the injunction imposes a continuing duty of supervision on the court, which would be an improper use of judicial resources. "Courts should be reluctant to issue injunctions that transform the court into an ad hoc regulatory agency to supervise the activities of the parties." *Franklin Envt'l Prot. Agency v. Bronson Mfg., Inc.* (Fr. Ct. App. 1999). However, the District overstates the difficulty of enforcement. The trial court ordered the District to permit Michael to attend school with the animal. Compliance with this order is simple. If the District admits Michael with the service animal, it will be in compliance with the injunction. If the District refuses to admit Michael with the service animal, it will be in violation of the injunction.

The trial court issued a preliminary injunction effective until trial on the merits. The trial court did not abuse its discretion.

Affirmed.

CONNECTICUT BAR EXAMINATION

26 February 2019

PERFORMANCE TEST #2

From the Multistate Performance Test

In re Remick

FILE

Memorandum to Examinee

Transcript of client interview

Memorandum to file

LIBRARY

Excerpts from the Restatement (Third) of Torts (2012)

Weiss v. McCann, Franklin Court of Appeal (2015)

Thomas v. Baytown Golf Course, Franklin Court of Appeal (2016)

Boxer v. Shaw, Franklin Court of Appeal (2017)

Daniels & Martin LLP
Attorneys at Law
3200 San Jacinto Blvd., Suite 270
Franklin City, Franklin 33075

MEMORANDUM

TO: Examinee
FROM: Susan Daniels
DATE: February 26, 2019
RE: Andrew Remick matter

Our client, Andrew Remick, was injured when his car stalled on a roadway and was struck by another vehicle. At the time of the accident, Remick was in the backseat of his car with a twisted ankle while a motorist, Larry Dunbar, attempted to jump-start the car with his truck's battery. Another motorist, Marsha Gibson, drove around a bend in the road, was unable to stop in time, and struck Remick's stalled car from behind. As a result of the collision, Remick was seriously injured and his car sustained significant damage.

Remick wants to know if he has any legal recourse. We talked about suing Marsha Gibson, and I suggested that there may also be a claim against Larry Dunbar. Remick told me that he thought the collision could have been avoided if Dunbar had either moved Remick's stalled car to the side of the road, set out emergency flares, or turned on the hazard lights on his truck.

Please draft a memorandum to me analyzing and evaluating whether Remick has a viable negligence claim against Dunbar. In addressing the element of duty, discuss the legal theories under sections 42 and 44 of the Restatement (Third) of Torts. Do not address either Gibson's liability or any defenses based on Remick's conduct.

Do not include a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis. I will ask another associate to assess the claim against Gibson.

Transcript of Interview of Andrew Remick
February 19, 2019

Attorney: Andrew, it's good to meet you. How are you doing?

Remick: I'm feeling better than I was a month ago, but I'm still on the mend.

Attorney: Why don't you tell me what happened.

Remick: Well, on January 20, I was driving my car on Highway 290 down by the coast. It's a two-lane road with small towns scattered here and there.

Attorney: Yes, I've been down that way before, and I recall that it's a pretty isolated stretch. How did the accident occur?

Remick: I was on my way back to Franklin City from a weekend trip. It was about 4:30 p.m., and all of a sudden my car stopped working. It just powered off and the dashboard display stopped working. I tried to start the car, but the engine wouldn't even turn over. I tried to turn on the hazard lights, but they didn't work either.

Attorney: Were you able to pull over to the side of the road?

Remick: No, the engine died while I was driving; I didn't have time to pull off the road.

Attorney: What did you do next?

Remick: First, I tried to use my cell phone to call for help, but I couldn't get a signal. I tried to push the car to the shoulder of the road. Since it's a stick shift, it can be moved, but when I tried to move it, I slipped and fell, badly twisting my right ankle. I was in excruciating pain and I could barely put any weight on it. I decided to get into the backseat to keep my ankle elevated and wait for somebody to drive by.

Attorney: And did that happen?

Remick: Yes, about 45 minutes later, a man named Larry Dunbar pulled up on the shoulder of the road next to my car, got out of his truck, and asked me if I needed help. I explained what had happened. Larry said that he was a mechanic and offered to help me.

Attorney: What did he do?

Remick: He went back to his truck, grabbed a toolbox, and began poking around under the hood of my car. I'm not very knowledgeable about cars, but I remember him mentioning that he thought my car might have a bad alternator, which is part of the

car's electrical system, so he was going to try to jump-start the car to see if the alternator was working.

Attorney: Where were you when all this was happening?

Remick: I was still sitting in the back of my car with my right foot elevated on the backseat. By this time, it was starting to get dark. My ankle had swelled up, and I was in a lot of pain. I told Larry I was worried about the fact that it was getting dark and my car was still parked on the road. I asked him if he could push the car off the road. He told me not to worry because he thought he could get the car started pretty quickly. I told him that I had emergency flares in the trunk; he said not to worry.

Attorney: Was he able to jump-start your car?

Remick: I never found out. Right after he attached the jumper cables, I heard another car coming around the bend behind my car and then I heard the screech of tires as the driver hit the brakes, but she couldn't stop in time. She hit my car, with me still in the backseat! The impact was so hard that it slammed me into the back of the driver's seat. I blacked out, and when I woke up, I was in the hospital.

Attorney: I can see a brace on your left shoulder, and your left arm is in a cast and a sling. Is that from the accident?

Remick: Yes, the impact of the collision dislocated my shoulder, broke my arm, and gave me a minor concussion. The ankle I initially twisted when I fell is nearly healed, and my doctor doesn't anticipate any long-term complications from the concussion. But the orthopedist thinks I will probably need surgery to repair the damage to my shoulder, and my broken arm will need to heal for at least another three to four weeks before the cast can be removed. I've been told that I'll have to undergo physical therapy for several months to regain full function in my left arm and shoulder. I'm really worried about my shoulder and my arm. I own a small landscaping business, and most of my work is very physical. Without full use of my shoulder and arm, I can't work.

Attorney: What about Larry Dunbar and the other driver, Marsha Gibson?

Remick: I don't know. I've never met or spoken to the other driver, Marsha Gibson, and I haven't seen or spoken to Larry Dunbar since the accident.

Attorney: What about your car? How badly was it damaged?

Remick: It turns out that my car stalled because of a bad alternator, which would have cost a few hundred dollars to fix. But now it's going to cost at least $4,500 to repair the damage caused by the collision.

Attorney: Was a police report generated for the accident?

Remick: I don't know. In the month since the accident, I've been focused on my recovery and trying to keep my landscaping business afloat. I think that the accident could have been avoided if Larry had taken the time to move my car to the side of the road or if he had at least turned on the hazard lights on his truck—you know, the "flashers"—or used my emergency flares. If he had done any of those things, I doubt that the other driver would have hit my car, and I would be nursing a sore ankle instead of facing shoulder surgery and months of rehabilitation.

Attorney: You may have a case against Larry Dunbar as well as against the driver who hit you. I'll get back to you as soon as we have completed our initial assessment of your case.

Remick: Thanks. I really appreciate your assistance.

Daniels & Martin LLP
Attorneys at Law
3200 San Jacinto Blvd., Suite 270
Franklin City, Franklin 33075

MEMORANDUM TO FILE

FROM: Peter Nelson, Private Investigator
DATE: February 22, 2019
RE: Andrew Remick matter

As requested, I have obtained a copy of the police report for the car accident that occurred on January 20, 2019. I also interviewed Marsha Gibson, the driver of the SUV that rear-ended Remick's stalled car, and gathered some initial background information about Larry Dunbar. Below is a summary of my findings.

Police Report:

- A two-car collision involving Remick's four-door passenger car and Gibson's SUV occurred at approximately 6:00 p.m. on January 20, 2019, on a relatively remote, two-lane stretch of Highway 290 between the towns of Castlerock and Highwater.
- At the time of the collision, Remick's car was stalled on the northbound lane of the highway, approximately 75 feet beyond a bend in the road.
- Remick was sitting in the backseat of his car at the time of impact.
- Dunbar's truck was parked on the shoulder of the northbound lane next to Remick's car.
- The hoods of Remick's car and Dunbar's truck were up, and Dunbar was in the process of jump-starting Remick's car battery.
- Gibson was driving northbound on Highway 290 at approximately 50 mph (the speed limit is 55 mph).
- Skid marks measured at the scene of the accident indicate that Gibson immediately applied the brakes on her vehicle but was unable to avoid hitting Remick's car. Her estimated speed at impact was 25 mph.
- The force of the collision caused Remick to slam into the driver's seat in front of him, as a result of which he suffered a concussion, a dislocated shoulder, and a broken arm. He was transported by ambulance to Castlerock Hospital for medical treatment.

- Neither Gibson nor Dunbar was injured by the collision.
- No persons were cited or ticketed for the accident, although the responding police officer noted that the accident occurred at dusk and that neither Remick's car nor Dunbar's truck had its hazard lights turned on.

Marsha Gibson's Statement to Police:

- Gibson claims that she was driving under the speed limit at the time of the collision.
- Gibson did not see Remick's unlit car until she was about 40 feet away from it because it was getting dark outside and Remick's car was parked just beyond a bend in the road.
- Gibson estimates that she was driving at about 25 to 30 mph when she collided with Remick's car.
- Gibson was not injured in the accident.

Larry Dunbar Background Information:

- Dunbar is 35 years old and currently works in cable TV sales.
- Dunbar is a former automotive mechanic, having spent three years working for Franklin City Automotive from 2012 to 2015.

Excerpts from Restatement (Third) of Torts (2012)

§ 42 Duty Based on Undertaking

An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if:

(a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or

(b) the person to whom the services are rendered . . . relies on the actor's exercising reasonable care in the undertaking.

Comment:

* * *

c. . . . [A]ffirmative duty based on undertaking . . . The duty provided in this Section is one of reasonable care. It may be breached either by an act of commission (misfeasance) or by an act of omission (nonfeasance).

d. Threshold for an undertaking. An undertaking entails an actor voluntarily rendering a service . . . on behalf of another . . . . The actor's knowledge that the undertaking serves to reduce the risk of harm to another, or of circumstances that would lead a reasonable person to the same conclusion, is a prerequisite for an undertaking under this Section.

* * *

§ 44 Duty to Another Based on Taking Charge of the Other

An actor who, despite no duty to do so, takes charge of another who reasonably appears to be:

(1) imperiled; and

(2) helpless or unable to protect himself or herself

has a duty to exercise reasonable care while the other is within the actor's charge.

Comment:

* * *

c. Distinctive feature of rescuer affirmative duty. This Section is limited to instances in which an actor takes steps to engage in a rescue by taking charge of another who is imperiled and unable adequately to protect himself or herself. The duty is limited in scope and duration to the peril to

which the other is exposed and requires that the actor voluntarily undertake a rescue and actually take charge of the other.

* * *

g. *Taking charge of one who is helpless.* The rule stated in this Section is applicable whenever a rescuer takes charge of another who is imperiled and incapable of taking adequate care. The rule is equally applicable to one who is rendered helpless by his or her own conduct, including intoxication; by the tortious or innocent conduct of others; or by a force of nature. The rule, however, requires that the rescuer take charge of the helpless individual with the intent of providing assistance in confronting the then-existing peril.

Weiss v. McCann
Franklin Court of Appeal (2015)

Plaintiff David Weiss, individually and in his capacity as guardian for Janet Weiss, appeals the dismissal of his personal injury action against Sue McCann for serious injuries his wife sustained at a party hosted by McCann. The issue on appeal is whether the Restatement (Third) of Torts §§ 42 and 44, collectively referred to as the "affirmative duty" or "Good Samaritan" doctrine, should apply to a homeowner. We find that under the specific facts of this case the Good Samaritan doctrine does apply. Accordingly, we reverse the order of the trial court dismissing the action.

The relevant facts and procedural history are as follows: On December 29, 2013, McCann hosted a party at her home in her basement recreation room. Janet Weiss, a neighbor, was among the attendees. Both McCann and Weiss had been drinking alcoholic beverages that evening. When the party ended and everyone had left except Weiss and McCann, Weiss fell, struck her head on the concrete floor, and lost consciousness. McCann revived Weiss and placed her on a couch. The next morning Weiss awoke and walked home, without informing McCann that she was leaving. At 9:30 a.m., McCann called Weiss's home to see whether Weiss had arrived home safely. McCann spoke to Weiss's husband, David, who said that Weiss was home and asleep. During the call, McCann did not mention that Weiss had fallen and hit her head. McCann called again at 11:30 a.m. to check on Weiss and for the first time informed David of his wife's fall and injury. David checked on Weiss and was unable to wake her, so he immediately called 911. An ambulance took Weiss to the hospital, where she had emergency brain surgery for a subdural hematoma. As a result of the injury, she suffered permanent brain damage. David Weiss brought this personal injury action against McCann, alleging that McCann was negligent in caring for Weiss after her fall and injury. McCann moved to dismiss the complaint for failure to state a cause of action, and the trial court granted the motion.

On appeal, the plaintiff claims that his complaint properly stated a cause of action in negligence based on the common law "affirmative duty" or "Good Samaritan" doctrine set forth in Restatement (Third) of Torts §§ 42 and 44, which has been adopted by the Franklin courts. To determine whether the trial court properly granted McCann's motion to dismiss, this court must consider as true all of the well-pleaded material facts set forth in the complaint and all reasonable inferences that may be drawn from those facts. *Davis v. Humphries* (Franklin Sup. Ct. 1996).

As a preliminary matter, we note that to establish a viable cause of action in negligence, a

plaintiff's complaint must allege the following four elements: (1) duty: a legal obligation requiring the actor to conform to a certain standard of conduct; (2) breach of duty: unreasonable conduct in light of foreseeable risks of harm; (3) causation: a reasonably close causal connection between the actor's conduct and the resulting harm; and (4) damages, including at least one of the following: lost wages, pain and suffering, medical expenses, or property loss or damage. *Fisher v. Brawn* (Franklin Sup. Ct. 1998).

On appeal, the plaintiff first claims that he presented facts establishing a duty under the Restatement (Third) of Torts § 42, which provides, "[a]n actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if: (a) the failure to exercise [reasonable] care increases the risk of harm beyond that which existed without the undertaking or (b) the person to whom the services are rendered . . . relies on the actor's exercising reasonable care in the undertaking."

We conclude that the language of § 42 envisions the assistance of a private person, such as McCann, to a person in need of aid. Based on the plain language of the Restatement, we will not, as a matter of law, preclude the application of § 42 to a homeowner such as McCann.

We now consider whether § 44 of the Restatement (Third) of Torts should apply as well. Section 44 provides that "[a]n actor who, despite no duty to do so, takes charge of another who reasonably appears to be: (1) imperiled; and (2) helpless or unable to protect himself or herself has a duty to exercise reasonable care while the other is within the actor's charge." Section 44 applies "whenever a rescuer takes charge of another who is imperiled and incapable of taking adequate care," including "one who is rendered helpless by his or her own conduct, including intoxication." § 44, comment g. Based on this language, it is clear that § 44 may apply to the homeowner McCann in this case.

The plaintiff's complaint alleges that McCann did not contact Weiss's family or seek medical assistance for Weiss after she fell and then failed to inform the plaintiff of Weiss's fall and injury until nearly noon the next day, at which point the plaintiff was unable to revive his wife. Based on our review of the language of the Restatement and the applicable case law, we cannot, as a matter of law, preclude the application of § 44 to McCann.

Reversed and remanded with instructions to the trial court to reinstate the complaint.

Thomas v. Baytown Golf Course
Franklin Court of Appeal (2016)

This interlocutory appeal stems from a wrongful death action brought by the surviving family members of Seth Thomas, who was killed in an automobile accident. Defendant Baytown Golf Course (Baytown) petitions for review of the trial court's order striking Baytown's notice that another individual, Glenn Parker, who was not named in this lawsuit, was a participating cause of the fatality and hence liable for comparative apportionment of damages under Franklin law. We conclude that Parker could be liable as a nonparty for the fatal accident after Parker assumed the duty of a "Good Samaritan" to use reasonable care for Thomas, but in fact placed Thomas in a worse position by giving his keys back to him and allowing him to drive away.

FACTS

On June 3, 2012, Thomas and Parker played golf and consumed alcoholic beverages at Baytown. Because Thomas appeared intoxicated, a Baytown employee took possession of Thomas's car keys. Parker then stepped forward and offered to drive Thomas home. With that assurance, and observing Parker's apparent lack of impairment, the employee gave Thomas's keys to Parker. Once in the parking lot, Parker returned the keys to Thomas. Thomas left the golf course in his own car and crashed into a tree. He died from his injuries.

The plaintiffs brought a wrongful death action against Baytown alleging that Baytown's sale of alcohol to Thomas was the cause of the accident. Baytown filed a notice of nonparty at fault, alleging that Parker was at least partially at fault because he volunteered to drive Thomas home and then gave the car keys back to Thomas. The plaintiffs filed a motion seeking to strike Baytown's notice of nonparty at fault. The trial court granted the motion, and this interlocutory appeal followed. For the reasons set forth below, we agree with Baytown that the trial court erred, and so reverse and remand.

DISCUSSION

Rule 28 of the Franklin Rules of Civil Procedure provides that a defendant can give notice that a person or entity not a party to the action is allegedly wholly or partially at fault for the purpose of determining the respective liability of all actors under Franklin's comparative negligence laws. The jury is required to consider the fault of all persons who contributed to the alleged injury, regardless of whether the person was, or could have been, named as a party to the suit. Once a defendant designates a person as a nonparty at fault by filing the appropriate notice

with the trial court, the defendant can offer evidence of the nonparty's negligence and argue that the jury should attribute some or all fault to the nonparty, thereby reducing the defendant's percentage of fault and consequent liability.

The issue, then, is whether Parker's actions contributed to Thomas's death, rendering Parker wholly or partially at fault. To find a person at fault in a negligence action, four elements must be shown: (1) duty, (2) breach of duty, (3) causation, and (4) damages. *See Fisher v. Brawn* (Franklin Sup. Ct. 1998). A duty must be recognized by law and must obligate a defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. *Id.*

Baytown argues that Parker had a duty to Thomas under the Good Samaritan doctrine set forth in the Restatement (Third) of Torts §§ 42 and 44. In its docket entry striking Baytown's notice of nonparty at fault, the trial court stated, "Mr. Thomas was not . . . 'helpless' as that term is used in § 44. He was simply too drunk to drive." We disagree. The determination of whether an individual is "imperiled" and "helpless" must be made within the context of each case. A person who is drunk and slumped in a chair at home in front of the television may not be considered imperiled and helpless. However, we reach the opposite conclusion if the same person is put behind the wheel of an automobile and sent down the road. Moreover, comment g to § 44 specifically provides that § 44 applies where a person "is rendered helpless by his or her own conduct, including intoxication."

Although the trial court's order focused on § 44, we find that both sections of the Restatement are applicable to the facts of this case. The major difference between the sections is the requirement of § 44 that the person be in an imperiled, helpless position. Section 42 has no such requirement, but does require either that the actor's actions increased the risk of harm or that the victim relied on the actor. In either event, we believe that the Good Samaritan doctrine applies when an actor, otherwise without any duty to do so, voluntarily takes charge of an intoxicated person who is attempting to drive a vehicle and, because of the actor's failure to exercise reasonable care, changes the other person's position for the worse. The rule applies here because if Parker had not said that he would see that Thomas got home safely, Baytown might have taken steps that would have avoided the accident.

The plaintiffs argue that Parker did not have a duty to Thomas because it was Baytown that first provided Thomas with the alcohol that rendered him too drunk to drive. The plaintiffs contend

that the duty of care that Baytown owed to Thomas as a patron in its bar is not one that can be delegated. We agree that Baytown's duty cannot be delegated. Baytown, however, is not trying to delegate its responsibilities to Parker. Rather, Baytown argues, and we agree, that the duties owed by Baytown and Parker are independent of each other.

When Parker took charge of Thomas for reasons of safety, he thereby assumed a duty to use reasonable care. Thomas was too drunk to drive. Baytown's employees had taken charge of Thomas and effectively stopped him from driving. Parker's offer deterred the employees from their efforts to keep Thomas out of his automobile. Rather than use reasonable care to drive Thomas home or make other arrangements, Parker discontinued his assistance and put Thomas in a worse position than he had been in when Baytown's employees had possession of his keys. A reasonable fact-finder could conclude that Parker's actions contributed to Thomas's death, rendering Parker wholly or partially at fault.

We conclude that the trial court erred in striking Parker as a nonparty at fault and therefore reverse and remand for further proceedings.

Boxer v. Shaw

Franklin Court of Appeal (2017)

Plaintiff Karen Boxer, as personal representative of the estate of Tim Boxer, appeals the dismissal of her wrongful death action against defendant Harry Shaw. Tim Boxer was struck and killed by a truck after exiting Shaw's car on the side of a highway. The trial court granted Shaw's motion for a directed verdict. We affirm.

At trial, Shaw testified that he and Boxer were coworkers who often socialized together. On the day of the accident, he and Boxer finished work early, around 3 p.m., and decided to go fishing. Shaw offered to drive because Boxer's car was in the shop. The two men fished for about three hours. They then went to a marina, watched the boats, and played pool until about 10 p.m., at which time they decided to go to a nightclub. They were driving on Highway 101 to the club when they got into a heated argument. Boxer started cursing and demanded that Shaw stop the car. Shaw pulled onto the shoulder of the road, and Boxer exited the car and lit a cigarette. Shaw has stated that he thought Boxer would get back in the car after smoking his cigarette, but Boxer refused to do so. Shaw decided to briefly drive away to allow Boxer to "cool off." Shaw drove one mile down the road and then returned. In the meantime, Boxer attempted to cross the highway and was struck by a truck.

Shaw testified that, although the two men had consumed a few beers while playing pool, Boxer did not appear to have had too much to drink. The toxicology and autopsy reports confirmed that Boxer's blood alcohol level was under the legal limit. It is undisputed that the accident occurred around 10:30 p.m., it was dark with misting rain, there were no lights on the highway, and Boxer was wearing dark clothing. The investigating police officer testified that the shoulder of the highway was "extremely wide" and agreed that there was ample room for a pedestrian to walk there.

On appeal, the plaintiff argues that the trial court erred by directing a verdict for Shaw on the issue of duty. The plaintiff contends that she presented evidence that Boxer was "helpless" and that Shaw had "taken charge of" Boxer after the two men left work to go fishing and thereby had assumed a duty to leave Boxer in no worse a position than when he took charge of him. We must determine whether the trial court erred in finding that Shaw owed no duty of care to Boxer because Boxer was not "helpless" and Shaw did not "take charge of" him.

In reviewing a ruling granting a directed verdict, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party against whom the verdict was

directed. *Ellis v. Dowd* (Franklin Sup. Ct. 1995). In a negligence action, if there is no duty, then the defendant is entitled to a directed verdict. *Id.*

An affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. The common law ordinarily imposes no duty on a person to act; however, where an act is voluntarily undertaken, the actor assumes the duty to use reasonable care. *Id.*

The Restatement (Third) of Torts § 44 provides that an actor who, despite no duty to do so, takes charge of another who reasonably appears to be imperiled and helpless or unable to protect himself or herself has a duty to exercise reasonable care while the other is within the actor's charge.

Under the Restatement, an intoxicated person is considered helpless. § 44 comment g. However, the undisputed evidence in this case indicates that Boxer was not "helpless." The mere fact that Boxer's car was being repaired did not render him helpless, and his blood alcohol level was below the legal limit. There was testimony from a family member that Boxer was in the midst of a nasty divorce and that he was very upset about the breakup of his marriage. However, the fact that a person may be distraught about a situation does not render that person "helpless" without additional evidence of actual impairment.

Even if we assume that Boxer was "helpless" under the circumstances, to show that Shaw "took charge" of Boxer, the plaintiff would have to show that Shaw through affirmative action assumed an obligation or intended to render services for Boxer's benefit. *See, e.g.*, *Thomas v. Baytown Golf Course* (Franklin Ct. App. 2016) (golfer assumed duty by telling golf course employee who had taken car keys from an intoxicated man that the golfer would drive the man home); *Sargent v. Howard* (Franklin Ct. App. 2013) (driver could be held liable for injuries sustained by ill passenger who was attacked after being left in an unlocked, running vehicle at night while driver used a convenience store restroom).

Viewing the evidence in the light most favorable to the plaintiff, the facts do not indicate that Shaw, through affirmative action, assumed an obligation or intended to render services for Boxer's benefit. We disagree with the plaintiff's claim that Shaw "took charge of" Boxer when the two men left work to socialize on the day of the accident, nor did he do so at any point throughout the remainder of the day. Boxer was not legally intoxicated and he was not helpless. Accordingly, Shaw could not have assumed an obligation to render services for Boxer's benefit. Granted, on the day of the accident, Shaw drove. However, Shaw's driving is not evidence of the

assumption of an affirmative obligation by Shaw to take care of Boxer. It is undisputed that both men mutually agreed to go fishing, visit the marina, and head to the nightclub. There is no suggestion that Shaw directed when and where he and Boxer would go, or that he intended to "take charge of" Boxer.

Because the plaintiff presented no evidence from which a jury could find that Boxer was "helpless" or that Shaw "took charge of" him, the trial court correctly concluded that Shaw had no duty to Boxer and properly directed the verdict for Shaw.

Affirmed.

CONNECTICUT BAR EXAMINATION

26 February 2019

ESSAY QUESTION #1

From the Multistate Essay Examination

One year ago, a man was injured when the car in which he and a woman were traveling slid off an icy highway during a winter storm and overturned. At the time of the accident, the woman was driving the car. The man was sitting in the front passenger seat, wearing his seat belt. The woman was driving 40 mph at the time of the accident, although the posted speed limit was 50 mph.

The man and the woman were rushed to a local hospital in its ambulance. There, hospital surgeons performed emergency surgery on the man. The man remained in the hospital for 10 days following his admission. Numerous medical instruments were used during his surgery and subsequent hospitalization, including needles, clamps, and surgical tools. However, he did not receive a blood transfusion or any blood products.

Three days after the man was released from the hospital, he developed a fever and visited his personal physician, who is not affiliated with the hospital. The physician ordered routine blood tests. The tests revealed that the man had a serious infection that is transmitted in nearly all cases through exposure to either contaminated blood products or improperly sterilized medical instruments (needles, clamps, surgical tools, etc.) that come into contact with a patient's blood. There are, however, other possible sources of the infection in a hospital environment, such as a failure of staff to follow proper handwashing techniques to avoid transmitting infection from one patient to another and staff failure to properly identify and discard certain used medical instruments that cannot safely be sterilized.

Infections occurring in individuals who have not received a blood product and have not been hospitalized during the period of likely exposure are possible but rare. The physician told the man that he "must have contracted this infection at the hospital" because the period between infection and symptom development is 10 to 13 days and the man was a patient at the hospital during the entire relevant period. The physician also stated that "at hospitals that have adopted medical-instrument sterilization procedures recommended by experts, cases of this infection have been almost completely eliminated." The man has no history of intravenous drug use, and he did not receive any medical treatment for several months before his hospital stay. All sterilization procedures at the hospital are performed by hospital employees. However, the particular sterilization procedure used while the man was hospitalized cannot be determined because, while the hospital now uses the sterilization procedure recommended by experts, there is no record of when it started using that procedure.

The man has sued the woman and the hospital, alleging negligence. Neither defendant is judgment-proof, and this jurisdiction has no automobile-guest statute. The parties have stipulated that the man's damages for the injuries he suffered in the accident are $100,000 and his damages from the infection he contracted are $250,000.

1. Could a court properly find that the woman was negligent even though she was driving below the posted speed limit? Explain.

2. Could a court properly find that the woman is liable for the man's damages resulting from the infection? Explain.

3. Could a court properly find that the hospital is liable for the man's damages resulting from the infection? Explain.

4. If a court found that both the woman's negligence and the hospital's negligence caused the man's infection, could the woman's liability be limited to $100,000 for injuries the man suffered in the accident? Explain.

CONNECTICUT BAR EXAMINATION

26 February 2019

ESSAY QUESTION #2

From the Multistate Essay Examination

A company is in the business of manufacturing and selling stereo equipment. Several months ago, the company borrowed money from a bank, to be repaid by the company in monthly installments. The loan agreement, which was signed by the company's owner, provided that, to secure the company's obligation to repay the loan, the company granted the bank a security interest in "all personal property" owned by the company. Also that day, under an oral agreement with the company's owner (who had full authority to speak on behalf of the company), the bank took possession of one of the most valuable items of the company's property—an original Edison gramophone that the company had acquired because it was the earliest precursor of the company's digital music players—as part of the collateral for the loan. The bank properly filed a financing statement in the appropriate filing office, listing the company as debtor and, in the space for the indication of collateral, listing only "all personal property."

Since borrowing the money, the company has run into various financial troubles. It has missed some loan payments to the bank and recently lost a lawsuit, resulting in a large judgment against the company. Last month, the judgment creditor obtained a judicial lien on the gramophone.

Last week, the bank notified the company that it was in default under the loan agreement. Without giving advance notice to the company, the bank sold the gramophone to an antiques collector in a commercially reasonable manner. The judgment creditor has learned about the sale of the gramophone and asserts that he had a superior claim to it.

The sale of the gramophone did not generate enough money to satisfy the company's obligation to the bank. The bank would like to seize some of the company's other property in which the bank has an enforceable security interest.

1. Does the company have any claim against the bank with respect to the sale of the gramophone? Explain.

2. As between the bank and the judgment creditor, who had a superior claim to the gramophone? Explain.

3. Does the bank have an enforceable security interest in any personal property of the company other than the gramophone? Explain.

CONNECTICUT BAR EXAMINATION

26 February 2019

ESSAY QUESTION #3

From the Multistate Essay Examination

Five years ago, three radiologists—Carol, Jean, and Pat—opened a radiology practice together. They agreed to call their business "Radiology Services," to split the profits equally, and to run the practice together in a manner that would be competitive. Toward that end, they purchased state-of-the-art radiology imaging equipment comparable to that of other radiology practices in the community.

Shortly after opening the practice, Carol, Jean, and Pat retained an attorney to organize the practice as a limited liability company. The attorney prepared all the necessary documents and forwarded the documents to Carol, Jean, and Pat for signature. However, they were so involved in their radiology practice that they forgot to sign the documents, and they have never done so.

Four months ago, Carol suggested to Jean and Pat that the practice replace some of the imaging equipment. Jean was worried about overspending on imaging equipment, but she did not express her concern to Carol and Pat.

Three months ago, Carol, without discussing the matter further with either Jean or Pat or obtaining their consent, purchased for the practice a $400,000 state-of-the-art imaging machine like those recently acquired by other radiology practices in the community.

After the purchase but prior to delivery, Jean learned what Carol had done and was furious. Jean did not believe the practice could afford such an expensive machine. When Jean confronted Carol, Carol said, "Too bad, it's a done deal—get over it." At that, Jean responded, "That's it. I've had enough. This machine was purchased without my consent. It's a terrible idea. I'm out of here and never coming back. Just give me my share of the value of the practice." Carol responded, "Fine with me." Carol and Pat subsequently agreed to continue their participation in Radiology Services without Jean.

Radiology Services is in a jurisdiction that has adopted both the Revised Uniform Partnership Act (1997, as amended) and the Uniform Limited Liability Company Act (2006, as amended).

1. What type of business entity is Radiology Services? Explain.

2. Did Carol have the authority to purchase the imaging machine without the consent of Jean and Pat? Explain.

3. Did Jean's statements to Carol constitute a withdrawal from Radiology Services? Explain.

4. Were Jean's statements sufficient to entitle her to receive a buyout payment from Radiology Services for her interest in the practice? Explain.

CONNECTICUT BAR EXAMINATION

26 February 2019

ESSAY QUESTION #4

From the Multistate Essay Examination

An airline is incorporated in State A, where its corporate headquarters are located. The facility where it receives and processes online and telephone reservation requests is located in State B. It employs 150 people at that facility. The airline's base of physical operations, including its transport hub and major maintenance facility, is in State C, where more than 12,000 of its 15,000 employees are located. The airline serves States A and C but not State B.

In August, a woman who lived in State C called the reservation center in State B to obtain a round-trip ticket for the woman to fly between State C and State A in early September.

In early September, the woman used the ticket to fly to State A. The purpose of her trip was to hunt for an apartment in State A, where she was planning to start working at a new job that was set to begin in December. The woman found an apartment and signed an agreement to rent the apartment for one year, starting on December 1.

On the woman's return flight from State A to State C, a mechanical failure forced the plane to make an emergency landing in State A. The woman suffered serious and permanent injuries during the emergency landing and was hospitalized for three weeks in State A. Upon leaving the hospital, she returned to her home in State C. Because of the injuries she suffered, the woman has been unable to work, and she has received an indefinite deferral of the starting date for her job in State A. She continues to live in State C, where she has lived her entire life, although she hopes one day soon to move to the apartment in State A and begin working at her new job.

The woman has retained an attorney, who recommended filing a personal injury claim against the airline in State B because of the larger awards that State B juries tend to give in such cases. Accordingly, the woman sued the airline in federal court in State B, making a state-law tort claim for damages in excess of $1 million for the injuries she suffered during the plane's emergency landing.

The airline promptly filed a motion to dismiss for lack of subject-matter and personal jurisdiction.

State B's long-arm statute allows its courts to exercise personal jurisdiction to "the maximum extent allowed by the Fourteenth Amendment of the United States Constitution."

How should the federal district court rule on the motion to dismiss? Explain.

CONNECTICUT BAR EXAMINATION

26 February 2019

ESSAY QUESTION #5

From the Multistate Essay Examination

Eight years ago, a settlor created a $300,000 irrevocable trust. The settlor's brother is the sole trustee of the trust. The trust's primary beneficiaries are the settlor's son and daughter. The trust instrument provides, in relevant part:

> During the term of this trust, the trustee shall pay to and between my two children so much, if any, of trust income and principal as he deems advisable, in his sole discretion, for each child's support. Upon the death of the survivor of my children, the trustee shall distribute any remaining undistributed trust principal and income equally among my surviving grandchildren.

The trust contains a spendthrift clause that prohibits the voluntary assignment of a beneficiary's interest and does not allow a beneficiary's creditors to reach that interest.

Two months after creating the trust, the settlor died. Both the settlor's son, now age 35, and the settlor's daughter, now age 32, survived the settlor and are still alive. The settlor's son has three living children, now 9, 11, and 14 years of age. These children currently live with their mother, from whom the settlor's son was divorced seven years ago. The settlor's daughter is unmarried and has no children. Both the son (employed as a waiter) and the daughter (employed as a bookkeeper) have earned, on average, less than $35,000 per year during the past seven years.

Over the past eight years, the son has incurred and has not paid the following debts:

> (a) $10,000 to a hospital for the son's emergency-room care
> (b) $35,000 to his former wife in unpaid, judicially ordered child support
> (c) $5,000 to a friend for repayment of a loan, five years ago, to purchase a high-end computer-gaming system for recreational use

Repayment of the debt to the friend was due last year, but the son defaulted on the loan.

During the first year of the trust, the trustee distributed $9,000 of trust income to each of the settlor's two children for their support. Thereafter, relations between the settlor's son and the trustee deteriorated. After the son and his wife divorced, the trustee frequently told others, behind the son's back and without any direct basis, that the son was an "adulterer" and a "terrible father." The trustee often referred to the son as a "bum," and he told the settlor's daughter, without any explanation, "Your brother is rude to me."

Over the last seven years, although the son's and daughter's financial needs were similar, the trustee has distributed $80,000 from trust income and principal to the settlor's daughter and nothing to the settlor's son, despite the son's repeated requests for trust distributions to help him pay his hospital bill, child support, and loan.

1. Given the terms of the trust the settlor created, could the trustee have properly distributed trust assets to the son to enable him to pay (a) his hospital bill, (b) child support, and (c) the loan to purchase the computer-gaming system? Explain.
2. Did the trustee abuse his discretion in refusing to make any distributions to the son during the past seven years? Explain.

3. In light of both the discretion granted the trustee and the spendthrift clause in the trust, may the son's three creditors obtain orders requiring the trustee to pay their claims against the son from trust assets? Explain.

CONNECTICUT BAR EXAMINATION

26 February 2019

ESSAY QUESTION #6

From the Multistate Essay Examination

One evening, Ben received a visit from his neighbor. Hanging on Ben's living room wall was a painting by a famous artist. "I love that artist," the neighbor said. "I've collected several of her paintings." Ben remarked that the famous artist was his ex-wife's mother and that whenever his new girlfriend visited, the fact that the painting still hung in his house made her jealous. The neighbor said, "I have a solution. Why don't you give the painting to me for safekeeping? I have an unsigned print by the same artist that you can hang in its place. The print is not in the artist's usual style, so your girlfriend will not get jealous and your living room will still have great art."

Ben thought this was a good idea. He and his neighbor carried the painting to the neighbor's house and hung it in the neighbor's dining room. Ben then took the neighbor's unsigned print home and hung it in his living room.

The next day, Ben decided that he really didn't like the print, and he took it off the wall. Then, around 10:00 p.m., he decided to retrieve the painting from his neighbor.

Ben went to his neighbor's house and knocked on the door, but there was no answer. Just as he was about to leave, he noticed that a ground-floor window was ajar. Ben pushed the window fully open and began to climb into the house to retrieve the painting. The neighbor, who had been asleep upstairs, was awakened by the noise and ran downstairs to find Ben halfway through the window. The neighbor became enraged. Ben tried to explain, but the neighbor would not stop yelling. Ben decided that it would be better to return to his home and retrieve the painting later, after the neighbor had a chance to cool off. But the neighbor followed him outside and across the lawn, yelling, "How dare you sneak into my house!" The yelling attracted the attention of a police officer who was passing in her patrol car. The officer stopped to investigate, and Ben was arrested, questioned, and released.

Two days later, the neighbor returned the painting to Ben, saying "Here's your painting. Give me back the print that I loaned you and we'll forget the whole thing." However, the previous day Ben had been so angry with the neighbor about his arrest that he had contacted an art dealer and had sold her the print. Ben did not tell the art dealer that the unsigned print was by the famous artist. Ben simply offered to sell the print at a very low price and told the art dealer, "I can sell this print to you at such a good price only because I shouldn't have it at all." Although the art dealer often investigated the ownership history of her purchases, she bought the print without further discussion. An hour after the sale, the art dealer contacted a foreign art collector famously

uninterested in exploring the ownership history of his acquisitions, and sold him the print for 10 times what she had paid for it.

The prosecutor is considering bringing the following charges: (i) a charge of burglary against Ben in connection with the incident at the neighbor's house, (ii) a charge of larceny or embezzlement against Ben for his actions involving the unsigned print, and (iii) a charge of receiving stolen property against the art dealer for her actions involving the print.

The jurisdiction where these events occurred has a criminal code that defines burglary, larceny, embezzlement, and receiving stolen property in a manner consistent with traditional definitions of these crimes.

With what crimes listed above, if any, should Ben and the art dealer be charged? Explain.