MPT 1
July 2018

State of Franklin v. Hale **(July 2018, MPT-1)** In this performance test, the examinee is an assistant district attorney in the office that prosecuted defendant Henry Hale for the attempted murder of Bobby Trumbull. Hale was convicted following a jury trial. He has now filed a motion for a new trial claiming that the prosecution failed to disclose exculpatory statements by a witness and the victim in violation of *Brady v. Maryland,* 373 U.S. 83 (1963), and that the trial court erred in allowing the prosecution to introduce the witness's out-of-court statements, which were made to a detective shortly after the shooting and placed Hale at the scene. The trial court allowed the introduction of this hearsay evidence on the theory that Hale had wrongfully caused the witness, who was his girlfriend at the time of the shooting, to be unavailable by marrying her before trial. The court found that Hale had married the witness, at least in part, to prevent her testimony at his trial by asserting Franklin's spousal privilege. Examinees' task is to draft the argument section of the brief opposing Hale's motion for a new trial and persuading the court that no *Brady* violation occurred with respect to either the witness's purported recantation or the victim's statement to the medic in the ambulance, and that the trial court properly admitted the witness's hearsay statements. The File contains the instructional memorandum, the office's guidelines for writing persuasive briefs, the defendant's brief in support of motion for a new trial, excerpts from the trial testimony, and excerpts from the hearing testimony on Hale's motion for a new trial. The Library contains excerpts from Franklin rules of evidence, criminal statutes, and rules of criminal procedure; and three Franklin cases.

ARGUMENT

I. The nondisclosure of Reed's statement on August 26, 2017 to Detective Jones did not violate Brady v. Maryland because the statement was not believable.

Reed's second statement to Detective Reed fails the material prong of Brady, and therefore the state's nondisclosure of this evidence was not did not contravene its duties under Brady. As set forth by the United States Supreme Court in Brady v. Maryland, a criminal defendant is deprived of due process under the Fifth and Fourteenth Amendments when the prosecution suppresses exculpatory evidence. Brady. Subsequently case law established that the burden to disclose exculpatory evidence lies on the prosecution. Haddon. Generally, a violation occurs where three elements are met: (1) the evidence is favorable to the defendant; (2) the government suppressed the evidence either willfully or unintentionally; and (3) the evidence is material. Strickler v. Green.

Evidence is favorable where, if divulged, the evidence would make a neutral fact-finder less likely to believe the defendant committed the crime. Haddon. Favorable evidence comes in a variety of forms, including both that which is useful for impeachment as well as forensic evidence. Id. Reed's second statement to Detective Jones likely satisfies the relatively low bar of being favorable evidence. Had the jury heard been privy to this statement, there is a reasonable chance it would have taken it into consideration as a statement favorable to Hale because the substance of the statement itself purports to exonerate Hale.

Likewise, the non-disclosure of Reed's second statement likely satisfies the suppression prong of Brady because the existence of the statement was not divulged to Hale until after his trial was finished. Whether information held by the prosecution was not given to a defendant intentionally or unintentionally does not factor into the suppression prong. Haddon. The suppression prong is satisfied whether the evidence was held by the prosecutor's office or any other state agency involved in the investigation of the Defendant. Kyles. Additionally, a prosecutor's "open-door policy" can further factor for the defendant in the suppression prong because a defendant can reasonably believe, because of such a policy, that the prosecutor has no more evidence than has been given voluntarily. Haddon. Because Detective Jones' office, involved with the investigation of Mr. Trumbull's shooting, held evidence of Reed's second statement and the information was not disclosed to Hale, the suppression prong is likely satisfied.

However, even where the first two elements of Brady are met, only when the evidence suppressed was material can a court find that the state violated Brady by failing to disclose

evidence. While the material prong favors the defendant substantially by allowing a court to take the effect of the evidence in a cumulative manner with the rest of the available evidence, important limits exist on what evidence constitutes material versus immaterial. See Haddon. For instance, an implicit requirement for evidence to be material is that it must be believable. Id. (admitting a victim's inconsistent statement because the prior "statements to police were believable").

Here, the nondisclosure of Reed's second statement did not violate Brady because nothing about the second statement was believable and therefore the evidence was immaterial. For instance, immediately after the incident--and prior to any contact with Hale--Reed immediately and with certainty identified Hale as being in an argument with Trumbull, hearing a gun shot, and thereafter seeing Hale flee the scene. In this narrative Reed did not mention seeing anyone else. Conversely, in the later statement--the day after marrying Hale--Reed showed signs of being untruthful in that she was not confident nor could offer any sort of narrative of the "correct" version of the events, contradicting what she previously offered to the state. While this circumstantial evidence alone is enough to doubt the veracity of Reed's second statement, Reed went beyond this and offered direct evidence that Hale himself told her to recant her previous statement. While a reasonable fact-finder should treat every late recantation with skepticism owing to the likelihood that the Defendant coerced the witness to recant an inculpatory statement, Reed's statement regarding Hale's pressure takes this a step further and totally shatters any materiality that the statement could arguably have had. Therefore, because the evidence is totally unbelievable, both circumstantially and directly, the evidence is not material and therefore the state was not required by Brady to divulge it.

II. Hale's non-receipt of Mr. Trumbell's statement to Mr. Womack did not constitute suppression by the prosecutor and thus no Brady violation occurred.

To meet the suppression prong of Brady, the allegedly suppressed evidence must first be determined to be in the possession of the government. Capp. The "government" in this sense is wide-ranging and essentially includes every state agency involved in the investigation or prosecution of the alleged crime. Kyles. However, where a government agency holds evidence pertinent to a crime but is not involved with the investigation or prosecution of the crime, the evidence is not subject to Brady. Capp. This owes to the fact that it cannot be said that either the investigatory or prosecutory agencies "possess" this evidence in the manner envisioned by Brady. Id. This information is fully available to a defendant through reasonable due diligence just as easily as it is available to the prosecution. Capp.

Even though, as Defendant rightfully contends, the ambulance service is an arm of the Franklin City government, the service was in no way involved with the investigation or prosecution of Mr. Trumbull's shooting. The ambulance service, by and through Mr. Womack, was simply responding to an emergency in the same manner it would to any other emergency, whether it relates to a crime or not. The prosecution's "open-door" policy does not even factor into a Brady consideration of Mr. Trumbull's statement because the prosecution did not have possession of the statement. Therefore, because the prosecution was is not required to offer Hale information it did not possess, the prosecution did not violate its duties under Brady.

III. The Court did not err in admitting Reed's first statement because her unavailability to testify at Hale's trial was the result of Hale's intentional and wrongful conduct.

Reed's initial statement to the police was properly admitted at trial because her unavailability was intentionally and wrongfully caused by Hale. In general, hearsay testimony is not admissible at trial. However, certain hearsay evidence is admissible where the declarant of the out-of-court statement is unavailable to testify and the statement is "offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result." Franklin Rule of Evidence 804(b)(6). The existence of a privilege--including the "Spousal Testimony Privilege"--constitutes unavailability for the purposes of this rule. This privilege requires that a spouse cannot be compelled to give testimony against his or her spouse who is a defendant in a criminal trial. Franklin Criminal Statute 9-707. The accused holds this privilege, and the privilege itself only extends until the spouses divorce. Id.

Conduct under Rule 804(b)(6) must be wrongful, but it need not be criminal. Preston. Franklin courts have implied that a marriage entered into between the time of a statement of a witness to the police and a subsequent marriage between that witness and the defendant who later asserts the privilege can constitute wrongful conduct for the purpose of this rule. Id. The test for whether the marriage constituted wrongful conduct is whether the marriage occurred in the normal course of events. Id. This test hinges upon the intent of the parties in entering into the marriage, taking into consideration whether the purpose of the marriage was to prevent the witness spouse from testifying or whether the couple planned on marrying before the statement occurred. Id.

Here, the circumstances indicate that Hale's purpose in marrying Reed was to prevent her from testifying at his upcoming trial. First, the wedding was a shotgun wedding--with Reed

and Hale previously having an on-again off-again relationship that suddenly flourished into a marriage within two months after Mr. Trumbull's shooting. Second, while Reed is certainly sincere in her love for Hale, Hale's intent is much more suspect. Reed admits that prior to their nuptials Reed told her it would be "hard for [them] to stay together if [Reed] testified against [Hale]," and insisted on being married quickly before the trial began. This indicates that Hale had an improper purpose in the marriage, and thus his quick marriage to Reed constitutes wrongful and intentional conduct to prevent Reed from testifying against Hale.

IV. Even if the court erred in admitting Reed's initial statement to police, the admittance did not prejudice Hale and thus a new trial cannot be granted.

Even where evidence is admitted in violation of a Franklin rule of evidence, the defendant is only entitled to a new trial where he or she can show the admittance prejudiced him or her. Franklin Rule of Crim. P. 33. However, here the admittance of Reed's statement to police did not prejudice Hale because Hale could have been convicted on the testimony of Mr. Trumbull alone. Mr. Trumbull's testimony conclusively stated that Hale was the one who shot Mr. Trumbull, and his testimony is likely to have the most weight given that it was only he and Hale who actually were present for the shooting. Therefore, because Mr. Trumbull's evidence was sufficient alone for Hale's conviction, Hale was not prejudiced by the admittance of Reed's statement and therefore Hale is not entitled to a new trial.

MPT 2
July 2018

Rugby Owners & Players Association **(July 2018, MPT-2)** The examinee's law firm has been retainedby two entities, the Rugby League of America (the League, made up of the owners of each of the eight teams) and the Professional Rugby Players Association (the union representing the players). The parties want the law firm's assistance in the creation of an unincorporated membership association, the Rugby Owners & Players Association (ROPA). ROPA will be a joint venture of the League and the Players to exploit various commercial opportunities, such as broadcast rights and merchandising, presented by professional rugby. Although the League and the Players each have their own counsel, they need a neutral counsel to assist them in the creation of ROPA, as neither side entirely trusts the other. The examinee is asked to draft only those provisions of ROPA's Articles of Association that deal with the association's governance (e.g., quorum requirements, voting rules, filling vacancies on the board, naming a chair, apportioning revenue, and amending the articles). In doing so, the examinee is instructed to provide a brief explanation of each of his or her recommendations and describe how the recommended language comports with both Franklin law and the clients' wishes for how the association should operate. The File contains the instructional memorandum, an interview with the representatives of the League and the Players, and an initial draft of selected provisions of the ROPA Articles of Association, with blanks to be filled in for both substantive language and explanation for those provisions the examinee is to draft. The Library contains excerpts from a treatise on Franklin corporate law, which is also applicable to unincorporated membership associations, and a case from the Franklin Court of Appeal addressing quorum and voting requirements.

ARTICLE IV - BOARD OF DIRECTORS SECTION 1. GOVERNMENT

Language: The government of the Association shall be vested in, and its affairs shall be managed by, a Board of Directors, consisting of two directors for every team in the league, who shall represent each class of members as follows:

A. Teams in the League - There shall be one director for each team in the league selected by the team's owner.

B. Players - There shall be one director for each team's players, who shall be selected by the players themselves and shall be the same as the Union representative.

Explanation: The Board of Directors governs the association and it is important to both the league and the players that they each have equal representation on the Board. Because there are currently 8 teams, the league wants 8 positions on the board, one to represent each team respectively. Each team would name its own representative. To create equality, the players will also need 8 seats on the board. The representative will be the same person that already serves as liaison with the union. However, because the league may expand, the Articles should make room for this contingency, since this is the desire of both Peters and Fischer. Thus, there are two representatives from each team that will sit on the board--one selected by and to represent the team itself and one selected by and to represent the team's players. The number will always be an even number since there are two interested classes of members. This may lead to deadlock in voting, but it may also encourage cooperation, which is the association’s ultimate goal. See Walker's Treatise, Sec 10.4.

SECTION 5. VACANCY IN BOARD OF DIRECTORS

Language: Vacancies in the Board of Directors may be filled only by the respective class of members represented by the director's seat that has become vacant. The team's owner will fill the vacancy of the director that represents their team. The players will fill the vacancy of the director that represents their team's players.

Explanation: It is important to the league and the players to maintain proportional representation on the board. Thus, any vacancies should be filled only by the class of members specifically represented by that seat on the board. No one else should have a say in how a vacancy is filled. Both Peters and Fischer concur that the most important aspect of the board is that each member has equal representation. Per Walker's Treatise, Sec. 10.5, such a method is allowable as long as specified in the Articles of Association.

Any attempt to "stack" the board or have more than one representative for a team or a team's players would be thwarted under this method. Thus, everyone remains equally protected and represented.

SECTION 6. MEETINGS OF THE BOARD

Language:

a. Frequency of meetings: The Board shall meet at least twice each calendar year.

b. Quorum: A quorum of 51% of the total number of directors must be present to conduct business and there must be at least two directors of each class of members.

c. Voting: A majority of directors for each class present and entitled to vote must vote in favor of any proposed resolution in order for it to be adopted.

Explanation: A board of directors must have a quorum before conducting any business at a meeting. Under Franklin law, a quorum must be at least a majority. See Schraeder v. Recording Arts Guild. In Schraeder, the court described an unincorporated membership association similar to the one our clients seek to form, in that there were two classes of members to be represented--musical artists and record companies. That association adopted provisions identical to the quorum and voting provisions provided above in order to protect the interests of each class of members. Peters and Fischer had similar objectives as the parties in Schraeder—to join two entities together for mutual benefit with each wanting to maintain equal authority in the newly joint-membership.

With the current 8 teams, there would be 16 directors. Thus, 9 would constitute a quorum under traditional rules. However, requiring 2 directors from each class of membership provides further protection for each class and ensures their participation in board matters. Peters and Fischer expressed their joint desire to avoid the requirement of "unanimity" because it would be unworkable. The voting provision above works as a "class vote" would for a corporation that has different classes of shares. Rather than pooling all directors together for purposes of deciding if there is a majority, this voting structure requires a simple majority of each class separately in order for a resolution to pass. In Schraeder, this structure worked well to protect the interests of a class that disagreed with a proposed resolution. There is precedent to show that courts will give effect to such provisions and members' attempts to protect conflicting interests through such voting structure. Thus, each class is protected and represented in every vote.

ARTICLE V - OFFICERS

Language: The Board of Directors shall appoint the following officers: A Chair, a Secretary, and a Treasurer. The Chair shall be one of the directors on the Board, and the position of Chair shall alternate every six months between the league and the players member classes.

Explanation: The players wanted a neutral, nonvoting chair such as the CEO while the teams wanted the structure listed above. The structure listed above is best because it provides an incentive for the various sides to work together. The only way the association with work and make a profit is if the teams and the players work together. Appointing a nonvoting chair would create a mediator, but it would not create the same incentive to work together. The neutral nonvoting mediator would not have the same incentive to promote cooperation. Alternating the chair does create such an incentive because each director holding the position of chair will not want to abuse the position. In six months or less time, a director from the opposite class will hold the same position and have the opportunity to act in their self-interest in retaliation. The association created in Schraeder had the above structure because though the artists and record companies had joined together for a common purpose, they didn't always trust each other. The same can be gleaned from the statements made by Peters and Fischer. This governance structure allows for both to have an equal say and promotes fairness.

ARTICLE VII - APPORTIONMENT & DISTRIBUTION OF REVENUES

Language: After expenses are paid, all remaining revenue shall be apportioned evenly (50-50) between the two classes of members--the league and the players association. Each class of members will then decide on its own and outside of this Association how to apportion the revenue allocated among its constituents. Any alterations to this provision requires the approval of a two-thirds majority of directors present and entitled to vote for each class.

Explanation: Fischer and Peters both agreed that all revenue was to be split equally between the league and the players. However, should any change need to be made in the future to this arrangement, they expressed the desire that it should not be able to be changed by only a simple majority. Thus, a two-thirds majority requirement will provide better protection such that altering the arrangement will require more agreement among directors, while still avoiding unanimity, which both Fischer and Peters believe is unworkable. It also requires a 2/3 vote of each class of directors--again mirroring the

general voting provisions provided for in Article IV, Section 6. This offers the best protection for each class.

ARTICLE VIII - AMENDMENT OF ARTICLES

Language: The Articles may be amended only by an absolute majority of directors for each class.

Explanation: The Articles are the governing document of the association. Agreement between the two groups was difficult to attain and needs to be protected moving forward in order for the association to succeed. Thus, amending the Articles that generally provide for equality between the two classes should require more than a simple majority vote according to the typical voting procedures. A simply majority is a majority of those present and entitled to vote. Contrastingly, an absolute majority is a majority of all directors. Thus, this voting requirement requires more than a simple majority based on the number of directors who are present constituting a quorum. It requires all directors seated on the board to cast a vote in favor or against the resolution to amend the Articles. Such an amendment may only pass if it is voted in favor of by an absolute majority of the directors representing the teams and an absolute majority of the directors representing the players. This additional safeguard protects the founding document of this association.

MEE Question 1

In *Gonzales v. Raich,* 545 U.S. 1 (2005), the Supreme Court held that Congress has the power under the Commerce Clause of Article I, section 8, of the Constitution "to prohibit the local cultivation and use of marijuana," even when applicable state law permits such cultivation and even when the cultivation and use are entirely within state borders. At the time of that decision, at least nine states authorized the use of marijuana for medicinal reasons. Since the decision, medicinal use of marijuana has been approved in numerous other states, and some states have also begun to allow the recreational use of marijuana.

Concerned with the widespread disregard of federal law in states that have "legalized" marijuana use, Congress recently passed the Federal Drug Abuse Prevention Act. Sections 11 and 15 of that Act provide as follows:

> *Section 11.* Any state law enforcement officer or agency that takes any individual person into custody for violation of any state law must make a reasonable investigation within five business days to ascertain whether the individual in custody was under the influence of marijuana at the time of the alleged offense. Such officers or agencies must file monthly reports with the federal Drug Enforcement Agency on the outcome of these required investigations, including the name of any individual determined to have been under the influence of marijuana at the time of his or her alleged offense.
>
> *Section 15.* No state government, state agency, or unit of local government within a state shall be eligible to receive any funding through the federal Justice Assistance Grant program unless use of marijuana is a criminal act in that state.

The Justice Assistance Grant program has been in existence for many years. It is the primary program through which the federal government provides financial assistance for state law enforcement agencies. Last year, the federal government made approximately $300 million in grants to state and local law enforcement agencies through this program. Congress has appropriated another $300 million for such grants in the upcoming fiscal year.

State A has a population of about 4 million people. Its crime rate is below average. Last year, total spending by law enforcement agencies in State A was $600 million, of which $10 million came from federal grants under the Justice Assistance Grant program.

State A recently adopted legislation decriminalizing the use of marijuana for all purposes by persons over the age of 21.

As applied to State A,

1. Is Section 11 of the Federal Drug Abuse Prevention Act a constitutional exercise of federal power? Explain.

2. Is Section 15 of the Federal Drug Abuse Prevention Act a constitutional exercise of federal power? Explain.

(1)

The issue is whether Section 11 is an unconstitutional act of Congress, where it commands local law enforcement officers into investigating federal criminal law, and then filing administrative reports summarizing their findings.

The Constitution creates a government of limited powers. Specifically, unless Congress is given a power expressly or by necessary implication, it has no power to act--"the enumeration presupposes something not enumerated" in Justice Marshall's famous dictum. Even if Congress is given a power, e.g., the power to regulate commerce among the several states, another Amendment may serve to expressly restrict the exercise of the enumerated power.

The express restriction pertinent here is the 10th Amendment. It provides that the powers of the federal government not expressly herein granted are reserved to the states, and the people, respectively. The United States Supreme Court has interpreted this clause to prohibit "commandeering". See Printz. "Commandeering" state government means just that: commanding local action, usurping local control, by taking over the state legislative or executive functions. For example, in Printz, Congress required local sheriffs to participate in a gun registration program, forcing them to conduct background checks. The Court held this was sufficient "commandeering" to violate the 10th Amendment, rendering the act in question unconstitutional.

Here, similar if not more excessive demands are made on local executive officers. Section 11 provides that: (1) state law enforcement must investigate all offenses within 5 days to determine whether the offense occurred under the influence of marijuana and (2) file monthly reports summarizing their findings. Local police cannot be commandeered into performing their investigation for the federal government. Even if it is permissible to require some mandatory administrative reporting for local officers (e.g., sharing of fingerprints, violent criminals, etc.), the second section is also unconstitutional because it is premised entirely on the unconstitutionally required investigation.

Thus, Section 11 is unconstitutional.

(2)

The next issue is whether Section 15 is an unconstitutional, "coercive" string attached to government spending. Most likely, it is not.

Congress generally has the power to spend funds collected by the Internal Revenue Service in such a way as to promote the general welfare. This is true even if the spending places conditions on the receipt of funds that require local governments to perform or forgo certain acts, so long as such conditions are related to a valid purpose and do not require states to act unconstitutionally. Such federal expenditures will generally be upheld unless the conditions are "coercive."

The key precedents here are South Dakota v. Dole and the Obamacare case, National Federation v. Sibelius. In the former case, the Court upheld a federal act requiring the drinking age to be 21 if the state wished to receive federal highway funds. Even though South Dakota would have lost 10% of its total funds, the Court held this was not an impermissible "coercive" condition on funding. In contrast, in National Federation of Health, the Court struck down the provision of federal law which would require the states to accept a condition concerning participation in health insurance marketplaces or forgo Medicaid funding. The Medicaid funding, which goes to help the needy receive health care, was up to a quarter of poorer states' budgets. A condition of this magnitude prevented the states from having any real choice in declining to accept the condition. That is, a condition of that magnitude was coercive. Thus, the Court struck down the offending provision.

Here, Section 15 more closely resembles the act in Dole. The act generally promotes the general welfare, the program relates to reducing crime, and the states are not required to act unconstitutionally. It is not unconstitutional to criminalize marijuana use. The sole issue is coercion. $10 million out of a $600 million budget section is far less than what was upheld in Dole.

Therefore, this section is most likely constitutional.

MEE Question 2

A homeowner, who knew that his neighbor wanted to buy a lawn mower, called the neighbor and offered to sell his lawn mower to her for $350. The neighbor replied, "No way! That price is too high." The homeowner responded, "The price is a good one. See if you can find another lawn mower as good as mine for as little as $350. I'm confident that you'll come to your senses. In fact, I'm so confident that not only am I still willing to sell you the lawn mower for $350, but I promise to keep this offer open for a week so that you have time to do some comparison shopping. If you don't get back to me within a week, I'll sell the lawn mower to someone who knows what a good value it is."

Four days later, the neighbor concluded that $350 was, indeed, a very good price for the homeowner's lawn mower. Accordingly, she decided that she would go see the homeowner the next morning and accept the offer to buy the lawn mower from him for $350. That evening, the neighbor got a telephone call from an acquaintance who lived on the same block as the homeowner and the neighbor. The acquaintance said, "Congratulate me! I just got a great deal on a used lawn mower. [The homeowner] agreed to sell me his lawn mower for $375. At that price, it's a steal. I'm picking it up tomorrow afternoon." The neighbor replied, "This must be a mistake; he offered to sell that lawn mower to me." The acquaintance said, "There's no mistake; we wrote up the deal and everything. I'll come by your place right now and show you the signed contract." A few minutes later, the acquaintance went to the neighbor's house and showed her a signed document pursuant to which the homeowner had agreed to sell his used lawn mower to the acquaintance for $375.

The neighbor went to the homeowner's house the first thing the next morning, rang his doorbell, and as soon as the homeowner came to the door, said, "I accept your offer." The homeowner replied, "Too late. I've agreed to sell the mower to someone else for $375. Next time, act quickly when you are presented with such a great bargain."

The neighbor is furious about the homeowner's refusal to sell her the lawn mower for $350. In her view, the homeowner was bound to keep his offer open for a week and, in any event, her statement "I accept your offer" created a contract that bound the homeowner to the deal.

1. Was the homeowner bound by his promise to keep his offer open for a week? Explain.

2. Assuming that the homeowner was not bound by his promise to keep the offer open, did the neighbor's statement "I accept your offer" create a contract with the homeowner for the sale of the lawn mower? Explain.

1. Was homeowner bound to keep promise open for a week

The homeowner was not bound to keep his promise open for a week. The main issue is whether his promise to keep the $350 price open was enforceable without consideration.

This is a contract for the sale of goods, a lawnmower, and therefore the UCC applies. The UCC applies when the contract is for the sale of goods. Goods are defined as all tangible movable things. A lawnmower would apply as a good and thus the UCC applies.

An option contract is a promise to keep an offer in a contract open for a specific period of time before offering it to another buyer. Generally, in order to be enforceable, an option contract must have consideration. The consideration can be any type of consideration, but there must be some type of consideration. Consideration is something that induces a party to uphold the agreement or the contract. It induces someone to take a legal detriment that they would not otherwise take or to have a legal duty they would not otherwise have. If someone merely promises to hold open an offer without any consideration, this is not an enforceable promise because there is no consideration.

If one of the parties in a sale of goods transaction under the UCC is a merchant, there is an exception to the consideration requirement. If a merchant promises to hold an offer open for a reasonable period of time in a memo and signs it, then that offer will be held open even when there is no consideration on the offer. This is known as the merchant's firm offer and is an exception under the UCC for option contracts. A merchant is defined as someone who normally deals in the type of goods being sold or holds himself out as a person that normally deals in those types of goods. Here, the homeowner is likely not a merchant. He is selling a lawnmower, which is something that he personally owns, to a neighbor. He does not appear to, and has not held himself out as, normally dealing in this type of good. Therefore, he is not a merchant and the merchant firm offer rule would not apply to his promise.

After making the initial offer to sell the lawn mower for $350 he then made another promise to keep the offer open for a week. He stated, "The price is a good one, see if you can find another lawn mower as good as mine for as little as $350. I'm confident that you'll come to your senses." He said if the neighbor didn't get back to him within a week, he'd sell the lawnmower to someone who knows what a good value is. Here, he made a promise, but there was no consideration for that promise. Therefore, the option contact is not enforceable and he is not bound to keep it open.

Further, this is likely not one of the situations where promissory estoppel would apply. The neighbor did not suffer any type of harm or detrimental reliance on that promise. The Homeowner is not bound by his promise to keep the offer open and when he agreed to sell the mower to someone else for $375, he was completely in his rights to do because there was no enforceable promise.

2. Was a contract created.

The homeowner's statement did likely not create a contract. The main issue is whether the homowner effectively revoked the offer to the homeowner.

A contract is enforceable when there is mutual assent between the parties based on an offer and an acceptance. The offeror makes an offer and the offeree must accept the offer as to the main terms. Under the UCC, the if there are different terms between non-merchants they will not become part of the contract, but an acceptance will not fail for lack of a mirror image in terms. Further, a contract must be supported by consideration.

An offer may be terminated by rejection of the offeree or by a counteroffer which would terminate the offer and be a new offer for a new contract. Mere inquiries into another price will not be characterized as a rejection. Additionally, an offeror may revoke his offer at any time as long as the offeree receives notice of the revocation. The offeree receives notice either when he receives a communication directly from the offeror that the offer is revoked, or he otherwise receives notice by the circumstances that should reasonably give him notice of the revocation. If the offeree receives notice of the revocation, the offer is revoked, and mutual assent cannot be formed by the offeree’s acceptance of the offer because there is no longer an offer.

Here, the homeowner made an initial offer when he offered to sell the lawnmower to his neighbor for $350. The neighbor’s response could be characterized as a rejection that terminated the offer or as an inquiry into another price. He stated, "No Way! That price is too high!" The homeowner repeated the offer, so either way, at this point the offer still stood.

Four days later, the neighbor found out that $350 was a good price. Had he gone to the homeowner at that point he would still have been able to accept the offer. However, he did not plan on going until the next morning. That evening he got a call from an acquaintance who told him that he received the lawnmower from the homeowner for $375. The neighbor said this was a mistake, the acquaintance said it was no mistake, and showed him the

contract.

It is likely that the oral statement alone, that the homeowner sold the lawnmower to him for $375m was enough to give the neighbor notice of the revocation. However, there was even more, he actually showed him the contract. This was clearly enough to give the neighbor reasonable notice that the offer was revoked. When he went to the homeowner's house and said I accept your offer, there was no longer any offer to accept as it had been revoked by the sale to the acquaintance and the neighbor’s notice of that sale. The statement I accept did not create a contract because there was no offer to accept.

MEE Question 3

In 2015, a man purchased a convenience store that sells gasoline and snack-type grocery items. The man's store is located within two miles of three other convenience stores that are larger and contain small dining areas. When he bought the store, the man planned to expand it as soon as he could in order to offer the same services and products as the other three stores in the area.

In 2017, the local zoning board passed an ordinance that rezoned the district in which all four stores are located from "light commercial" to "residential." Convenience stores are not "residential" uses. The zoning ordinance contained typical language protecting existing nonconforming uses.

In early 2018, the man decided to expand his store by 1,100 square feet to add a small dining area. To finance this expansion, he obtained a $200,000 loan commitment from a local bank, with the funds to be disbursed at such times and in such amounts as the bank determined to be appropriate if, in the bank's good-faith judgment, there was "satisfactory progress" being made on the project. Documents reflecting this commitment were signed by the man and the bank, and a mortgage to secure the repayment of the loan was promptly and properly filed in the local land records office.

Two weeks after obtaining the loan commitment, the man signed a contract with a general contractor for construction of the store expansion. In compliance with its loan commitment, the bank disbursed $50,000 to the man, who, in turn, paid that sum to the general contractor. Construction began immediately thereafter.

Four weeks into the project, a plumbing subcontractor installed all the plumbing fixtures. After the general contractor failed to pay the $20,000 agreed price to the subcontractor, the subcontractor immediately filed a mechanic's lien against the man's property in the local land records office to secure its claim for $20,000.

Eight weeks into the project, the bank disbursed an additional $40,000 to the man, who, in turn, paid $40,000 to the general contractor. The general contractor used these funds to pay various creditors, but not the plumbing subcontractor.

Two weeks ago, a bank loan officer learned for the first time about the mechanic's lien. The next day, when the man approached the bank about making another disbursement, the loan officer refused. The man asserts that, under the loan agreement, the bank is obligated to disburse further funds.

1. Is the expansion project a nonconforming use? Explain.

2. Assuming that the expansion project does not violate the zoning classification, is the bank obligated to disburse further funds? Explain.

3. Does the mechanic's lien have priority, in whole or in part, over the bank's mortgage? Explain.

1. The issue is whether the expansion project was a reasonable expansion of the nonconforming use permitted under the zoning ordinance.

Nonconforming uses in existence prior to the enactment of a zoning ordinance may remain within the zoning district when the zoning board permits such nonconforming uses to remain. Here, the 2017 zoning ordinance protected the man's nonconforming convenience store, so he was permitted to continue his nonconforming use and remain in the zoning district. When an owner is permitted to continue a nonconforming use, he may not unreasonably expand or make substantial changes to the nonconforming use. Here, the man did expand his nonconforming use, but he can argue that he did so reasonably. His expansion will expand the square footage of his store and add a small dining area--such changes do not dramatically change the nature of the nonconforming use that was protected under the zoning ordinance. Additionally, the owner could argue that his expansion will result in a convenience store that looks and operates much like the other three convenience stores that have also been deemed protected nonconforming uses under the zoning ordinance. While the municipality could argue that his expansion of the existing nonconforming use would be unreasonable, particularly if it greatly increases traffic or the impact on the surrounding area, the owner has an argument that his expansion is reasonable and in conformity with the other convenience stores protected under the existing nonconforming use provision in the zoning ordinance.

2. The issue is whether the bank's future advances were obligatory.

Under a mortgage agreement, a mortgagee may agree to make future advance payments to a mortgagor. Such payments are outlined in the agreement and may be discretionary or obligatory. In this situation, the facts indicate that the agreement between the man and the bank allowed for future advances to be made from the bank to the man "at such times and in such amounts as the bank determine[s] to be appropriate." The agreement is based on the bank's good-faith judgment of the "satisfactory progress" of the man's expansion of his convenience store. Such language allows the bank to use discretion in both when and in what amount to disperse funds, so the bank was not obligated to disburse further funds to the man when the bank learned about the mechanic's lien. It does not appear the bank acted in bad faith in refusing to disburse the funds, because learning that a subcontractor has not been paid provides reasonable grounds to find that the project is not making satisfactory progress.

3. The issue is whether the bank was on notice of the mechanic's lien when it disbursed the $40,000 to the man four weeks after the plumber recorded his lien.

The priority that future advances take over a subsequent lien depend on whether the advance payments are made pursuant to a scheduled payment agreement or simply at the discretion of the lender. If the future advances are obligatory and scheduled, the lender who makes such advance payments will take priority over any other subsequent lien or mortgage, even if the advances are made after the junior lien or mortgage comes into existence. On the other hand, if the advance payments are subject to the discretion of the mortgagee, such payments will only take priority over a competing mortgage or lien if the payments were made pursuant to an agreement that was entered into without notice of the competing lien or mortgage and the payments themselves are made without notice. Notice can be classified as either actual, constructive, or inquiry notice. Constructive notice occurs when there has been a proper recording of a lien in the land records office.

In this situation, and as discussed above, the future advances from the bank were made pursuant to an agreement that gave discretion to the bank in making such payments. Here, the plumber properly recorded his lien four weeks before the bank disbursed $40,000 to the man, so at the time the bank disbursed that $40,000, the bank was on constructive notice of the mechanic's lien. If the jurisdiction considers constructive notice to be sufficient for this purpose, the mechanic's lien would have priority with respect to the $40,000 disbursement and any future disbursements, but not over the previous disbursement. If the jurisdiction requires actual notice, the bank would have priority with respect to both disbursements that were prior to the bank officer learning of the lien, and the mechanic’s lien would have priority only as to any future disbursements.

MEE Question 4

By his will, a testator created a trust of a small house and an apartment building containing six three-bedroom apartments. The will directed the trustee to sell the house within six months of the testator's death. The will also provided, in relevant part, that "all trust income will be paid to my cousin, Albert, during his lifetime" and that "upon Albert's death, all trust principal will be distributed to my granddaughter, Betty." Neither the will nor the trust made any provision for the testator's son, who was living at the time the will was executed. Shortly after making this will in 2006, the testator died.

After the trust was created, the trustee sold the house for $100,000 and properly invested the sale proceeds. All six apartments in the apartment building were rented at market rates ranging from $1,200 to $1,400 per month.

In 2010, one apartment, which had been rented for $1,300 per month, was vacated. The trustee thereafter rented this apartment to himself for $1,300 per month. The other five apartments continued to be rented throughout the term of the trust at market rates of between $1,200 and $1,400 per month.

In 2012, a portion of the apartment building's roof was destroyed by fire. Because the trustee had not purchased a fire insurance policy, he spent $50,000 to repair the roof. The trustee charged this expense to trust income even though the trust had liquid assets of more than $120,000 that could have been used to pay for the repair. Because the roof repair was charged to trust income, Albert received $50,000 less income from the trust in 2012 than he had received in prior years.

In 2013, Betty died. Betty was survived by her husband and a daughter. Under Betty's duly probated will, she left her entire estate to her husband. If Betty had died intestate, her estate would have been distributed equally between her husband and her daughter.

There is no applicable statute relevant to the disposition of Betty's interest in the trust.

In 2018, Albert died. Albert was survived by Betty's husband and Betty's daughter. Albert was also survived by the testator's son.

1. What fiduciary duties, if any, did the trustee violate in administering the trust? Explain.

2. Upon Albert's death, how should the trust principal be distributed? Explain.

A trust that is created by a testator's will is known as a testamentary trust. Here, the testator created a testamentary will.

1. Fiduciary Duties Violated by Trustee in Administering the Trust

The issue is whether the trustee breached his fiduciaries duties of either loyalty or prudence by engaging in the following acts:

Trustee Renting Apartment to Himself

The duty of loyalty requires that the trustee act in the best interest of the beneficiaries and avoid creating conflicts of interest by self-dealing. A trustee breaches his duty of loyalty when he does business, in his personal capacity, with the trust. In this case, the trustee has rented an apartment to himself for $1,300 per month since 2010. It is irrelevant that this price is within the range of market rate for the apartment (1,200-1,400/month) because the fairness of the transaction is not evaluated. Rather, the trustee is strictly barred from engaging in self-dealing with the trust. For this reason, the trustee has breached his duty of loyalty by renting an apartment to himself on behalf of the trust.

Failure to Obtain Fire Insurance Policy

Trustees are under a duty of prudence to act with regard to the trust property as a reasonable investor under similar circumstances. Here, there is an argument that the trustee breached his duty of prudence by failing to maintain fire insurance policy on the apartment building. The cost of fire insurance would likely be slight in comparison to the $50,000 work of damages sustained to the roof. Moreover, the risk of fire in a rented apartment is reasonably foreseeable, and a prudent investor would likely obtain fire insurance to insulate the trust from the risk of fire. For this reason, the trustee has likely breached his duty of prudence by failing to obtain fire insurance on the apartment.

Charge of Repair Costs Against Income

Under the common law principal/income distinction, life beneficiaries are entitled to the income of the trust, while the remainder beneficiary is entitled to the principal. The testator, in drafting his will, has adhered to this distinction, providing that Albert is to receive all trust income during Albert's life, and Betty is to receive all trust principal upon Albert's death. Principal consists of the property held by the trust, as well as sums generated from the sale of the same property. Income is the revenue generated from the investment of trust property. Where the principal is damaged and repair is required, the funds for repair should come

from the trust principal rather than income. Trustee's failure to use the liquid assets of $120,000 caused Albert to receive $50,000 less in 2012 than he had in prior years. For this reason, the trustee has breached his fiduciary duty of prudence by not adhering to the principal/income distinction.

Note that even under the modern trend, which is more flexible and does not rigidly adhere to the principal/income distinction, trustee's actions still resulted in Albert receiving $50,000 less than he had in prior years and would likely be judged unreasonable.

2. Distribution of Trust Principal

The issue is how the trust principal should be distributed upon Albert's death as between Betty's heirs or descendants, and testator's son.

As a general rule, a testator who seeks to disinherit a child should do so by express language. Failure to expressly disinherit could result in the will being challenged by the disinherited child. However, most states require that a challenge under the will be brought within a specified period of time, and in this case there are no facts to indicate that son has challenged his father's failure to provide for him under the will in the 12 years since his death.

The trust expressly instructs the trustee to distribute the trust principal to his granddaughter Betty. There is no condition attached to the trust requiring that Betty survive Albert if she is to receive the principal. Furthermore, a principal beneficiary under a trust has a vested interest in the remainder in the principal that is freely transferable and devisable. For this reason, the trust principal will pass through Betty's estate according to her duly probated will, which left her entire estate to her husband.

MEE Question 5

A woman has sued a man for injuries she received in an automobile collision at a suburban traffic circle in State A on January 1. Both drivers were driving alone, there were no other witnesses, and a forensic accident investigation failed to determine which of the two drivers was at fault.

Among other things, the woman's complaint alleges the following:

1. The woman was driving her pickup truck in the traffic circle at or below the speed limit when the man suddenly pulled his car into the traffic circle immediately in front of her.

2. The man's action left the woman no opportunity to slow down, stop, or avoid colliding with his car.

3. The woman observed that the man was texting on his phone when he entered the traffic circle and did not see him look up to check for traffic before entering the circle.

4. The accident caused the onset of significant neck pain for the woman requiring extensive medical treatment and resulting in lost wages.

The man has denied that he was texting at the time of the accident and alleges that the accident was the woman's fault. According to the man, the woman was driving her truck substantially over the speed limit, her brakes were defective, and despite the fact that the man's car was far ahead of the woman's truck when he entered the traffic circle, the woman failed to slow down to avoid a collision.

A jury trial has been scheduled.

The man's attorney plans to offer the following evidence:

(a) Testimony by a mechanic to the effect that "I inspected [the woman's] truck a week before the accident. The brakes on the truck were worn and in need of repair. I ordered new parts."

(b) A written invoice signed by the mechanic stating: "New parts for [the woman's] truck brakes ordered on December 23 and received on January 2," found in the mechanic's file cabinet among similar invoices for other customers.

(c) Testimony by the woman's doctor, who treated the woman for neck pain after the accident, that the woman told the doctor, "I have suffered from painful arthritis in my neck for the past five years."

The woman's attorney plans to call the man's roommate to testify that "[the man] is addicted to texting and never puts his phone down. He even texts while driving."

State A has adopted evidence rules identical to the Federal Rules of Evidence.

1. Is the mechanic's testimony admissible? Explain.

2. Is the invoice for the new parts for the woman's truck brakes admissible? Explain.

3. Is the doctor's testimony admissible? Explain.

4. Is the roommate's testimony admissible? Explain.

1.

The mechanic's testimony is probably admissible. At issue is whether it is relevant, and proper lay person testimony. As a general rule, all relevant evidence is admissible unless otherwise excluded. Evidence is relevant where it has a tendency to prove that a fact in consequence is more probable than not. However, under 403, a judge may exclude even relevant evidence if its probative value is outweighed by its prejudicial effect such as if it misleads the jury, confuses the issues, or wastes time.

Here the mechanic's testimony is relevant and should not be excluded under 403. The mechanic is seeking to testify about the state of the woman's brakes only a week before the accident. The information that he observed them and they were worn and in need of repair indicates that her brakes may have been defective and therefore the cause of the accident--rather than the defendant being the cause of the accident. Therefore it is relevant to causation in this case. Moreover, the testimony's probative value is not outweighed by some prejudice--it does not confuse the issues, but rather is right on the issue as to what cause the accident, and for the same reason it does not waste time. It also is not overly inflammatory. Therefore, because the evidence is relevant and permissible under 403, there must be some other grounds to exclude it.

In order for lay person testimony to be proper, it must be from their own personal knowledge and be helpful to the jury. In regard to the former, lay person testimony must pertain to things the witness is capable of knowing, that is, it cannot address topics which require scientific or otherwise technical knowledge. Examples of proper lay person testimony are the speed of moving objects or whether someone appeared to be drunk.
Here, the mechanic's testimony was probably proper lay person testimony. He had personal knowledge of the car because he had recently seen it--only the week before the accident. Moreover, examining brakes probably is not the type of topic that requires specialized, scientific, or otherwise technical knowledge. However, if the plaintiff did show that this is outside the scope of lay person testimony because it is specialized or technical knowledge, then the defense would have to show that the mechanic is an expert under Daubert in order for the testimony to be admissible. But because looking to see whether brakes are worn probably does not rise to the level of specialized knowledge that requires an expert, this should be admissible. Moreover, the testimony will be helpful to the jury because knowing the condition of the brakes a week before the accident relates directly to the causation of the accident, as noted above.

In conclusion, the mechanic's testimony is probably admissible because it is relevant, not prejudicial, and proper lay person testimony.

2.

The invoice is probably admissible. As a general matter, when assessing the admissibility of documents, one should consider whether the document has been authenticated, the effect of the best evidence rule, and whether the document is excluded by hearsay. Again, all relevant evidence is admissible unless otherwise excluded. Here, the invoice is relevant for the same reasons that the mechanic's testimony above is relevant, and is probably not unduly prejudicial for that same reason.

The next question then is whether the document can be authenticated. To authenticate a document it must be shown that the document is what it purports to be which can be accomplished by a number of methods including personal knowledge testimony. Presumably, in this case, the mechanic could testify to authenticate the invoice because he made and signed it, and therefore that hurdle to admissibility should be overcome.

Next, the question is whether the best evidence rule poses a hurdle. Under the best evidence rule, an original copy of a document rather than testimony about the document must be offered into evidence in some situations. Here, there does not appear to be any better judgment rule hurdle, either, because the actual invoice itself--not testimony or a copy of it--is sought to be entered into evidence.

Thus, the main issue is whether the invoice constitutes impermissible hearsay. Hearsay is an out of court statement offered for the truth of the matter asserted. Where such an out of court statement is attempted to be admitted for the truth, it is barred unless there is an exception to the hearsay rule. The invoice is hearsay. It includes statements regarding the ordering of new brakes for the plaintiff's car, and those statements would be offered for the truth that those brakes were indeed ordered in order to show that the plaintiff's car required repair.

However, there is a strong argument that this invoice falls under the business records exception to the hearsay rule. Under that rule, where a document is a business record it may be admissible. A business record is one that is regularly kept and maintained in the ordinary course of business by one with a business duty to such routinely keep those records that can be authenticated as such. Here, this document appears to be a business record. The invoice was found in the mechanic's cabinet with similar invoices for other customers. This seems to

indicate that such invoices were regularly kept and maintained as part of the ordinary course of business. It is noted that the mechanic signed the invoice, indicating that he was the one who made it. Thus, he could testify to these facts and establish that he is one with personal knowledge and the business duty to keep and maintain the records.

In conclusion, the invoice is probably admissible. It can be authenticated, the best evidence rule does not apply, and though it is hearsay, it falls in the business records exception.

3.

The doctor's testimony is probably admissible. At issue is whether the report of past neck pain is relevant, and whether it is hearsay not within an exception. The rules for relevancy are stated above. As a general rule, statements about past occurrences, experiences, and accidents are not relevant. But there are exceptions. For example, where the past occurrence is used to demonstrate causation, that past condition is relevant. Here, though the discussion about her neck pain is about a past condition it is relevant to the present case of what damage was caused to the plaintiff. Indeed, the plaintiff alleges she has significant neck pain from the accident. But her statements to the doctor could show that her pain was preexisting from arthritis, not the accident. Their probative value is also not outweighed by any prejudice.

Second, there is a question of whether the statement to the doctor is hearsay. The rules for hearsay are noted above. Here, the statement is an out of court statement--made to the doctor--offered for the truth of the matter asserted--the cause of plaintiff’s neck pain. Thus, the question is whether the statements fall in an exception or exclusion under the hearsay rules.

First, and the strongest argument for admitting the statement, opposing party statements are excluded from the hearsay definition such that they are admissible. Specifically, when a statement is made by an opposing party and is offered against that party, the statement is considered non-hearsay and admissible. Here, the statements were made by the plaintiff to her doctor and are being offered against her by the defendant. Thus, they are non-hearsay and may be admissible.

But even if the statements were not excluded from the hearsay definition, they fall in a hearsay exception. Specifically, statements made for the purpose of medical diagnosis or treatment are excepted under the hearsay rules. The facts state that the plaintiff told the doctor about her neck pain from arthritis for treatment purposes, and thus they fall in this hearsay exception and would be admissible.

Finally, there may be an issue with doctor-patient confidentiality--or in other words, privilege. But the FRE have generally done away with the doctor-patient privilege outside the psychotherapy setting. And even if the privilege still exists in FRE jurisdictions, it would not apply in this case because the plaintiff waived the privilege when she put her medical condition at issue by alleging damage to her neck.

Thus, the doctor's testimony is admissible because it is relevant, non-hearsay (or falls in a hearsay exception), and is not privileged.

4.

The roommate's testimony probably is not admissible. The issue is whether the testimony pertains to a "habit" of the defendant. The relevancy rules are stated above. The evidence would be relevant in regard to the defendant's tendency to text and probably would not be overly prejudicial. However, this relevant evidence is otherwise excluded as improper character evidence. As a general rule, character evidence is not permissible in civil trials unless character is directly in issue. Here, there is an automobile accident and question of negligence, so character is not directly at issue.

But while character evidence is generally excluded, evidence of habit is not. In order for behavior to constitute a habit, it must be specific in nature and regularly occurring. Here, the behavior at issue is probably not specific enough as to fall within the habit definition. While the roommate will say that the man is "addicted" to texting and "never" puts his phone down even "while driving," these assertions may be too broad to constitute a habit. If the statements had more specificity in time and place and situation, that might rise to the level that constitutes habit. But merely regularly using one’s phone, without additional specificity, probably does not constitute a "habit" for these purposes.

Therefore, because the defendant's conduct is not regular or specific enough to constitute habit evidence, the roommate's testimony is inadmissible as improper character evidence.

MEE Question 6

A woman and a man decided to start a solar-panel installation business in State X. They agreed to incorporate the business and to be equal shareholders. They also agreed that the woman would be solely responsible for managing the business.

On November 10, the woman mailed to the Secretary of State of State X a document titled "Articles of Incorporation." The document included the name of the corporation (Solar Inc.), the name and address of the corporation's registered agent, and the woman's name and address (as incorporator). The woman, however, inadvertently failed to include in the document the number of authorized shares, as required by the business corporation act of State X, which in all respects comports with the Model Business Corporation Act (1984, as revised). The woman signed the document and included a check to cover the filing fee.

On November 20, the woman, assuming that the articles of incorporation had been filed and purporting to act on behalf of the corporation, entered into a one-year employment contract with a solar-panel installer. The woman signed the employment contract as "President, Solar Inc." and the installer signed immediately below.

On November 30, the woman received a letter from the Secretary of State's office returning the articles of incorporation and her check. The letter stated that the articles, although received on November 15, had not been filed because they failed to include the number of authorized shares, as required by state law.

On receiving this letter, the woman immediately revised the articles by adding the number of authorized shares. On December 5, the woman mailed back the revised articles to the Secretary of State's office, along with another check to cover the filing fee. The revised articles of incorporation were received and filed by the Secretary of State's office on December 10.

Six months later, Solar Inc. went out of business and the installer's employment was terminated.

1. When did Solar Inc. come into existence? Explain.

2. Is the woman personally liable to the installer on the employment contract that she signed? Explain.

3. Is the man personally liable to the installer on the employment contract? Explain.

1. Solar Inc. came into existence on December 10

At issue is when the corporation came into existence.

To be incorporated, there must be (1) an incorporator, who (2) files Articles of Incorporation with the Secretary of State, and (3) the articles must be accepted. Once accepted, a "de jure corporation" (i.e. legal corporation) is created. Until this point, including if articles are improperly filed and not accepted by the secretary of state, the corporation is not created.

Here, although the woman filed the articles initially on November 10, they were incorrectly done and failed to include all the requirements. As such, they were not accepted by the secretary of state and a corporation was not created. Only after the woman amended the articles and refiled, and the articles were then accepted on December 10, was the corporation created.

Thus, Solar Inc. came into existence on December 10.

2. The woman will probably not be personally liable to the installer on the employment contract that she signed.

At issue here whether the woman is liable for signing a contract before a de jure corporation is created.

Once a valid corporation has been created, the shareholders of such corporation are not personally liable for the corporation's debts. Only the corporation is liable for such debts. However, prior to the creation of a de jure corporation, anyone signing on behalf of the corporation can be held personally liable under partnership principles. When the woman entered into the contract, she was acting as a partner in a general partnership. Under a general partnership, partners may enter contracts on behalf of the partnership so long as they are acting with authority and the contracts are within the ordinary course. If contracts are entered into by the partnership, the partners are considered to be jointly and severally liable. This would make the woman personally responsible to the installer on the employment contract that she signed. However, there are two doctrines that can come to her rescue.

First, the doctrine of a De Facto Corporation. If the incorporator filed the articles of incorporation with the secretary in good faith that they had been fully completed and would be accepted, and then proceeded to act under the privileges of a corporation (for example,

by entering into a transaction as a corporation), then the corporation will be treated as having validly incorporated for the purpose of that transaction despite the fact that a proper legal corporation had not yet been created. In this case, the woman did file the articles in good faith believing them to be complete, and fully expecting them to be accepted by the secretary of state. Then, assuming that the articles of incorporation had been filed, she entered into the transaction with the solar panel installer. In doing so, she acted under the privilege of the corporation. This type of action falls under the ambit of the doctrine of de facto corporation, and the transaction will be considered validly entered into by the corporation and not the woman personally. Thus, she would not be liable.

Second, even if the de facto corporation defense was not available, the doctrine of Corporation by Estoppel would lead to the same conclusion. This doctrine stipulates that if one acts on behalf of a corporation, and a third party reasonably relies on such appearance and enters into a contract with such person (under the belief that they are contracting with the corporation), then both parties will be estopped from treating the contract otherwise (meaning both parties will be required to treat it as though the contract was entered into by the corporation). This doctrine only applies to contracts. Here, this contract would fall under this doctrine. The woman purported to act on behalf of the corporation and even signed the contract as "President, Solar Inc." The installer signed below this, reasonably believing he was contracting with Solar Inc. and not the woman personally. As such, this contract would fall under the Corporation by Estoppel doctrine and both parties (the woman and the installer) would be required to treat the contract as though entered into by Solar Inc. and not the woman personally. As such, she would not be personally liable.

3. The man is not personally liable to the installer on the employment contract.

The man is also not liable on the employment contract. As discussed above, the corporation was a *de facto* corporation and generally, shareholders are not liable for the debts of the corporation. This is one of the biggest benefits of incorporating, shareholders have very limited liability. They are only at risk of losing any money they contributed to receive their shares. Additionally, as above, if the installer is required to treat the contract as though entered into by Solar Inc., he cannot bring a personal claim against the man for the contract.