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**MPT 1
JULY 2016**

In re Whirley (MPT-1)

In this performance test item, examinees are associates at a law firm representing Barbara Whirley. In January, Whirley began renting a house from Sean Spears. In the last few months, Whirley has had some problems with the house—a leaking toilet, a broken automatic sprinkler system, and a defective sliding door in the guest bedroom, which has allowed water to enter and cause the carpet to get mildewed and moldy. In addition, Whirley’s dog has chewed on the baseboard in the laundry room. She has told Spears about the problems with the toilet, sprinkler system, and door, but he has failed to make any repairs. Whirley seeks the firm’s advice regarding her options as a tenant. Examinees’ task is to draft an objective memorandum identifying the options Whirley has under Franklin’s landlord/tenant law to address each condition in the house and recommending which options are best, keeping in mind that Whirley prefers to continue living in the house. The File contains the instructional memorandum from the supervising attorney, a summary of the client interview, the lease agreement, an email exchange between Whirley and Spears, and a repair estimate. The Library contains excerpts from the Franklin Civil Code and two Franklin cases that discuss what conditions may constitute breaches of the warranty of tenantability and the tenant’s potential remedies.

**MINNESOTA BAR EXAMINATION
JULY 2016
REPRESENTATIVE GOOD ANSWER
MPT 1**

MEMORANDUM

To: Della Gregson, Partner
From: Examinee
Date: July 26, 2016
Re: Barbara Whirley Remedy Analysis

Barbara Whirley rented a three-bedroom, two-bathroom house from Sean Spears in January of this year. This memorandum describes the legal options Ms. Whirley has with regard to the disputes she has been having with her landlord about unrepaired conditions.

LAW

In Franklin, the landlord-tenant relationship is both governed by the written lease the parties entered into as well as statutory duties described in Franklin Civil Code Section 540, et seq. This section will provide a broad overview of the applicable law.

1. Statutory Requirement of Tenantability

As noted in *Gordon v. Centralia* (Fr Sup Ct 1975), in every residential lease, there is an implied warranty of tenantability. Franklin has codified this doctrine. Franklin Civil Code Section 540 provides that the "lessor of a building intended for human occupation must put it into a condition fit for such occupation and repair all subsequent conditions that render it untenable." Section 541 goes on to define what includes an untenable dwelling. In relevant part, a dwelling is considered untenable if it lacks: (1) effective waterproofing and weather protection or roof and exterior walls, including unbroken windows and doors; (2) plumbing or gas facilities maintained in good working order; (3) electrical lighting, wiring, and equipment maintained in good working order; and (4) floors, stairways, and railings maintained in good repair.

2. Tenant's Statutory Remedies for Untenable Dwellings

Next, Franklin Civil Code Section 542 lays out a tenant's remedies if a landlord neglects

to repair conditions that render a premises untenantable within a reasonable time after receiving written notice from the tenant of the conditions. These remedies are also described in the Franklin Court of Appeals decision in *Shea v. Willowbrook Properties* (2012). The tenant may: (1) repair and deduct costs of repairs if the cost of repairs is less than one month's rent; (2) repair and sue, if the cost of the repairs exceeds one month's rent; (3) vacate the premises and be discharged of paying further rent or performance of other conditions as of date of vacating the premises; or (4) withhold some or all of the rent if the landlord doesn't make the repairs, provided the conditions substantially threaten the tenant's health and safety.

The statute also notes that if a tenant makes repairs more than 30 days after giving notice to the landlord, the tenant is presumed to have acted after a reasonable time. A tenant may make repairs after shorter notice if the circumstances so require. As the statute notes, these remedies are in addition to any other remedy provided by the rental agreement, or common law.

3. Protection Against Landlord's Possible Retaliation

Franklin Civil Code Section 542 also provides that if the exercise of any of the remedies listed in that section leads to an eviction action, a justified use of the remedies provided in section (a)(1)-(4) is an affirmative defense.

4. Tenant's Affirmative Statutory Obligations

Franklin Civil Code Section 543 states that no duty on the part of the landowner to repair under Sections 540 or 541 arises if the tenant is in violation of any of three listed affirmative obligations, provided that the tenant's violation contributes materially to the existence of the condition or interferes materially with the landlord's obligation under Section 540 to effect the necessary repairs. The third listed affirmative obligation states that the tenant may not permit any person or animal on the premises to destroy, deface, damage, impair, or remove any part of the dwelling unit or the facilities, equipment, or appurtenances thereto. If the tenant fails to meet this affirmative obligation, the landowner owes no duty under Sections 540 or 541.

ANALYSIS

1. Franklin Civil Code Section 540 et seq. Applies

This section of the Franklin Civil Code applies to lessors of a building intended for human occupation. Here, Ms. Whirley is renting the house from Mr. Spears to reside in. The lease agreement between the two of them notes the Landlord leases the Premises to the Tenant for "private residential use." Therefore, Franklin Civil Code Section 540 et seq. applies to Ms. Whirley's disputes.

2. Leaking Toilet in Second Bathroom

Ms. Whirley's first complaint is that the toilet in her second bathroom began leaking two months after she moved in. Under Franklin Civil Code Section 541, a dwelling is deemed untenantable for the purposes of Section 540 if it lacks plumbing facilities maintained in good working order. Here, the toilet is clearly not functioning properly. In her March 31, 2016 email to Mr. Spears, Ms. Whirley described that the leak is so bad that she has to empty the plastic bucket she had been using to catch the leak twice a day, and sometimes the toilet does not flush. This condition certainly makes her dwelling untenantable. Ms. Whirley first informed Mr. Spears of the problem on February 19, 2016 (in writing, as required), and he has yet to resolve it. This is well past the statutory 30 days a tenant may give the landlord to make repairs before the tenant is presumed to have acted after a reasonable time. Fr. Civil Code Section 542(c).

The next question is the appropriate remedy for Ms. Whirley. The cost of repairing the toilet, according to the handyman's estimate, is \$200. This amount does not exceed one month's rent (which for Ms. Whirley is \$1,200 under the lease agreement). Ms. Whirley's first option, under Section 542(a)(1) is to make the repairs and deduct the cost of repairs when the rent is due. To adequately prove her expenses in court, Ms. Whirley will need to provide documentation or an explanation of how she came to the number. *Shea v. Willowbrook* (Fr. Ct. App. 2012). Ms. Whirley is also legally able, under Section 542(a)(3), to vacate the premises, thus discharging her from needing to pay further rent. However, because Ms. Whirley has indicated she wishes to stay, this is not the best option for her (and while it is an option for the other conditions as well, I apply the same reasoning here to discount it). Finally, under Section 542(a)(4) can withhold a portion or all of the rent until Mr. Spears makes the repair, if the conditions substantially threaten her health and safety. This is likely an option for Ms. Whirley. In *Burk v. Harris* (Fr. Ct. App. 2002), the court found that a leaking shower (as well as improper waterproofing and a non-functioning thermostat) were not merely cosmetic defects or matters of convenience, but affected Tenant's health and safety. Similarly, the malfunctioning toilet which sometimes does not flush and for which she has to empty out a plastic bucket twice a day is not merely cosmetic or an inconvenience, but truly impacts her health and safety. Therefore, Ms. Whirley has the legal option to withhold a portion of all of the rent until the repairs are made. This is likely the best option for Ms. Whirley because it allows her to not bear the cost of a malfunctioning toilet. Ms. Whirley may not, under these facts, pursue the remedy in Section 542(a)(2) because the costs of repair are not larger than her rent.

As described in *Burk*, to determine the appropriate reduction in rent, a trial court may either

(i) measure the difference between the fair rental value of the premises if they had been as warranted and the fair rental value as they were during occupancy in unsafe or unsanitary condition, or (ii) reduce a tenant's rental obligation by the percentage corresponding to under statute the relative reduction of use of the leased premises caused by the landlord's breach. The court would also order Mr. Spears to make repairs, which would stop Mr. Spears from asking Ms. Whirley to "hold down the fort."

3. Problems with outdoor sprinkler system not working

Ms. Whirley's next problem is that the outdoor sprinkler system is not working. According to her emails, she did not see any leaks, so she believes it's a defective sprinkler box. Ms. Whirley informed Mr. Spears of this problem on March 31. The handyman estimated that fixing this condition would cost \$300. Ms. Whirley may argue this broken sprinkler system causes her dwelling to be untenable because it lacks electrical wiring and equipment in good working order. Fr. Civil Code 541(7). However, because this condition is outside the dwelling itself, courts may be skeptical as to whether a broken sprinkler system creates untenability.

If a court would find the broken sprinklers enough for untenability, Ms. Whirley's best argument under the law is to make the repairs and deduct the cost of repairs when the rent is due (given that the cost of repairs does not exceed one month's rent). She will likely not be able to withhold a portion of the rent because this type of condition is more of a convenience or cosmetic, rather than a threat to her health and safety. *Burke*. Ms. Whirley can still water and maintain the garden (as Mr. Spears required in her lease), but it is simply more of a hassle for her because she has to do it by hand. Ms. Whirley may take action now because, again, she told Mr. Spears of the problem on March 31 so she has waited a reasonable amount of time for him to fix it.

4. Smell and Mold in the Guest Bedroom

Ms. Whirley's third complaint is certainly her most serious. Ms. Whirley has found that the carpet near the sliding glass door from a guest bedroom to the backyard is damp, and there is a half-inch gap between the bottom of door and door frame. Ms. Whirley noticed this problem in May, and emailed Mr. Spears in writing about it on May 26. Under Section 541(1), Ms. Whirley would argue the dwelling is untenable because it lacks effective waterproofing and weather protection of the exterior walls, including unbroken windows and doors. Mr. Spears may argue, however, that the dampness is Ms. Whirley's fault (perhaps because she kept the door open in inclement weather), and so he has no duty to fix it under Franklin Civil Code 543.

A court is not likely to agree. Ms. Whirley has noted the door is in the closed position, that

she hasn't opened it since moving in, and that when she noticed the gap she tried to open the door but it would not budge. Although she is unsure whether any houseguests have used the door, the fact she could not open it herself suggests that it is stuck. Also, Ms. Whirley tried to mitigate the damage by putting plastic along the door frame to try to keep the outside moisture from coming in (although it did not help). In her emails and in her interview with us, Ms. Whirley stated that the carpet is increasingly discolored and smelly, and she noticed mold growing. The entire room is completely unusable now. Under these facts, Ms. Whirley certainly has a strong claim that the dwelling is untenantable.

The handyman has estimated fixing this problem would cost \$1,800, which is more than Ms. Whirley's monthly rent. Therefore, under Section 542(a), Ms. Whirley may make the repairs and then sue Mr. Spears for the cost of repairs, or, once again, withhold a portion or all of the rent until Mr. Spears makes the relevant repairs if the conditions substantially threaten her health and safety. This condition is very similar to the situation in *Burke*, where the Court of Appeals found substantial threat to the tenant's health and safety from damp carpet. The mold that is growing, as Ms. Whirley noted, is dangerous to her health. It also makes an entire room of the house unusable to her. Therefore, the option of withholding rent is likely the best option for Ms. Whirley as she herself has complained about paying for a three-bedroom house when in reality for her she can only use it as a two-bedroom house. As noted above and described in *Burke*, a possible measure of damages would be the difference between the fair rental value of the premises if they had been as warranted and the fair rental value as they were during occupancy in an unsafe condition. Here, the average cost for a two-bedroom in the area is \$1,000, while she is paying \$1,200. This difference is one possible measure of her damages. Again, Ms. Whirley may take any of these steps now because more than a reasonable time has passed between her notifying Mr. Spears of the problem and his failure to solve it.

4. Damage to Wall and Baseboard in Laundry Room

Ms. Whirley's final complaint is that the wall and the baseboard in the laundry room are damaged. Ms. Whirley suspects that her dog, Bentley, has caused this damage. She has since mitigated the risk by taking away his access to the area Bentley was chewing on. Ms. Whirley would like Mr. Spears to take care of the repair cost because he allowed her to have a dog. Under the lease agreement, Ms. Whirley agreed that she was liable and responsible for any damage or required cleaning to the Premises caused by any unauthorized animal. However, Ms. Whirley states she and Mr. Spears agreed to a Pet Addendum. Once we look at that, we can see whether the parties have agreed on who is responsible for damages by pets. Without knowing the specifics of their agreement, however, it appears that the statutory law is not in Ms.

Whirley's favor. The statute provides that a landlord has no duty to repair when the tenant permitted an animal to damage any part of the dwelling. Fr. Civil Code Section 543. This is what happened with Bentley, who Ms. Whirley left in the laundry room when she was at work. Therefore, landlord likely has no duty to repair this damage. Ms. Whirley will likely have to cover the cost, estimated by the handyman at \$300, herself. Furthermore, it does not appear that Ms. Whirley has notified Mr. Spears about this damage. The statute does require her to give him reasonable time to do so. Therefore, even if Ms. Whirley has a case to get Mr. Spears to repair this damage, she has to give him a reasonable time to repair before she can pursue her statutory remedies. This case is like Shea, where the court found if the damage was the tenant's own fault, the landlord had no duty to repair.

5. Protection from Eviction

Ms. Whirley's valid defenses under Section 541 protect her from eviction by Mr. Spears under Section 550(a), particularly as to the wet carpet as the court, like in Burke, will find that to constitute a substantial breach requiring the landlord to fix it and awarding tenant possession of the premises. This should allay Ms. Whirley's fears that she will be required to move.

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**MPT 2
JULY 2016**

Nash v. Franklin Department of Revenue (MPT-2)

Examinees' law firm represents Joseph and Ellen Nash, a married couple who own land in Knox Hollow, Franklin, on which they raise Christmas trees for sale. While initially selling the trees was a casual endeavor, five years ago they made it a commercial tree-farming operation and began claiming tax deductions for expenses from a trade or business. The Franklin Department of Revenue recently reviewed the Nashes' income tax returns and has disallowed the Nashes' deductions for the last five years' farm expenses, as well as their claim for a home-office deduction. The Nashes appealed the new tax assessment, and the firm represented the Nashes at a hearing before the Franklin Tax Court. Examinees' task is to draft the legal argument for the post-hearing brief requested by the Tax Court, making the case that the Nashes are entitled to the full deductions that they claimed under Franklin law. [Franklin law uses the federal Internal Revenue Code and Regulations to calculate Franklin tax liability.] The File contains the instructional memorandum, the firm's guidelines for drafting briefs, the decision by the Franklin Department of Revenue, and a transcript of Joseph Nash's testimony before the Franklin Tax Court. The Library contains relevant excerpts from Internal Revenue Code §§ 162, 183, and 280A, and Internal Revenue regulations (26 C.F.R. § 1.183-2). The Library also contains two cases from the Franklin Tax Court addressing what it means for a taxpayer to be engaged in an "activity for profit," and the standard for whether a taxpayer has used a portion of his or her home "exclusively" as the principal place of business of a business.

**MINNESOTA BAR EXAMINATION
JULY 2016
REPRESENTATIVE GOOD ANSWER
MPT 2**

I. Legal Argument

Joseph and Ellen Nash are entitled to full deductions for their Christmas tree operation and a deduction for their exclusive use of a room in their residence as a home office. Orders of the Department of Revenue are presumed correct and valid; the taxpayer bears the burden of demonstrating that the challenged order is incorrect. *Nelson v. Franklin DOR*. Here, Joseph and Ellen Nash have met their burden.

A. Start-Up Business Activities Are for Profit Under the Internal Revenue Code Even Though the Business Faces Initial Obstacles to Profitability.

Joseph and Ellen Nash are entitled to a full deduction for all the ordinary and necessary expenses paid or incurred in carrying on any trade or business. Because they ran the Christmas tree operation for profit, they are entitled to the full deduction. The Franklin legislature intended to make Franklin personal income tax law identical to the Internal Revenue Code (IRC) for purposes of determining Franklin taxable income. *Lynn v. Franklin DOR*. 26 CFR § 1.183-2 sets out nine factors to use when assessing whether an activity is for profit. None of the factors is conclusive. *Morton v. Franklin DOR*. Under the totality of the circumstances, it is clear that Joseph and Ellen Nash ran their Christmas tree farm for profit.

The first factor is the manner in which the taxpayer carries on the activity. Business plans suggest a motive to earn a profit. *Jennings v. Franklin DOR*. Two facts are crucial in this regard: the Nashes converted a bedroom into an office to serve as the principal place of business and there is a history of expansion of the Christmas tree operation. As to the second factor, the Nashes started with a garbage can advertising sale, and later began reading books on raising trees before cutting down some acreage to plant and grow trees. Then, a Christmas tree farmer the Nashes had worked with retired, so the Nashes contacted his commercial customers and followed his advice on cutting trees and keeping records. They also bought new equipment necessary to expanding the operation. Thus, the manner of the business is one of escalation from a small sales outpost to a commercial operation.

The second factor is the expertise of the taxpayer or his advisors. The Nashes lived on the land

for a long time and are educated about the outdoors. Crucially, they consulted an expert, the retired Christmas tree seller, and they followed his advice regarding operations on the land and in record keeping. Finally, the Nashes bought books and catalogues to keep themselves informed of the business and the things they would need to earn a profit. This development of expertise suggests more than mere hobby; the Nashes were serious about having a successful Christmas tree business, and they intended to make a profit.

The third factor is the time and effort expended by the taxpayer in carrying on the activity. Although Joseph was still working full time, his wife had recently retired from her job with the county. It was when Ellen retired that they decided "Why not?" and started escalating their business plans by contacting the farmer's commercial customers as a target for expansion. Further, Joseph still invested significant time in the business even though he was working. Moreover, Ellen's retirement reduced their income which supports the notion that they need to earn a profit with the business. Thus, the greater availability of Ellen to work on the farm in addition to Joseph's efforts suggest that this was done for profit.

The fourth factor is the expectation that assets used in activity may appreciate in value. The Nashes would not have taken the steps they did if they didn't expect an appreciation in value. They cut down trees on their land, changed the nature of their home by adding an office, bought 'specialized equipment to trim and shape the trees' and contacted commercial suppliers. Further, they owned the land on which this business commenced. Thus, it is clear that they expected their land to appreciate in value.

The fifth factor is the success of the taxpayer in carrying on other similar or dissimilar activities. The Nashes foray into the Christmas tree business began with their moderate success in selling cypress, pine, and spruce trees for \$15 to \$25. Only after realizing they were running out of trees and with Ellen retiring did they start expanding the business. Their modest success initially was a factor in expanding their business, thus, the origins in this similar activity suggest that the business was operated for profit.

The sixth factor is the taxpayer's history of income or losses with respect to the activity. The Nashes have made modest income gains of \$1,000 or so over the past few years, which shows that they are trying to turn a profit; they just haven't been that successful yet. The losses, further, stem from investments in the property to make the business profitable one day.

The seventh factor is the amount of occasional profits if any which are earned. Although the

Nashes have not yet made a profit, that in no way destroys the intent to make a profit. Further, the business is one of long expectations: they have to grow trees to sell them. This requires substantial investment, and these are Christmas trees, which only are marketable once a year. Thus, until they establish themselves as a reputable dealer of Christmas trees, it is highly understandable why they haven't yet turned a profit. Their losses come from investments—investments that they intend to turn to profit.

The eight factor is the financial status of the taxpayer. The Nashes are a family business. But they are running this business for profit. They own land and intend to use it as such to earn a profit off an activity they enjoy.

The ninth factor is the personal pleasure of recreation. Although the Nashes gain pleasure from being outside, this factor does not suggest that their Christmas tree business is not for profit. They want to run this particular business for profit because it's fun. The fun part doesn't mean they are indifferent to earning profits.

B. A Room in a Residence Is Exclusively Used as the Principal Place of Business for Any Trade or Business If It is Physically Separate from the Main Residence and Is Not Willfully Used for Recreation.

Joseph and Ellen Nash are entitled to a home office deduction. Under IRC § 260A, the general rule is that there is no deduction allowable with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence. Subpart (c) contains an exception for to the extent that any item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis as the principal place of business for any trade or business of the taxpayer. The exclusive use requirement for a deduction for using residence as a place of business is an 'all or nothing' standard. *McBride v. Franklin DOR*.

In *Lynn v. Franklin DOR*, the Franklin Tax Court expounded on the meaning of 'exclusive use.' It concluded that an area's physical separation from a living area of a home, conversion from a guest bedroom to an office, and the existence of a separate entrance strongly support the existence of an area used exclusively as a principal place of business in a home. *Id.* Further, it is crucial to analyze the use to which the room is put. In *Lynn*, the court found that the parties had not met their burden of proving exclusive use when evidence was presented that a room was used for watching television at low volume by a child of the house, that personal business was done in the room, and little evidence as to business use was presented.

The Nash family survives the Lynn test. Starting in 2011, they set aside a room in the house 'just for business,' taking out a bed and replacing it with office equipment. Transcript. They kept records, catalogues, and books in the room, which they consulted in the course of their business. The room had a desk, two chairs, and a television. The television, however, was used only for the Weather Channel for business reasons. Weather is very important for an outdoor business. Further, Joseph Nash testified that the room was used exclusively for business. Thus, like in Lynn, we have a physically separate room that was extensively testified to as being used only for business, and the room was converted from a room with a bed to a room that functions as an office with books, a TV for business purposes, and a desk.

The only facts which could possibly be construed as cutting against the room's exclusive use as a principal place of business are that one of the chairs is a recliner, the dog lies in the room, and there is a fireplace. The fireplace is merely incidental; the Nash family could not change its existence and there is no evidence that they used the fireplace for recreational or non-business purposes. Moreover, the presence of a dog without evidence that the room was used for recreation with the dog does not mean that the use was not exclusively for business. Finally, a recliner is a comfortable chair, but that is not inconsistent with the room being used exclusively as a principal place of business. It is the use to which the room is put that matters, and a comfortable chair can just as easily be used exclusively for business purposes, like reading from the books and catalogues when formulating a business plan.

Thus, the Nash family has met its burden to show that the room was exclusively used as a principal place of business for the Christmas tree business. Therefore, they are entitled to a home office deduction.

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MEE Question 1

Two siblings, a brother and a sister, decided to start a bike shop with their cousin. They filed a certificate of organization to form a limited liability company. The brother and the sister paid for their LLC member interests by each contributing \$100,000 in cash to the LLC. Their cousin paid for his LLC member interest by conveying to the LLC five acres of farmland valued at \$100,000; the LLC then recorded the deed.

Neither the certificate of organization nor the members' operating agreement specifies whether the LLC is member-managed or manager-managed. However, the operating agreement provides that the LLC's farmland may not be sold without the approval of all three members.

Following formation of the LLC, the company rented a storefront commercial space for the bike shop and opened for business.

Three months ago, purporting to act on behalf of the LLC, the brother entered into a written and signed contract to purchase 100 bike tires for \$6,000 from a tire manufacturer. When the tires were delivered, the sister said that they were too expensive and told her brother to return the tires. The brother was surprised by his sister's objection because twice before he had purchased tires for the LLC at the same price from this manufacturer, and neither his sister nor their cousin had objected. The brother refused to return the tires, pointing out that the tires "are perfect for the bikes we sell." The sister responded, "Well, pay the bill with your own money; you bought them without my permission." The brother responded, "No way. I bought these for the store, I didn't need your permission, and the company will pay for them." To date, however, the \$6,000 has not been paid.

One month ago, purporting to act on behalf of the LLC, the cousin sold the LLC's farmland to a third-party buyer. The buyer paid \$120,000, which was well above the land's fair market value. Only after the cousin deposited the sale proceeds into the LLC bank account did the brother and sister learn of the sale. Both of them objected.

One week ago, the brother wrote in an email to his sister, "I want out of our business. I don't want to have anything to do with the bike shop anymore. Please send me a check for my share."

1. What type of LLC was created—member-managed or manager-managed? Explain.
2. Is the LLC bound under the tire contract? Explain.
3. Is the LLC bound by the sale of the farmland? Explain.
4. What is the legal effect of the brother's email? Explain.

**MINNESOTA BAR EXAMINATION
JULY 2016
REPRESENTATIVE GOOD ANSWER
MEE 1**

I. Member-Managed LLCs

The operating agreement creates a member-managed LLC. The issue is whether the LLC is member-managed or manager-managed. LLCs are hybrid organizations, with characteristics of both corporations and partnerships. They often have limited liability, limited liquidity, limited taxation, and limited duration. Members become members upon contributing either a monetary or other service to the LLC. Generally, an LLC is presumed to be member-managed unless the articles of organization or operating agreement provide otherwise. A manager-managed LLC is run by an elected group of managers, who manage the business similarly to a board of directors. A member-managed LLC arises by default or when the articles of organization or operating agreement reserve the rights of management to members of the LLC.

Here, neither the articles of organization nor the operating agreement expressly contain a provision regarding whether the LLC is manager-managed or member-managed. This would ordinarily create a presumption that the LLC is member-managed. Additionally, the operating agreement reserves some rights to the members - specifically, the ability to approve the sale of the LLC's farmland. Because of the default rule, this reserved right and the failure to elect managers, the LLC is member-managed.

II. Tire Contract

The LLC will be liable on the tire contract. The issue is whether the brother had the authority to enter into a binding contract on behalf of the LLC. The LLC will be liable on a contract if the person entering the contract had authority or the LLC assumes the contract. Generally, members acting as managers, managers, and officers have the authority to enter into contracts on behalf of the LLC, as the LLC's agents, in the ordinary course of the LLC's business. Authority can be actual or apparent. Actual authority exists when an agent has express permission to do something, or when the agent reasonably believed he had the authority to do something, based on his job title. Apparent authority exists when the principal cloaks the agent with authority and a third party detrimentally relies upon such cloaking.

Alternatively, an LLC can adopt a contract that it is not otherwise bound by, either expressly or

impliedly. Express adoption occurs when there is a resolution to assume the contract. Implied adoption occurs when the LLC accepts a benefit under the contract with full knowledge of the contract terms.

Here, the brother was acting as one of three managing members of the LLC. He therefore had actual authority to enter into contracts for the LLC within the ordinary course of the bike business. Entering into a contract for bike tires is within the course of the business, and thus falls under his actual authority. Alternatively, even if he somehow lacked the power, the LLC would be liable due to the brother's apparent authority, as the brother was cloaked in authority (the bike shop previously accepted the contracts entered into by brother) and the tire company detrimentally relied upon this to enter into a new contract.

III. Sale of Farmland

The LLC will most likely not be liable on the contract for the sale of the farmland. The issue is whether the farmland could be sold without the consent of all three members, as provided in the operating agreement. Generally, the operating agreement is binding, and actual authority would be required to sell the land. However, where there is apparent authority or a bona fide purchaser for value purchases the land without notice of another's interest, she may take it free of the other interest.

Here, the operating agreement required that all three members agree before selling the farmland. To have actual authority to sell the farmland, therefore, any one of the members would need to have permission from the other two. To have apparent authority, the LLC itself would have had to somehow cloak the cousin with authority to sell the farmland, which it did not do under the facts before us.

The third-party buyer may take good title if it had no reason to know that the cousin did not have authority to sell and bought the land in good faith, seeing only that the LLC had recorded the prior deed and that someone from the LLC was conveying the deed. However, since the sale is outside the LLC's ordinary course of business (bike business selling farmland), a bona fide purchaser should have doubt about a single member's ability to bind the LLC and would need reason to believe that the selling member had authorization from the others, which is not indicated here.

IV. Brother's Email

The brother's email is a dissociation. The issue is what legal effect the brother's email had. Generally, dissociation of a member occurs when there is an express written statement by a member seeking to leave an LLC. Upon dissociation, the member loses his right to participate in the LLC but still can receive distributions from it. Newer LLC laws do not require the LLC to buy the member out at a fair market price or begin the process of dissolution, unless agreed to by the other members or provided in the operating agreement.

Here, the brother gave an express, written statement via his email of his intention to no longer be associated with the LLC. Because two parties still remain in the LLC, they may continue to run the LLC and pay distributions, unless they choose to buy out the brother or dissolve the LLC.

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MEE Question 2

A defendant was tried before a jury for a robbery that had occurred at Jo-Jo's Bar on November 30. At trial, the prosecutor called the police officer who had investigated the crime. Over defense counsel's objection, the officer testified as follows:

Officer: I arrived at the defendant's home on the morning of December 1, the day after the robbery. He invited me inside, and I asked him, "Did you rob Jo-Jo's Bar last night?" The defendant immediately started crying. I decided to take him to the station. Before we left for the station, I read him Miranda warnings, and he said, "Get me a lawyer," so I stopped talking to him.

Prosecutor: Did the defendant say anything to you at the station?

Officer: I think he did, but I don't remember exactly what he said.

Immediately after this testimony, the prosecutor showed the officer a handwritten document. The officer identified the document as notes she had made on December 2 concerning her interaction with the defendant on December 1. The prosecutor provided a copy of the document to defense counsel. The document, which was dated December 2, stated in its entirety:

The defendant burst into tears when asked if he had committed the robbery. He then received and invoked Miranda rights. I stopped the interrogation and didn't ask him any more questions, but as soon as we arrived at the station the defendant said, "I want to make a deal; I think I can help you." I reread Miranda warnings, and this time the defendant waived his rights and said, "I have some information that can really help you with this case." When I asked him how he could help, the defendant said, "Forget it—I want my lawyer." When the defendant's lawyer arrived 30 minutes later, the defendant was released.

The officer then testified as follows:

Prosecutor: After reviewing your notes, do you remember the events of December 1?

Officer: No, but I do remember making these notes the day after I spoke with the defendant. At that time, I remembered the conversation clearly, and I was careful to write it down accurately.

Over defense counsel's objection, the officer was permitted to read the document to the jury. The prosecutor also asked that the notes be received as an exhibit, and the court granted that request, again over defense counsel's objection. The testimony then continued:

Prosecutor: Did you speak to the defendant any time after December 1?

Officer: Following my discovery of additional evidence implicating the defendant in the robbery, I arrested him on December 20. Again, I read the defendant his Miranda rights.

The defendant said that he would waive his Miranda rights. I then asked him if he was involved in the robbery of Jo-Jo's Bar, and he said, "I was there on November 30 and saw the robbery, but I had nothing to do with it."

Defense counsel objected to the admission of this testimony as well. The court overruled the objection.

The defendant's trial for robbery was held in a jurisdiction that has adopted all of the Federal Rules of Evidence.

Were the following decisions by the trial court proper?

1. Admitting the officer's testimony that the defendant started crying. Explain.
2. Permitting the officer to read her handwritten notes to the jury. Explain.
3. Admitting the officer's handwritten notes into evidence as an exhibit. Explain.
4. Admitting the officer's testimony recounting the defendant's statement, "I have some information that can really help you with this case." Explain.
5. Admitting the officer's testimony recounting the defendant's statement, "I was there on November 30 and saw the robbery, but I had nothing to do with it." Explain.

**MINNESOTA BAR EXAMINATION
JULY 2016
REPRESENTATIVE GOOD ANSWER
MEE 2**

1. Admission of officer's testimony that the defendant started crying.

The officer's testimony about the defendant crying is admissible. At issue is whether the testimony violated the defendant's Miranda rights or should have been excluded as hearsay.

The 5th Amendment prohibits use of a confession made during custodial interrogations without first reading a defendant her rights. Custody exists where a reasonable person would not feel free to leave, and an interrogation is any conduct by police that would reasonably lead to an incriminating response. Officers must read defendants their Miranda rights before performing a custodial interrogation, and any invocation of the right to remain silent or speak to an attorney requires the questioning to stop. Statements made before Miranda, or in a non-custodial interrogation, do not violate the 5th Amendment.

Here, the officer's testimony is about an interaction at the defendant's home. Without giving Miranda warnings, the officer asked the defendant if he robbed Jo-Jo's bar the previous evening, and in response the defendant began crying. The question certainly would elicit a response that is incriminating if affirmative, but the questioning occurred at the defendant's home, and there was no indication that he was not free to go or not answer. Because the defendant was not in custody for this question, the answer and testimony does not violate Miranda and is admissible as evidence.

Hearsay is an out of court statement offered for the truth of the matter asserted. Hearsay is generally inadmissible unless it meets an exception. However, certain statements are excluded from the hearsay definition. Chief among those excluded are admissions by a party opponent. A statement made by a party opponent and later offered against that same party is not defined as hearsay and is therefore admissible if relevant. A statement, for hearsay purposes, is any verbal conduct or nonverbal conduct, if the nonverbal conduct is intended to operate as an assertion. An assertion is capable of being true or false.

Here, the defendant's act of crying is a nonverbal act. However, it is not an assertion. Simply crying in response to a question is not capable of being true or false--it just happens. Therefore, the crying is not a statement for purposes of hearsay and is admissible. Even if the crying were

treated as a statement, the defendant made the statement in question, and the prosecution is offering it against him. Therefore, it would qualify as a statement by party opponent and be admissible if relevant.

Because there was no Miranda violation for the crying, and there is no hearsay issue, it is admissible. The trial court's admission was proper.

2. Permitting officer to read her handwritten notes to the jury.

The trial court properly allowed the officer to read her handwritten notes to the jury. At issue is whether the notes qualify for the past recollection recorded exception to hearsay and whether there are any Miranda issues with the statements.

As above, hearsay is an out of court statement offered for the truth of the matter asserted in the statement. Hearsay is inadmissible unless it meets an exception. One exception is the past recollection recorded. A witness must testify from her memory, not a written statement. If a witness fails to remember an instance about which she is being asked to testify, the witness may have her memory refreshed by anything that may stimulate her memory. This is called past recollection refreshed. If the witness still cannot remember the events, she may read a recorded recollection of the event into evidence, provided that the recorded recollection is accurate, clear, and was made contemporaneously with the events. To qualify for the exception, the written material must be provided to the opposition beforehand.

Here, the officer failed to remember the events after reviewing her notes. The officer also testified that she made the notes the day after speaking with the defendant, that she remembered the conversation clearly, and that she wrote it down accurately. However, the handwritten notes are hearsay, because they are statements offered for their truth--that the events they describe actually happened. Because the officer established that the written notes were accurate, clear, and made soon after her conversation with the defendant, they qualify for the past recollection recorded exception and may be read into evidence.

Nonetheless, the same Miranda issues and hearsay issues apply to the defendant's statements in the officer's notes. This is a hearsay-within-hearsay problem, and both levels of hearsay must meet an exception to be admissible. The defendant made two statements in question. The second will be evaluated in answer 4. As to the first statement, the defendant voluntarily stated "I want to make a deal; I think I can help you" after receiving Miranda rights. Voluntary statements

made after being Mirandized do not violate the rules of the 5th Amendment and are admissible. As above, this statement was made by the defendant and is now offered against him. Therefore, it is not hearsay as a statement by party opponent.

Therefore, it was proper for the trial court to allow the officer to read the notes into the record.

3. Admitting the officer's handwritten notes into evidence as an exhibit.

It was improper to admit the handwritten notes into evidence as an exhibit. At issue is under what circumstances a past recollection recorded can be offered and admitted into evidence.

The general rule is that a past recollection recorded may be read into evidence on direct examination, as was the case here, but the actual notes may only be offered as an exhibit into evidence by the opposing party.

Here, the prosecution both introduced the officer's reading of the statement and the written statement itself. That is improper. Therefore, the trial court should not have admitted the exhibit into evidence.

4. Admitting the officer's testimony recounting defendant's statement, "I have some information that can really help you with this case."

The statement about having information was properly admitted into evidence. At issue is whether the statement violates Miranda or is barred as inadmissible hearsay.

As above, confessions obtained in violation of Miranda are inadmissible. However, voluntary statements and statements after a knowing and voluntary waiver of Miranda are admissible. Here, the defendant was re-Mirandized and waived his Miranda rights before making the statement in question. Assuming that the waiver was knowing and voluntary, the statement does not violate Miranda.

As above, hearsay is an out of court statement offered for its truth. This statement does not meet the hearsay definition because it is a statement by party opponent offered against the party who made it. However, evidence must still be relevant to be admissible. Relevant evidence is anything that makes a material fact more or less probable than it would be without the evidence. Material facts are those that have a direct bearing on the outcome of the case. Here, the

statement that the defendant has information that could really help with the case makes it more likely that he knew about the crime committed. This makes it more likely than it would be without the statement that the defendant was somehow involved with the robbery. Because the statement makes those facts more likely--albeit indirectly--the statement is relevant and admissible. Therefore, it was not improper for the court to admit the statement.

5. Admitting the officer's testimony recounting the defendant's statement, "I was there on November 30 and saw the robbery, but I had nothing to do with it."

The trial court properly admitted the officer's testimony regarding the defendant's statement. At issue is whether the statement violated the defendant's Miranda rights, or the hearsay rule.

A defendant must be Mirandized before a custodial interrogation. The defendant made his statement after being arrested and in response to an officer's question. This qualifies as a custodial interrogation. However, a defendant can waive his Miranda rights by making a knowing and voluntary waiver. Here the officer's testimony indicates that the defendant waived his Miranda rights and made the statements voluntarily. Assuming that to be the case, there is no issue with Miranda here. The defendant did not invoke his right to remain silent by unequivocally stating that he wished to remain silent, and he did not invoke his right to have an attorney present.

A defendant also has a 6th Amendment right to counsel at all proceedings crucial to a prosecution, once charges have been filed. Charges had not yet been filed against the defendant at the time of this questioning, so there is no 6th Amendment issue here.

As above, this is a statement by party opponent, so it has no hearsay problem. However, as above, it must still be relevant. Even though the statement that the defendant was present but had nothing to do with the robbery makes it less likely that he committed the crime, that still fits the test for relevant evidence. As such, the statement is admissible. Therefore, it was proper for the court to admit it.

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MEE Question 3

Six months ago, a man visited his family physician, a general practitioner, for a routine examination. Based on blood tests, the physician told the man that his cholesterol level was somewhat elevated. The physician offered to prescribe a drug that lowers cholesterol, but the man stated that he did not want to start taking drugs because he preferred to try dietary change and “natural remedies” first. The physician told the man that natural remedies are not as reliable as prescription drugs and urged the man to come back in three months for another blood test. The physician also told the man about a recent research report showing that an herbal tea made from a particular herb can reduce cholesterol levels.

The man purchased the herbal tea at a health-food store and began to drink it. The man also began a cholesterol-lowering diet.

Three months ago, the man returned to his physician and underwent another blood test; the test showed that the man’s cholesterol level had declined considerably. However, the test also showed that the man had an elevated white blood cell count. The man’s test results were consistent with several different infections and some types of cancer. Over the next two weeks, the physician had the man undergo more tests. These tests showed that the man’s liver was inflamed but did not reveal the reason. The physician then referred the man to a medical specialist who had expertise in liver diseases. In the meantime, the man continued to drink the herbal tea.

Two weeks ago, just before the man’s scheduled consultation with the specialist, the man heard a news bulletin announcing that government investigators had found that the type of herbal tea that the man had been drinking was contaminated with a highly toxic pesticide. The investigation took place after liver specialists at a major medical center realized that several patients with inflamed livers and elevated white blood cell counts, like the man, were all drinking the same type of herbal tea and the specialists reported this fact to the local health department.

All commercially grown herbs used for this tea come from Country X, and are tested for pesticide residues at harvest by exporters that sell the herb in bulk to the five U.S. companies that process, package, and sell the herbal tea to retailers. U.S. investigators believe that the pesticide contamination occurred in one or more export warehouses in Country X where bulk herbs are briefly stored before sale by exporters, but they cannot determine how the contamination occurred or what bulk shipments were sent to the five U.S. companies. The companies that purchase the bulk herbs do not have any control over these warehouses, and there have been no prior incidents of pesticide contamination. The investigators have concluded that the U.S. companies that process, package, and sell the herbal tea were not negligent in failing to discover the contamination.

Packages of tea sold by different companies varied substantially in pesticide concentration and toxicity, and some packages had no contaminants. Further investigation has established that the levels of contamination and toxicity in the herbal tea marketed by the five different U.S. companies were not consistent.

The man purchased all his herbal tea from the same health-food store. The man is sure that he purchased several different brands of the herbal tea at the store, but he cannot establish which brands. The store sells all five brands of the herbal tea currently marketed in the United States.

The man has suffered permanent liver damage and has sued to recover damages for his injuries. It is undisputed that the man's liver damage was caused by his herbal tea consumption. The man's action is not preempted by any federal statute or regulation.

1. Is the physician liable to the man under tort law? Explain.
2. Are any or all of the five U.S. companies that processed, packaged, and sold the herbal tea to the health-food store liable to the man under tort law? Explain.
3. Is the health-food store liable to the man under tort law? Explain.

**MINNESOTA BAR EXAMINATION
JULY 2016
REPRESENTATIVE GOOD ANSWER
MEE 3**

Liability of Physician.

The doctor is not likely liable. The issue is whether doctor breached his duty of care to the man.

Man can bring a claim in negligence against the doctor. A plaintiff in a negligence action must prove (1) defendant had a duty of care owed to the plaintiff, (2) the defendant breached his duty of care, (3) the breach was the actual and proximate cause of the harm, and (4) property or personal injury resulted.

Here, the doctor had a duty of care to the man. Generally, all people hold a duty to act with reasonable care so not to unreasonably elevate the risks to foreseeable plaintiffs. Professionals generally have a heightened standard--to use that reasonable care of an ordinary professional in his or her field. General professionals (not specialists) are generally held to a standard of like generalists in their community. As a physician, the doctor had a duty to act reasonably under the circumstances and as an ordinary general practitioner would act. This includes a duty to properly advise about what kind of medications to take and whether herbal tea was safe or appropriate for man's circumstances. It also would have required appropriate action in response to the doctor discovering the high white blood cell counts.

Doctor, however, likely did not breach his duty of care. Although doctor told man that drinking the tea was shown to help reduce cholesterol and the tea actually caused liver damage, the investigation that revealed the danger was a few months later and showed that liver specialists had discovered that the tea was linked to liver problems. The specialists were at a major medical center and they had all found that their patients were drinking the tea and had high white blood cell counts. They all reported this to the local health department. Doctor--as a generalist--likely acted reasonably under the circumstances in recommending the tea because it was based on a recent report before the investigation was revealed showing the harmful effects.

Furthermore, he did not likely breach his duty when he discovered the elevated white blood cell counts after three months because he referred man to a liver specialist immediately after testing. Man would likely argue that the difference in the blood result from the first test to three months later indicates that something went wrong quickly within those three months, that the doctor knew that man had started drinking the tea, and should have advised him to stop drinking the tea

during the two weeks that man underwent tests with doctor. However, given that he was a generalist, that he did take care to perform tests and referred man to a specialist, and doctor advised the man that herbal remedies were not as reliable as prescription, doctor did not likely breach his duty of care.

Even assuming a breach, man will not likely be able to prove actual and proximate cause of his damages. Actual cause is but for causation and proximate cause requires that the plaintiff's harm be within the reasonable foreseeable risk created by the defendant's conduct. Assuming that the doctor breached his duty by not advising the man to stop drinking the tea when the test result showed the high blood count level, it is unlikely the doctor can be held liable because he was not the but for cause--the man had already consumed the tea for three months and was already negatively affected by the tea by the time of the visit. Thus, it would be hard for man to prove any delay caused by doctor's breach was the cause of his damages.

Lastly, man did suffer damages--permanent liver damage that undisputedly was caused by the tea. However, for the reasons stated above, doctor will not likely be liable.

US Company Liability.

The companies will not likely be liable. The issue is whether any of the US companies will be held strictly liable for the tea containing toxins.

Under strict liability, a commercial seller of a product will be held liable regardless of fault if there is a defect in the product which actually and proximately causes the plaintiff damages. Here, the US companies distributing the tea are commercial sellers. The investigation has shown that they were not negligent, so the best way to possibly hold them liable would be under a theory of strict product liability. A product must either have a design defect or manufacturing defect. A defect exists if it makes the product unreasonably unsafe for users. A design defect is one that infects all products, and a manufacturing defect is one that make a certain product defective, apart and different from the other products. Here, it appears that there was a manufacturing defect because not all tea packages were contaminated. The toxins are a defect because they make the tea unreasonably safe for drinkers, as evidenced by the report.

Man will be unable to show that the manufacturers are the actual and proximate cause of the harm he suffered. Man is unsure which brands he purchased and the investigation shows that the amount of toxins in the tea of the different companies varied, and some packages did not contain any contamination. Thus, without being able to pinpoint exactly which brands he purchased, he

will be unable to show which company is the actual cause of his harm. Furthermore, man will not enjoy the inference of res ipsa loquitur (where a plaintiff cannot pinpoint exactly who caused the harm but he knows that the harm would not have occurred but for the negligence of the defendant) because that is only available in negligence suits, while the investigation shows that the companies were not negligent. Accordingly, it is unlikely that the companies will be held liable under a strict tort liability theory.

Health-Food Store Liability.

The store will likely be liable. The issue is whether it will be held strictly liable.

The same elements for strict products liability above apply here. The store is a commercial seller and it sold a defective product to man. We know that man purchased all of his tea from the health food store and that the tea is the actual cause of his harm. Lastly, selling the tea was the proximate cause of the harm because it was foreseeable that selling defective tea might cause harmful impact on a person's health, and man was a purchaser of the tea at the store and therefore was a foreseeable plaintiff. Furthermore, man used the tea in a reasonably foreseeable way--by drinking it. Accordingly, all of the elements for strict liability are met and store will be held liable. Note that store can go after the companies (if it can establish which company sold the defective product) in indemnification.

MEE Question 4

Two years ago, PT Treatment Inc. (PTT), incorporated in State A, decided to build a new \$90 million proton-therapy cancer treatment center in State A. The total cost to PTT for purchasing the land and constructing the building to house the treatment facility was \$30 million. PTT financed the purchase and construction with \$10 million of its own money and \$20 million that it borrowed from Bank. To secure its obligation to Bank, PTT granted Bank a mortgage on the land and all structures erected on the land. The mortgage was properly recorded in the county real estate records office, but it was not identified as a construction mortgage.

Two months after the mortgage was recorded, PTT finalized an agreement for the purchase of proton-therapy equipment from Ion Medical Systems (Ion) for \$60 million. PTT made a down payment of \$14 million and signed a purchase agreement promising to pay the remaining \$46 million in semi-annual payments over a 10-year period. The purchase agreement provided that Ion has a security interest in the proton-therapy equipment to secure PTT's obligation to pay the remaining purchase price. On the same day, Ion filed a properly completed financing statement with the office of the Secretary of State of State A (the central statewide filing office designated by statute), listing "PT Treatment Inc." as debtor and indicating the proton-therapy equipment as collateral.

Shortly thereafter, Ion delivered the equipment to PTT and PTT's employees installed it. The equipment was attached to the building in such a manner that, under State A law, it is considered a fixture and an interest in the equipment exists in favor of anyone with an interest in the building.

The new PTT Cancer Treatment Center opened for business last year. Unfortunately, it has not been an economic success. For a short period, PTT contracted with State A Oncology Associates (Oncology) for the latter's use of the proton-therapy equipment pursuant to a lease agreement, but Oncology failed to pay the agreed fee for the use of the equipment, so PTT terminated that arrangement. To date, PTT has been unsuccessful in its efforts to collect the amounts that Oncology still owes it. PTT's own doctors and technicians have not attracted enough business to fully utilize the cancer treatment center or generate sufficient billings to meet PTT's financial obligations. PTT currently owes Ion more than \$30 million and is in default under the security agreement. Ion is concerned that PTT will soon declare bankruptcy.

In a few days, Ion will be sending a technician to the PTT facility to perform regular maintenance on the equipment. Ion is considering instructing the technician to complete the maintenance and then disable the equipment so that it cannot be used by PTT until PTT pays what it owes.

1. In view of PTT's default, if Ion disables the proton-therapy equipment, will it incur any liability to PTT? Explain.
2. If PTT does not pay its debts to either Bank or Ion, which of them has a superior claim to the proton-therapy equipment? Explain.
3. Does Ion have an enforceable and perfected security interest in any of PTT's assets other than the proton-therapy equipment? Explain.

**MINNESOTA BAR EXAMINATION
JULY 2016
REPRESENTATIVE GOOD ANSWER
MEE 4**

1. Ion's Liability to PTT

Ion could incur liability to PTT if it disables the equipment. The issue is whether Ion taking actions to disable the equipment after PTT's default is a breach of the peace.

A security agreement exists to create a security interest in collateral. A security interest gives a creditor certain rights in collateral in exchange for loaning money. A security interest arises through a valid security agreement and attaches to collateral. A security agreement is a written document in which the parties agree to create a security interest, the creditor gives value, and the debtor has some rights in the collateral.

A party defaults on its security agreement when conditions included in the agreement occur or when it fails to make payments or perform under the agreement. On default, a secured party may take certain steps to reclaim the collateral. It may engage in self-help and repossess the collateral as long as it does not breach the peace. A secured party breaches the peace when it engages in any behavior that could lead to violence. This typically occurs with a debtor's presence and objection to the actions of the secured party. Besides self-help, a secured party may also seek judicial action and foreclosure to enforce its interest in collateral.

Here, Ion has a valid security interest in PTT's proton-therapy equipment. The two parties entered into a written agreement that granted Ion a security interest in the equipment, Ion sold PTT the equipment on credit, and PTT has the right to possess the equipment. PTT also has defaulted on its payment plan with Ion, which means that Ion can take steps to enforce its security interest. Ion wants to send a technician to maintain and then disable the equipment. The issue is whether these actions would result in a breach of the peace. PTT is running a business providing therapy to cancer patients and would object to the disabling of the equipment as it would interrupt therapy for these patients. If Ion disables the equipment without notice to PTT during routine maintenance, it is less likely to cause confrontation and Ion can do it if there is no breach of the peace. A breach of the peace subjects the secured party to liability, especially for tort claims.

2. Does Bank or Ion have a superior claim?

Bank likely has the superior claim. The issue is whether Bank's purchase money mortgage in the building and structure is superior to Ion's purchase money security interest in PTT's equipment. Additionally, at issue is the effect of the equipment's status as a fixture on the priority of the claims.

A security agreement exists to create a security interest in collateral. A security interest gives a creditor certain rights in collateral in exchange for loaning money. A security interest arises through a valid security agreement and attaches to collateral. A security agreement is a written document in which the parties agree to create a security interest, the creditor gives value, and the debtor has some rights in the collateral. A purchase money mortgage exists when a creditor loans money to a debtor which the debtor uses to purchase land, and the debtor gives the creditor a mortgage in the land as collateral. A purchase money security interest in equipment exists when the creditor gives value and takes a security interest in the collateral which is purchased with the value given by the creditor. Perfection of a security interest allows third parties notice of a security agreement between a creditor and a debtor.

A fixture is an object or equipment that becomes so attached to real property that it becomes part of that property and can only be removed with substantial damage to the property. In order for a valid security interest in a fixture to exist, a secured party must file a fixture filing in the same office in which the real estate records for the property are located and must include a description of the property and the name of the owner of the property. This filing must occur before the debtor takes possession of the collateral to become a fixture or within 20 days after the secured party has an interest in it. Usually, a secured party with a fixture filing has priority over a party with a prior real estate interest if that secured party has validly recorded its interest in the county recorder's office where real estate records are kept, unless the party with the prior real estate interest has a construction mortgage and the other secured party has no notice of that fact.

Here, the bank got a valid purchase money mortgage and recorded that mortgage. It did not, however, identify that mortgage as a construction mortgage. Even though Ion had a valid PMSI in the equipment, it did not make a fixture filing in the appropriate county recorder's office. State A law considers the equipment that Ion has a security interest in to be a fixture and that an interest in the equipment exists in favor of anyone with an interest in the building. Because Bank has an interest in the building and Ion did not file a valid fixture filing, Bank has the superior claim to the equipment.

3. Does Ion have an enforceable and perfected security interest in assets other than the equipment?

Ion may have an enforceable and perfected security interest in the amounts due to PTT from Oncology. The issue is whether Ion has a security interest in an account given to Oncology that was a lease of the collateral securing Ion's security agreement.

A security agreement exists to create a security interest in collateral. A security interest gives a creditor certain rights in collateral in exchange for loaning money. A security interest arises through a valid security agreement and attaches to collateral. A security agreement is a written document in which the parties agree to create a security interest, the creditor gives value, and the debtor has some rights in the collateral. A secured party has an interest in any accounts granted by the debtor to another party if those accounts are payment towards the use of collateral secured by the original security agreement and the original debtor has defaulted or become insolvent.

Here, Ion had a valid security agreement with PTT (see above). PTT then leased the equipment to Oncology for Oncology's use. Thus, the lease involves the collateral securing Ion's security agreement with PTT. Oncology has failed to pay PTT for its use of the equipment, and PTT has been unable to collect the amount it is owed. PTT owes Ion more than \$30 million and the amounts owed to PTT by Oncology are for Oncology's use of the equipment that is subject to a security agreement between Ion and PTT. Additionally, PTT perfected its security agreement in the equipment by filing a financing statement with the Secretary of State. This would give notice to third parties. Thus, because PTT has a perfected security interest in the equipment, and Oncology's due payments to PTT are for the use of the collateral in that agreement, Ion has an enforceable and perfected security interest in the accounts due to PTT from Oncology.

MEE Question 5

A homeowner and his neighbor live in houses that were built at the same time. The two houses have identical exteriors and are next to each other. The homeowner and his neighbor have not painted their houses in a long time, and the exterior paint on both houses is cracked and peeling. A retiree, who lives across the street from the homeowner and the neighbor, has complained to both of them that the peeling paint on their houses reduces property values in the neighborhood.

Last week, the homeowner contacted a professional housepainter. After some discussion, the painter and the homeowner entered into a written contract, signed by both of them, pursuant to which the painter agreed to paint the homeowner's house within 14 days and the homeowner agreed to pay the painter \$6,000 no later than three days after completion of painting. The price was advantageous for the homeowner because, to paint a house of that size, most professional housepainters would have charged at least \$8,000.

The day after the homeowner entered into the contract with the painter, he told his neighbor about the great deal he had made. The neighbor then stated that her parents wanted to come to town for a short visit the following month, but that she was reluctant to invite them. "This would be the first time my parents would see my house, but I can't invite them to my house with its peeling paint; I'd be too embarrassed. I'd paint the house now, but I can't afford the going rate for a good paint job."

The homeowner, who was facing cash-flow problems of his own, decided to offer the neighbor a deal that would help them both. The homeowner said that, for \$500, the homeowner would allow the neighbor to take over the homeowner's rights under the contract. The homeowner said, "You'll pay me \$500 and take the contract from me; the painter will paint your house instead of mine, and when he's done, you'll pay him the \$6,000." The neighbor happily agreed to this idea.

The following day, the neighbor paid the homeowner \$500 and the homeowner said to her, "The paint deal is now yours." The neighbor then invited her parents for the visit that had been discussed. The neighbor also remembered how annoyed the retiree had been about the condition of her house. Accordingly, she called the retiree and told him about the plans to have her house painted. The retiree responded that it was "about time."

Later that day, the homeowner and the neighbor told the painter about the deal pursuant to which the neighbor had taken over the contract from the homeowner. The painter was unhappy with the news and stated, "You can't change my deal without my consent. I will honor my commitment to paint the house I promised to paint, but I won't paint someone else's house."

There is no difference in magnitude or difficulty between the work required to paint the homeowner's house and the work required to paint the neighbor's house.

1. If the painter refuses to paint the neighbor's house, would the neighbor succeed in a breach of contract action against the painter? Explain.

2. Assuming that the neighbor would succeed in the breach of contract action against the painter, would the retiree succeed in a breach of contract action? Explain.
3. If the painter paints the neighbor's house and the neighbor does not pay the \$6,000 contract price, would the painter succeed in a contract claim against the neighbor? Against the homeowner? Explain.

**MINNESOTA BAR EXAMINATION
JULY 2016
REPRESENTATIVE GOOD ANSWER
MEE 5**

Because this contract is a contract for services (the painting of a house), common law principles apply.

1. If the painter refuses to paint the neighbor's house, would the neighbor succeed in a breach of contract action against the painter?

If the painter refuses to paint the neighbor's house, the neighbor would succeed in a breach of contract action against the painter. The issue here is whether the homeowner and the neighbor created a valid assignment, and whether the painter needed to agree to it to be bound. A party to a contract may validly assign his or her interest in the benefits of that contract as long as that assignment does not increase the other party to the contract's obligations excessively. To be a valid assignment, the assignment must state a present intent to assign ("I assign to you the right..."; not "I promise to assign..."). An assignment need not be in writing, unless there is a Statute of Frauds issue (e.g., the contract is for services that cannot be completed within one year). The consent of the other party to the contract is not necessary for a valid assignment.

Here, homeowner and painter entered into a valid assignment agreement. Homeowner allowed the neighbor to take over the homeowner's rights under the contract and used present terms of assignment, not "I promise to assign the rights to you." There was even consideration here: the homeowner promised to assign his interest to the neighbor in exchange for the neighbor paying him \$500. This assignment need not be in writing under the Statute of Frauds. The project here (painting a house) can be completed (easily) in less than one year. Further, this contract does not in any way increase the obligations to the painter (the other party to the contract). As the facts note, homeowner's and neighbor's house are identical, are right next to each other (the painter wouldn't have to travel farther), and the current paint on the houses is equally as old. For the painter, the job is exactly the same: just one house over. Therefore, he has no basis to complain that his obligations will increase under the assignment. Further, he has no basis in law to complain that he did not agree to the assignment: assignments do not require the agreement of both parties to the contract (unlike a novation), and any party can unilaterally assign their rights as long as they follow the rules stated above. Therefore, if painter refuses to paint the neighbor's house, the neighbor would succeed in a breach of contract action against the painter.

2. Assuming the neighbor would succeed, would the retiree succeed in a breach of contract action?

Even should the neighbor succeed in her breach of contract action against the painter, the retiree would not succeed in a breach of contract action. The issue here is whether the retiree is an intended beneficiary of the contract or whether he has some breach of contract claim.

First, the retiree is not an intended beneficiary of any of the contracts here, he is an incidental beneficiary. An intended beneficiary may sue for breach of contract on a contract to which they are a beneficiary under certain conditions (he knows about the contract and assets; he learns about the contract and sues; he learns about the contract and relies). An intended beneficiary is one who was an individual the parties to the contract wanted to provide with some sort of benefit, and is often written into the contract. An incidental beneficiary is one who just happens, through no purposeful intent of the parties, to benefit under a contract. An incidental beneficiary may not sue for breach of contract. The retiree is not an intended beneficiary here. He is not mentioned in any of the contracts and was not in any of the parties' minds when they entered into those contracts. They did not even think of him in creating their rights and obligations. Instead, the retiree is an incidental beneficiary: he just happens to benefit from the painting of the house because he has been annoyed about the condition of their houses and the paint. But no contracts were entered into for his benefit. Neighbor calling and telling the retiree about the contract does nothing to give him rights to enforce the contract. Therefore, the retiree would not have a breach of contract action based on his status as a beneficiary.

Second, there is no contract between retiree and any other party he could sue on. A contract requires offer, acceptance, and consideration. Neighbor did not promise him anything, she simply informed him of her plans and he said "about time." There was no statement of an offer, no acceptance, and certainly no consideration. The same is true of the painter, to whom he never even spoke. Furthermore, principles of promissory estoppel do not apply. Promissory estoppel requires a promise by a promisor and reasonable, detrimental reliance by the promisee. This does not apply here because, first, neither the painter nor neighbor made a promise to retiree and, second, there is no evidence retiree relied on any promises. Therefore, retiree cannot succeed in a breach of contract action.

3. If the painter paints the neighbor's house and the neighbor does not pay the \$6,000 contract price, would the painter succeed in a contract claim against the neighbor? Against the homeowner?

If the painter does paint the house, but the neighbor does not pay, he would succeed in a contract claim against both the neighbor and the homeowner. The issue here is who is liable for the breach of a contract by an assignee (the person to whom a contract was assigned). The common law rule is that an assignee who paid consideration for the assignment is liable to the

obligor (the original party to the contract whose performance was contracted for) for a breach of duty. Also, the assignor (the original party under the contract who assigned their duty) may be liable under these circumstances because he or she remains in privity of contract with the obligor: he or she was not completely discharged from the contract as he or she would be if a novation had occurred.

Here, if the painter paints the neighbor's house, the neighbor would be in breach of the contract if she does not pay the \$6,000 contract price as agreed upon (barring defenses like impossibility, impracticability, or frustration of purpose, which do not arise under these facts). Because the neighbor paid consideration for this assignment, having paid homeowner \$500 to take over his rights under the contract, she is liable to the painter under the contract. If homeowner, on the other hand, had given her the assignment gratuitously and as a gift, neighbor would not be liable under the contract and only homeowner would be liable. Under the law, the homeowner assignor for consideration is also still liable under the contract, so the painter can pursue a successful contract claim against the homeowner here.

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MEE Question 6

A woman and a man have both lived their entire lives in State A. The man once went to a gun show in State B where he bought a gun. Otherwise, neither the woman nor the man had ever left State A until the following events occurred.

The woman and the man went hunting for wild turkey at a State A game preserve. The man was carrying the gun he had purchased in State B. The man had permanently disabled the gun's safety features to be able to react more quickly to a turkey sighting. The man dropped the gun and it accidentally fired, inflicting a serious chest wound on the woman. The woman was immediately flown to a hospital in neighboring State C, where she underwent surgery.

One week after the shooting accident, the man traveled to State C for business and took the opportunity to visit the woman in the hospital. During the visit, the woman's attorney handed the man the summons and complaint in a suit the woman had initiated against the man in the United States District Court for the District of State C. Two days later, the woman was released from the hospital and returned home to State A where she spent weeks recovering.

The woman's complaint alleges separate claims against the man: 1) a state-law negligence claim and 2) a federal claim under the Federal Gun Safety Act (Safety Act). The Safety Act provides a cause of action for individuals harmed by gun owners who alter the safety features of a gun that has traveled in interstate commerce. The Safety Act caps damages at \$100,000 per incident, but does not preempt state causes of action. The woman's complaint seeks damages of \$100,000 on the Safety Act claim and \$120,000 on the state-law negligence claim. Both sets of damages are sought as compensation for the physical suffering the woman experienced and the medical costs the woman incurred as a result of the shooting.

The man has moved to dismiss the complaint, asserting (a) lack of personal jurisdiction, (b) lack of subject-matter jurisdiction, and (c) improper venue. State C's jurisdictional statutes provide that state courts may exercise personal jurisdiction "to the limits allowed by the United States Constitution."

With respect to each asserted basis for dismissal, should the man's motion to dismiss be granted? Explain.

**MINNESOTA BAR EXAMINATION
JULY 2016
REPRESENTATIVE GOOD ANSWER
MEE 6**

Personal Jurisdiction.

The man is subject to the court's personal jurisdiction. The issue is whether a person who has minimal contacts with a state may be subject to the court's jurisdiction if they are handed the summons and complaint while in the state (tag).

A court may only exercise jurisdiction over a defendant if it comports with the state statute and constitutional limitations. Here, the state statute is limited to what the constitution requires. Thus, the inquiry is based on the constitutional limitations, set by the court. A court always has personal jurisdiction over a defendant in the state in which he is "at home," that is, the place where he resides. A person resides at his principal residence. This is called general personal jurisdiction and if it exists, a person may be sued there for any claim arising from anywhere in the world. Here, there is no general personal jurisdiction because man resides in State A, not State C.

However, even minimal contacts with a state may be sufficient to establish constitutional personal jurisdiction so long as the cause of action arises out of the contacts. This is called specific personal jurisdiction. That does not exist here because the cause of action arose in State A--the firing of the gun--and the court is sitting in State C.

Nonetheless, the court has held that personal jurisdiction is constitutional if the person is personally served with the summons and complaint while inside the state (i.e., "tag"). The one exception is a person may not be tagged if in the state for judicial proceedings or making an appearance to contest personal jurisdiction. Here, though, man was in State C to do business and visited woman in the hospital. Since he was personally served with the complaint and summons while in State C, personal jurisdiction is proper.

Subject Matter Jurisdiction.

The court has subject matter jurisdiction over the claims. The issue is whether there is federal question jurisdiction and whether the state law claim can come in under supplemental jurisdiction.

Federal courts, unlike state courts, have limited subject matter jurisdiction. They may only

exercise subject matter jurisdiction over cases given to it by statute. Congress has provided two general categories--diversity and federal question jurisdiction. Diversity jurisdiction requires that there be complete diversity--all plaintiffs must be diverse from all defendants. Diversity is based on citizenship, which is based on domicile. A person is domiciled where she is physically present and intends to stay indefinitely. Diversity jurisdiction also requires that there be an amount in controversy more than \$75,000 (which is based on the good faith pleading of the plaintiff). Federal question jurisdiction arises whenever there is a claim for a right arising under federal laws or the Constitution, based on the plaintiff's well pleaded complaint. No amount in controversy is necessary for this type of jurisdiction.

Here, there is no diversity jurisdiction because both parties are residents of State A, where they have lived their entire lives. Although woman was temporarily in hospital at State C, she never intended to relinquish her State A citizenship, as she returned home after filing suit and leaving the hospital.

However, there is federal question jurisdiction. Woman brings a claim under the Federal Safety Act, which gives cause of action for people harmed by a gun whose owner fails to take precautions for the gun's safety, which is at issue here. Furthermore, the gun traveled in interstate commerce, as required by the Act, because man bought the gun in State B and brought it back to State A. Thus, there is a valid federal right being claimed in woman's well pleaded complaint. Thus, the claim under the Act is properly within the court's jurisdiction.

However, the state claim does not have an independent basis for subject matter jurisdiction because there is no diversity jurisdiction (even though the amount in controversy is more than \$75,000) and the negligence claim is a state law claim, not a federal claim. Congress has granted the federal courts subject matter jurisdiction over state claims that do not have an independent subject matter jurisdiction ground under the supplemental jurisdiction statute. This statute allows a claim to come in under subject matter jurisdiction if it arises under the same transaction or occurrence as the claim with original subject matter jurisdiction and so long as it does not destroy diversity (if the original subject matter jurisdiction was diversity jurisdiction).

Here, the claim arises from the same transaction (the gun firing) and the federal claim does not preempt the state law claim. Furthermore, it does not ruin diversity because the Act claim comes in under federal question jurisdiction. Accordingly, there is subject matter jurisdiction over both claims and the motion should be denied on that ground.

Venue.

Venue is improper and the motion to dismiss should be granted on this basis. The issue is whether venue may be proper in a district in which the plaintiff recovers from her injuries but which no party has any other connection with.

Under federal statute, venue is proper in any district in which any defendant resides so long as all defendants reside in the same state, or in the state where a substantial amount of the events giving rise to the cause of action occurred. If neither of those two bases exist, then any district with personal jurisdiction over the defendant will suffice. For purposes of venue, a person resides in his principal place of residence and an entity resides anywhere it is subject to personal jurisdiction.

Here, man resides in State A--where he lives. His business and brief visit in State C do not establish his residence there. The fact that he is subject to personal jurisdiction in State C because he was tagged there is insufficient because the venue statute states that a person resides in his principal residence--here, State A. Furthermore, the substantial portion of the events giving rise to the lawsuit took place in State A--where the woman was shot and where they were hunting. Arguably, some of the events arose in State B (where the gun was purchased), but State C is too attenuated to the events giving rise to the claim, even though woman was treated for her injuries there (her injuries were incurred in State A). Thus, because State C fails both prongs of the federal venue statute, venue is improper in State C.

A better venue would be State A--where both parties reside (convenience) and where the events took place. A court with improper venue need not dismiss a case--it can transfer to a proper venue that has personal jurisdiction and subject matter jurisdiction over the case. A transfer to State A would be proper and the interests of justice suggest that transfer may be a good option for the court.