MPT 1
February 2019

State of Franklin Dep't of Children and Families v. Little Tots Child Care Center **(February 2019, MPT-1)** In this performance test, examinees' law firm represents Ashley Baker, the owner and operator of the Little Tots Child Care Center. Upon its initial inspection of Little Tots, the Franklin Department of Children and Families (FDCF), the administrative agency charged with monitoring child care centers, found several violations that it deemed critical. After other violations were found on successive inspections, FDCF issued a Notice of Revocation of the license to operate Little Tots, which will take effect in seven days. Baker, who expanded the center's enrollment and obtained a government grant which allows her to offer reduced fees, wants to challenge the revocation. The supervising attorney has filed the complaint for preliminary and permanent relief. The task for examinees is to draft the argument section of the brief in support of the motion for a preliminary injunction to prevent the license revocation until a trial can be had on the merits. The File contains the instructional memorandum, the office guidelines for drafting persuasive briefs, a statement from Baker, the Notice of Revocation, the FDCF inspection reports, and an email from a parent in support of the center. The Library contains excerpts from the Franklin Child Care Center Act and FDCF regulations implementing the act, and one Franklin case discussing the requirements for a preliminary injunction.

Memorandum
To: Gale Fisher
From. Examinee
Date: February 26, 2019

Re: Little Tots Child Care Center

You have asked me to prepare the argument section of our brief in support of the Motion for Preliminary Injunction to enjoin FDCF from revoking Ashley Baker's license to operate Little Tots. Below is a draft of that section.

Law Governing Preliminary Injunctive Relief

In Lang v. Lone Pine School District (2016), the Franklin Court of Appeal articulated a four-part test to determine the availability of preliminary injunctive relief. While the court noted that a preliminary injunction is an extraordinary remedy and generally disfavored, a plaintiff will nonetheless be granted relief upon meeting the following factors: 1) the moving party must show it is likely to succeed on the merits; 2) the party must show that it will suffer irreparable harm if an injunction is not granted; 3) that the benefits of granting the injunction outweigh the possible hardships; and 4) the issuance of a preliminary injunction serves the public interest.

1. Because Little Tots has shown improvement over the course of its operation, and because the violations are minimal and easily redressed, Ms. Baker has shown likelihood of success on the merits.

Citing Smith v. Pratt, the court in Lang provided that to demonstrate that a party is likely to succeed on the merits of its case, it need only show that the chances of succeeding on at least one claim is "better than negligible," or "better than a mere possibility." Little Tots has been in operation only eight months under the direction of Ms. Baker, who took it over when the previous owner found she could not meet expenses. Immediately upon taking control, Ms. Baker expanded the enrollment to meet demand and changed some of its operating procedures. The first inspection came only 30 days into her tenure in the midst of all these changes. As the three Notice of Deficiency reports indicate, Ms. Baker has made marked improvements in satisfying the concerns of the FDCF, and will soon be able to eliminate the remaining violations.

In the FDCF's first report from July 16, 2018, there were 37 children whose enrollment forms were incomplete; background checks were missing for four teachers; the number of children

in the two 2-year-old rooms exceeded the limit by one; and the number in the 3-year-old room exceeded the limit by three in those two rooms. The next Deficiency Notice, dated October 19, 2018, noted the following: enrollment forms were missing for only 16 students; background checks were missing for only 2 teachers; and only one classroom exceeded capacity -- a 2-year-old room that had one more student than allowable. The last Deficiency Notice, of January 23, 2019, noted that only 5 children had missing enrollment forms; only 2 teachers were missing background, and one of those teachers was new; and, again, only one 2-year-old room exceeded capacity by 1 student.

The deficiencies that remained were largely justifiable. As Ms. Baker explained, the additional child in the 2-year-old room was a condition that existed for only a week and was due to a parent in urgent need of day care. In terms of teacher background checks, one teacher was newly hired and the other was on the staff of prior management and therefore should have had a completed check on file.

One other area of deficiency noted in the last report was failure of supervision in the food area, an area of some concern because of one child who is allergic to milk. Ms. Baker understands the need for supervision and will rectify the problem, but she also notes that the child in question is 5 years old, knows he's allergic to milk, and has never tried to take it when placed out. Still, Ms. Baker has found an online program on food safety for child care works and will make it mandatory viewing for her staff.

For all of these reasons, Ms. Baker's chance of success is both better than negligible, and better than a mere possibility, and on this count, injunctive relief should be granted.

2. Because the parents who send children to Little Tots will be forced to find other day care, and because Ms. Baker will lose a government grant that subsidizes the program, closing the program even temporarily will cause irreparable harm.

Per Lang, the standard for irreparable harm is one that cannot be compensated for by pecuniary damages. Here, even temporarily closing Little Tots will result in the failure of the business. Importantly, it is not just the loss of income that will create Ms. Baker's harm, but the loss of vocation as a child care provider. Financially, Ms. Baker will not only be without personal income, but will be unable to repay her business loans, which would turn a temporary shutdown into a permanent closing. Also, because the program serves an underserved community, Ms. Baker was able to find funding through a government grant to subsidize the center. A temporary closing would entail a revocation of that grant without the opportunity to

regain the lost funds. Of course, the parents who rely on Little Tots would be forced to find other options for day care, or, worse, be forced to quit their jobs to stay at home with their children. When the center reopened, it would be unlikely that many of this client base would return. Finally, as Ms. Baker herself says, "caring for children is my passion and my livelihood." Closing Little Tots would be a devastating blow for not only her career, but for Ms. Baker personally.

As demonstrated, the harm to Ms. Baker and Little Tots would undeniably be irreparable.

3. Because there is no immediate harm to students, there is no hardship presented to FDCF, but there is benefit to keeping the center open.

The rationale for closing Little Tots must rest on a determination of harm to students. As the Franklin Administrative Code section 3.01 sets forth, "Because of the actual or potential harm to children, noncompliance with the following regulations will be determined to be critical violations: enrollment procedures, staff qualifications, staffing, program, structure and safety, meals and nutrition, and health." Ms. Baker agrees that she is not in strict compliance with the code, but at the same time there is no evidence of actual harm to children, and only slight potential for harm. The missing background check, incomplete enrollment forms, and temporary overenrollment in a single classroom have created no discernible actual harm, and, as Ms. Baker vows, are easily correctible very soon. The only ostensible potential harm of a serious nature would be if the allergic child were to drink milk, a situation that Ms. Baker has already taken steps to redress. Moreover, the FDCF has claimed no overt hardship should the injunction be granted.

On the other hand, there is evidence of the benefits of keeping the center open. As one parent has communicated, "It has a good program for the children. My kids love it there. One of my kids was really shy and hesitant to play with other kids but has overcome all that since he started attending Lilttle Tots."

For these reasons, the benefit of keeping Little Tots open far exceeds the hardships entailed in closing it.

4. Little Tots serves an underserved community of working-class families, making the granting of injunctive relief in the public interest.

As Lang provides, the fourth factor to be considered is the public interest served by injunctive

relief. In this case, closing Little Tots would burden families who have few, if any, other options. Because Little Tots serves a working-class community, parents often have to go to early shifts or late shifts. Little Tots meets this demand by opening earlier and staying open later than other providers. In addition, working class families often cannot afford child care. Little Tots, however, because of its government funding, has been able to subsidize the cost of child care and hire more staff to enroll more children -- again, in this way, serving the community. As Jacob Robbins, one of the parents, has said, "I have talked with a dozen parents who are upset. We do not know where to send our kids. My wife commutes to work downtown, and I am a mechanic at the truck depot. The way our hours work out, we need Little Tots because it is the only care center that meets our schedules. Plus, it is affordable."

Clearly, then, shuttering Little Tots, even temporarily, would not be in the public interest, but would prove a public detriment.

Ms. Baker thus meets all four factors that create the standard for offering preliminary injunctive relief. The court should provide this relief.

MPT 2
February 2019

In re Remick **(February 2019, MPT-2)** This performance test requires examinees to draft an objective memorandum analyzing whether the client, Andrew Remick, has a viable negligence claim against motorist Larry Dunbar under the alternatives set forth in sections 42 and 44 of the Restatement (Third) of Torts, often referred to as the "Good Samaritan" doctrine. Remick's car had stalled at dusk on a winding road when Dunbar, a former auto mechanic, offered assistance. While Dunbar was attempting to jump-start the car, another motorist drove around the bend and rear-ended the vehicle. Remick was in the backseat with a twisted ankle when the force of the collision threw him against the driver's seat, which resulted in multiple injuries, including a concussion and a broken arm. The primary inquiry is whether "Good Samaritan" Dunbar owed Remick an affirmative duty of care under the circumstances to protect Remick and his car from being hit by another motorist. The File contains the instructional memorandum, a transcript of the client interview, and a memorandum from the firm's private investigator. The Library contains excerpts from the Restatement (Third) of Torts and three Franklin cases.

To: Susan Daniels

From: Examinee

Date: February 26, 2019

RE: Andrew Remick Cause of Action

Below, please find the memo you requested regarding a potential cause of action by our client Andrew Remick against Larry Dunbar. As you know, in order to successfully assert a claim of negligence, four elements must be established: duty, breach of duty, causation, and damages. Here, the primary issue is whether Dunbar owed a duty of care to Remick.

Dunbar likely owed a duty of care to Remick under the Restatement (Third) of Torts Section 42.

In general, a person owes no affirmative duty of care to a person unless they are in a special relationship. However, Section 42 of the Restatement (Third) of Torts provides that an "actor who undertakes to render services to another and knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if: failure to exercise care increases the risk ... or the person to whom the services are rendered relies on the actor's exercising reasonable care in the undertaking." The comment to this rule clarifies that such a duty may be breached by nonfeasance, or the inaction of the defendant. Additionally, an "undertaking" occurs for the purposes of this rule when a person voluntarily renders a service on behalf of another to reduce the risk of harm to that person. The Franklin Court of Appeal has clarified this to apply to "the assistance of a private person ... to a person in need of aid." (Weiss v. McCann).

Here, according to Remick, Dunbar voluntarily stopped by the side of the road to aid him with Remick's broken down car. Similarly to the situation in Weiss, where a homeowner voluntarily aided a guest who had fallen and struck her head, Dunbar voluntarily rendered aid to Remick in order to reduce the risk of harm to Remick. (See id.). Dunbar's attempt to fix Remick's car will likely be found to be a "rendering of services" carried out in order to "reduce the risk of harm" to Remick. Because Dunbar was rendering services to Remick, he was bound by the reasonable duty of care provided by Section 42 if his failure to take reasonable care increased the risk to Remick or Remick relied on Dunbar exercising reasonable care. Here, it is unlikely that Dunbar's failure to turn on hazard lights or move the vehicle away from the road affirmatively increased the risk to Remick. Prior to Dunbar stopping to render aid, Remick had not moved his car away from the road and had not turned on his hazard lights. Thus, Dunbar's

subsequent failure to do so likely did not increase the risk of danger.

However, it is likely that Dunbar was required to operate under a duty of care because Remick "relie[d] on [Dunbar's] exercising reasonable care." Here, Remick noted that he asked Dunbar to turn on the hazard lights or move the car from the road. However, Dunbar told Remick not to worry about that and that he could get the car started quickly. There is a valid argument that Remick did not rely on Dunbar exercising reasonable care because Remick could have turned on the hazard lights himself. However, Remick noted that Dunbar told him that he was a mechanic and Remick also stated that he was in great pain, limiting the possibility for him to move around the vehicle or to the trunk of the vehicle to obtain flares. Because of these facts, it seems that Remick relied upon Dunbar exercising reasonable care in his decision not to turn on hazards, light a flare or otherwise move the vehicle, and thus it is likely that Dunbar owed Remick a duty of care under Section 42.

Dunbar likely owed a duty of care to Remick under the Restatement (Third) of Torts Section 44.

Similar to Section 42, Section 44 of the Restatement (Third) of Torts requires a rescuer to exercise reasonable care when the rescuer "takes charge of another" who appears to be imperiled and helpless or unable to protect himself. A person takes charge of another when they "assume an obligation or intend to render services for [another's] benefit." Boxer v. Shaw. To take charge of another, the rescuer must be "taking charge" in order to confront the peril that has imperiled the rescuee. However, the determination of whether a person is considered "helpless" is made within the context of each case. Thomas v. Baytown Golf Course. The court in Boxer noted that the fact that the allegedly "helpless" person did not have a vehicle due to it being repaired was not enough to render him helpless. In fact, the plaintiff in Boxer was not considered helpless by the court despite being intoxicated and without a vehicle on a highway. However, in Thomas, the court noted that an intoxicated person at the wheel of a car may be considered helpless. However, both courts make clear that a person may make themselves helpless through intoxication or other means.

Here, it is likely that Remick will be considered imperiled as he was stranded on a highway road with his car stuck in the middle of the road. Additionally, Remick also likely meets the definition of "helpless" due to the totality of circumstances in his situation. Although, under Boxer, Remick will not be considered "helpless" merely because he was stranded on the roadway, the additional fact that he twisted his ankle and was unable to walk will likely add to his helplessness in this context. There is a reasonable counter-argument that Remick was not

helpless due to the fact that he was not intoxicated or otherwise mentally impaired. However, his injury, the breakdown of his car and his inability to make a cell phone call for help all add together to make it likely that a court would find him to be helpless in the context of Section 44.

Dunbar will also likely be found to have taken charge of Remick because he intended to render car-fixing services to Remick for Remick's benefit. Additionally, he intended to confront the peril that had beset Remick by assisting Remick to fix his vehicle and drive off of the roadway. Because Dunbar took charge of a helpless person with the intent of confronting the peril that had beset Remick, he owed Remick a duty of care under Section 44.

Dunbar likely breached his duty of reasonable care to Remick as he did not take any measures to avoid the foreseeable danger of a car collision.

As discussed above, Dunbar likely owed a duty of reasonable care to Remick. A breach of duty is unreasonable conduct in light of foreseeable risks of harm. (Weiss) Breach of duty make take the form of malfeasance or nonfeasance. Here, there was a foreseeable risk of harm from another car striking Remick's car because the car was positioned without lights on a dark road. The car was positioned on a bend in the road and the speed limit of the road was 55 mph, which is great enough speed where a driver may not be able to react quickly to a dark car appearing quickly in front of her. Because such a collision was foreseeable, Dunbar had a duty to take reasonable measures to protect Remick and his vehicle from resulting harm. Dunbar thus likely breached his duty of reasonable care when he did not take reasonable precautions to avoid collision because he did not turn on the car hazard lights, set out a flare, or otherwise attempt to minimize the foreseeable danger to Remick and Remick's vehicle. Because Dunbar likely breached his duty of reasonable care to Remick, this element is met.

Dunbar likely was the cause of damages to Remick and his vehicle.

The element of causation is satisfied where there is a reasonably close causal connection between the actor's conduct and the resulting harm. (Weiss). Here, Dunbar's lack of conduct in failing to turn on Remick's hazard lights bears a reasonably close causal connection to the resulting harm sustained by a car collision. Dunbar's failure to take any precautionary measures despite the road being dark were a foreseeable cause of the later collision. But for Dunbar's conduct, it is likely that the crash or the severity of the crash could have been avoided. Because there is a reasonably close causal connection between Dunbar's lack of

conduct and the resulting damages, the element of causation is likely met.

Remick sustained damages as a result of Dunbar's breach of duty.

The final element that must be met in order for a plaintiff to successfully assert a claim for negligence is damages. Weiss held that recoverable damages include "lost wages, pain and suffering, medical expenses or property loss or damage." (citing Fisher v. Brawn). Here, Remick appears to have suffered significant personal injury including pain and suffering from his shoulder and arm damage, loss of wages from his landscaping business, medical expenses arising from his arm injury, and property damage to his vehicle. Each of these damages is recoverable under Fisher and thus the element of damages should be met by Remick.

Conclusion

Because Dunbar owed Remick a duty of reasonable care under Restatement (Third) of Torts Sections 42 and 44, he breached his duty of reasonable care, and he was the cause of damages to Remick, Remick likely has a strong claim for negligence against Dunbar.

Please contact me if you have any questions or would like me to do any further research.

MEE Question 1

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

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

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

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

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

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

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

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

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

The Court could properly find that the woman was negligent even though she was driving below the posted speed limit.

The issue is whether the woman may be precluded from liability on a negligence claim because she was driving under the posted speed limit.

For a claim of negligence to be viable, the following elements must be satisfied: (1) the actor owed a duty of care to the victim, (2) the actor breached that duty, (3) the actor's actions were the cause of the victim's injuries, and (4) the victim must have sustained damages. Additionally, for a successful negligence claim, the actor (defendant) must have no applicable defenses to assert.

Here, the man was a passenger in the car driven by the woman. As the driver of the vehicle, the woman owed the man the duty of care to act as a reasonable, prudent driver would in similar circumstances. In this situation, reasonable care would involve obeying traffic rules, including rules of the roadways and driving within the posted speed limit.

Moreover, as the pair was traveling in a snowstorm, reduced speeds were likely required of a reasonable, prudent person. The woman was noted as driving 40 miles per hour when the posted speed limit was 50 miles per hour. Driving at a speed 10 miles under the speed limit during a snowstorm would often be seen as compliant with the duty of care owed given the circumstances. However, without more information on the severity of the road conditions or more information regarding the woman's driving, it is possible that the woman was still negligent, despite driving under the speed limit.

As such, the court could properly find that the woman was negligent even though she was driving below the posted speed limit.

The Court could properly find that the woman is liable for the man's damages resulting from the infection.

The issue is whether the woman could be found liable for the man's damages resulting from the infection.

As stated above, one of the essential elements of a claim for negligence is that the actor be the cause of the victim's harm or injury. One aspect of the causal connection is proximate or legal cause. For an actor's actions to be the proximate cause of the victim's injuries, the

injuries must be to the extent, of the type, and occur through a manner that would be foreseeable, given the circumstances.

Here, the man was in a car accident when the vehicle the woman was driving overturned. The injury in question here is the infection that the man contracted, presumably while being treated at the hospital for his injuries from the accident. It is foreseeable that the man would need to receive medical treatment for his injuries, and as such, his receiving an infection during those services, while not expected, is certainly not unforeseeable.

As such, the court could properly find that the woman is liable for the man's damages resulting from the infection.

The Court could properly find that the hospital is liable for the man's damages resulting from the infection.

The issue is whether, absent explicit proof via record of hospital procedures, the hospital may be liable for the man's damages resulting from the infection.

The concept of res ispa loquitur applies to negligence cases when the source of the harm is not easily identifiable, but the harm incurred is of the type not typically sustained in the absence of negligence. To succeed on a res ipsa loquitur claim, one must demonstrate that (1) the actor was in control of the instrumentality which caused the harm, (2) that it is more likely than not that the victim's harm was caused by the actor's negligence, and (3) the victim himself did nothing to contribute to the harm.

Here, the doctor has stated that the type of infection the man is experiencing is typically caused through exposure to contaminated blood or unsanitized medical equipment. The man had recently been hospitalized for 10 days, the entire incubation period for infection, and had also received procedures involving numerous medical instruments, including needles and clamps. The man had no history of intravenous drug use or prior medical treatment within 6 months of his recent hospitalization. Therefore, despite the lack of concrete proof, the man's damages from the infection are not likely in the absence of negligence and therefore, res ipsa loquitur applies.

As such, the Court could property find that the hospital is liable for the man's damages resulting from the infection.

The woman's liability could not be limited to $100,000 for injuries the man suffered in the accident.

The issue is whether the woman's liability could be limited to $100,000 if both the woman and the hospital are found liable for negligence for the man's injuries.

When two or more defendants are found liable in tort to a plaintiff, they are generally found to be jointly and severally liable. Joint and several liability means that any defendant can be required to pay the entire judgment, and then seek repayment from the other tortfeasor. This is in contrast with pure several liability, wherein joint tortfeasors are only liable for their share of the harm.

In a joint and several liability jurisdiction, which is the majority, the woman cannot limit her damages to the $100,000 for the injuries he sustained in the accident. The man could seek to get the entire $350,000 from her, and she could try to seek contribution from the hospital.

MEE Question 2

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

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

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

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

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

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

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

1. The issue is whether the company improperly distributed the collateral without notice to the debtor

Upon default, a secured party may repossess collateral without notice to the debtor, so long as it does not breach the peace. Once the property is repossessed, however, the secured party must send proper notice to the debtor, any secondary obligor, other secured parties, and creditors prior to distribution (selling the collateral). Notice must be provided within a reasonable time prior to the sale of collateral; generally, 10 days or more prior to sale has been found reasonable. Failure to properly notify may result in adverse consequences for the secured party: they may be estopped from seeking a deficiency against the debtor, the deficiency may be reduced, or they may be liable to suit on behalf of the debtor or other creditors with interest in the collateral for damages or even to enjoin the sale if it has not already occurred. In all other respects, the sale of collateral after default must be commercially reasonable.

Because the bank attached its interest by possession (see part III), the company, as a debtor in the secured transaction with the bank, had a right to be notified prior to a sale of the gramophone. The bank failed to give the company notice. Since the sale of the gramophone was insufficient to cover the company's debt, the bank might have an opportunity to collect a deficiency from the company. While all other aspects of the sale were commercially reasonable, this was an improper distribution by the bank and the company likely will not be liable for the full deficiency and may even be able to sue for damages.

Because the bank failed to provide adequate notice, the company has a right to contest paying a deficiency and perhaps to hold the bank liable for damages.

2. The issue is whether the bank's perfected security interest has priority over a judicial lien creditor.

Rules of perfection determine priority among secured parties, general creditors, and lien creditors. A secured party perfects its interest when, after the interest attaches (see part III for rules of attachment), the secured party files a financing statement, obtains control or possession over the collateral, or through automatic perfection by operation of law. A financing statement must contain a description of the property, the parties to the security agreement, and be authorized by the debtor. The debtor's authorization on a security agreement will constitute authorization of the filing statement. Super-generic terms, like "all personal property" are acceptable in filing statements. A secured party with a perfected

security interest has priority in interest in the collateral over a judicial lien creditor, but a judicial lien creditor has priority over an unperfected security interest.

Here, the bank filed a financing statement covering property that they had an attached interest through possession (see part III). That the financing statement merely names "all personal property" is acceptable, because unlike in a security agreement, super-generic names are fine. Because the bank perfected its security interest, it has priority over the judgment creditor and has the superior claim to the gramophone.

3. The issue is whether the bank's interest attached in any other "personal property" of the company.

A security interest is enforceable against a debtor when the interest attaches. Attachment occurs when: i) the debtor has rights to the collateral; ii) the secured party gives value to the debtor; and iii) the parties execute an authenticated security agreement that sufficiently describes the collateral. A security agreement can be accomplished through execution of an authorized document, or by delivering control or possession of the collateral to the secured party. A security agreement must describe the collateral with sufficient specificity, and super-generic terms like "all my personal property" will not suffice.

The company, as debtor, had ownership rights in the gramophone and the bank distributed loan amounts (value). Two of the three criteria for attachment are readily apparent. However, the security agreement does not sufficiently describe the collateral to be secured. The term "all personal property" may be ok for a financing statement, but it is insufficiently specific for a security agreement. This agreement document was therefore invalid. When the bank took possession of the gramophone, it exercised a security method through possession and attached its interest in the gramophone only. Other personal property, however, did not attach for lack of specificity.

Because the security agreement document was super-generic, the bank's interest only attached to the gramophone through possession. It does not have an enforceable security interest in any other personal property of the company.

MEE Question 3

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

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

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

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

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

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

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

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

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

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

I. Business Entity of Radiology Services

The first issue is whether Carol, Jean, and Pat met the requirements to be a limited liability company, or whether they instead formed a general partnership.

In order to form a limited liability company, the incorporators involved must file the articles of incorporation with the secretary of state's office, which must include the signatures of all incorporators, the address and name of the agent, the number of shares authorized to distribute, and the name of the company. What is critical is the filing of the articles and payment of the filing fee. To form a general partnership, there are no formalities required. A general partnership is an ongoing business between two or more people for profit. General partners do not need to file any sort of paperwork.

In this case, Radiology Services would be considered a general partnership. The facts tell us that the parties "agreed to call their business 'Radiology Services,' to split profits equally, and to run the practice together in a manner that would be competitive." That met the requirements of forming a general partnership. Further, while the parties intended to later form a limited liability company, they failed to execute the required paperwork. The paperwork was purportedly filled out correctly, however "they were so involved in their radiology practice that they forgot to sign the documents, and have never done so." They thus did not form a limited liability company.

Accordingly, Radiology Services is a general partnership consisting of Carol, Jean, and Pat.

II. Carol's Authority to Purchase of the Radiology Machine

The next issue is whether Carol had the authority to purchase the radiology machine.

In a general partnership, the partners have the authority to conduct business reasonably related to the scope of their duties. When they act outside the scope, the other partners can ratify their otherwise un-permitted actions by unanimous vote. When a general partner acts within the scope of their duties, they bind other general partners, meaning they are personally liable.

Here, Carol's duties are related to radiology practices. Five years ago, they purchased "state-of-the-art" radiology equipment, and did so in order to be competitive in the market. Four months ago (approximately 4.5 years after purchasing the original equipment), Carol suggested the partners purchase a new radiology imaging machine. Carol received no

objection. In order to conduct their line of work, it would seem that Carol would have the authority to purchase a new machine to be used by the partners when conducting their business.

Accordingly, Carol did have the authority to purchase the radiology machine.

III. Jean's Statements of Withdrawal

The next issue is whether Jean's statement, "I'm out of here and never coming back," constitutes a withdrawal from Radiology Services.

In a general partnership, a general partner may dissociate from the partnership at any time for any reason in an at-will partnership. When they dissociate, they are still liable for any pre-dissociation obligations, however they lose their fiduciary duties and can compete with the company.

Here, Jean expressly told Carol that she intended to leave the partnership, and had no intention of returning. Carol and Jean subsequently agreed to continue their partnership and participate in Radiology Services without Jean. Jean, at that point, would no longer be a partner of Radiology Services.

Accordingly, Jean dissociated from Radiology Services and is thus no longer a partner.

IV. Jean's Entitlement to a Buyout Payment

The final issue is whether Jean's statement, "just give me my share of the value of the practice," was sufficient to entitle her to receive a buyout payment from Radiology Services for her interest in the practice.

Generally, when a partner dissociates from a practice, the partner must make a demand for payment of their share of the practice. There are no formal requirements to make this request. However, the partner is liable for their share of the profits and losses for the pre-dissociation commitments.

Here, Jean did make a statement requesting a buyout from Radiology Services. Because there are no formal requirements, unless otherwise specified, the buyout request would be valid. However, the new imaging unit was purchased prior to the dissociation, and Jean would be bound by that obligation as well. As such, the statements by Jean were sufficient, but her one-third payment amount will depend on the financial state of Radiology Services.

MEE Question 4

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

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

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

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

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

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

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

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

Subject Matter Jurisdiction

Federal courts may obtain subject matter jurisdiction through either diversity jurisdiction or federal question jurisdiction. If the claim is not based on a question of federal law or a federal statute giving rise to a cause of action, then the court may only obtain jurisdiction through diversity.

Diversity jurisdiction requires complete diversity of citizenship of the parties and an amount in controversy over $75,000. Citizenship of a corporation is in the state in which it is incorporated, and the state from which it controls its business (thus a corporation may be citizen of more than one state). An individual is a citizen of the state in which they are domiciled. Generally a person's domicile is decided by factors such as where they currently live, where they intend to remain indefinitely, where they vote, and where they consider their residence. A person may only be a citizen of one state. Citizenship is determined at the time the claim is filed. If complete diversity of citizenship of the parties is met the amount in controversy must also be over $75,000. Generally the court accepts the plaintiff's claim of damages unless they are directly contradicted by statute or other incontrovertible evidence.

Here, the airline is a citizen of State A for purposes of diversity jurisdiction because it is incorporated in State A and also has its corporate headquarters in State A. The woman is a citizen of State C because that is where she currently lives and has lived her entire life. Even though the woman intends to move to State A, it is very indefinite and she has received an "indefinite deferral" of her start date for her job in State A. Since at the time of filing she is living in State C with no definite plans to move, she will be considered a citizen of State C for purposes of diversity jurisdiction. Since the airline is a citizen of State A and the woman is a citizen of State C there is a complete diversity of citizenship to qualify for diversity jurisdiction. The woman is claiming $1,000,000 in damages, which is higher than $75,000, so the amount in controversy is satisfied. There is no reason for the court to challenge the amount in controversy in the facts. Therefore, both the diversity of citizenship and the amount in controversy requirements for diversity jurisdiction are met and the court will have diversity jurisdiction in this case.

In conclusion, the court should deny the motion to dismiss on the basis of lack of subject-matter jurisdiction.

Personal Jurisdiction

In order to obtain personal jurisdiction over the parties, a federal court must satisfy both the personal jurisdiction rules of the state in which it sits as well as satisfy constitutional requirements under the Fourteenth Amendment. A federal court can obtain personal jurisdiction under the Constitution by consent, residency, personal service, or minimum contacts analysis. Minimum contacts requires that the defendant have sufficient purposeful minimum contacts with the forum state that some sort of liability is foreseeable, and that those minimum contacts give rise to the claim at hand, and that asserting personal jurisdiction would not offend traditional notions of fair play and substantial justice. If the court cannot show that the contacts with the forum state gave rise to the claim, the court can also attempt to show that the defendant had substantial business with the forum state such that it should be subject to general jurisdiction in the state. This requires a strong showing that the business is "essentially at home" in the forum state.

Here, the airline has not consented to personal jurisdiction, does not reside here, and was not personally served here. The court must therefore satisfy the minimum contacts test or show that the airline does substantial business in the state to the extent that it is "essentially at home" and could be subject to general personal jurisdiction. The airline has some contacts with State B that could satisfy minimum contacts including a reservation facility where it processes online and telephone reservation requests. The facility employs 150 people and handles all reservation requests. The airline may be able to predict that it would be subject to a lawsuit regarding the reservation center in State B. However, the woman's claim does not arise based on her interaction with the company in State B. She did buy her ticket from the center in State B, but her flight was from State A to State C and her injuries occurred in State A. The woman did not even physically visit State B, she only called the reservation center from her home in State C. There is a doubtful question for the court about whether this satisfies the minimum contacts analysis, since there was no issue with the ticket reservation process, but rather with the flight itself, which had nothing to do with State B.

Assuming minimum contacts fails, the court could look at whether the airline could be considered "essentially at home" in State B and therefore could be subject to personal jurisdiction even for a claim that did not arise in State B. The airlines employs 150 in State B, but none of its corporate locations or physical operations are in State B. Additionally, the amount of employees in State B is relatively small compared to the total employee base of 15,000 employees, 12,000 of which are in State C. This is most likely not enough to show

that the airline should be subject to general jurisdiction in State B.

In conclusion the court should find for the airline on the issue of personal jurisdiction.

Overall Conclusion

The court should deny the motion to dismiss on subject matter jurisdiction grounds, but should grant the motion on personal jurisdiction grounds.

MEE Question 5

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

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

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

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

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

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

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

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

1. Given the terms of the trust the settlor created, could the trustee have properly distributed trust assets to the son to enable him to pay (a) his hospital bill, (b) child support, and (c) the loan to purchase the computer-gaming system? Explain.

2. Did the trustee abuse his discretion in refusing to make any distributions to the son during the past seven years? Explain.

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

1. Can trustee distribute for hospital bill, child support, loan for gaming.

A properly created trust requires a settlor to transfer trust property into trust, appoint a trustee (although a trust will not fail for want of a trustee), provide instructions regarding the distribution of the trust assets, and select beneficiaries. A settlor can create a trust where the distributions of trust assets will be determined by the trustee based on his or her discretion. In this case, the trustee has wide discretion to make distributions if it is in line with the trust instrument. However, at all times, the trust instrument controls how the trustee should act. Where a settlor has created a trust for the "support" of the beneficiary, and left the distribution left to the determination of the trustee, the trustee must act in good faith and must distribute trust assets for necessaries and governmental obligations. Medical care is generally considered a necessary.

Here, the settlor created a support trust for the benefit of his children and appointed his brother as the trustee. He properly funded the trust and the instructions of the trust instrument delineates that the trustee will have discretion to make distributions based on his children's "support" needs. Therefore, based on the trust instrument itself which allows for "support" spending, the trustee could have distributed funds from the trust to pay the son's hospital bills because that is a "necessary" and is generally considered to be within the "support" definition. Furthermore, the trustee also could have paid the son's child support because it can be argued that the son needs to pay that amount in order to avoid government obligations that would otherwise garnish from his wages. As a discretionary funding, the trustee could make that determination and therefore disburse those funds.

However, the trustee would not be able to disburse the funds for the loan for the game because it cannot be argued that the game is necessary for the son and therefore does not fit into the definition of "support."

2. Trustee's abuse of discretion

A discretionary trust is created when the settlor provides instructions to the trustee to disburse funds based on the trustee's discretion. While the trustee has wide discretion in determining asset distribution, the trustee must act in good faith when making distributions. A trustee can be held to abuse his or her discretion when the trustee acts on his discretion, but bases that discretion on personal resentment of the beneficiary or other unreasonable reason. In this way, the trustee can violate the trust instrument, which controls the trustee's actions at all times.

Here, the trustee abused his discretion when he refused to make any distributions to the son in the past 7 years. The settlor clearly set up the trust for the benefit of his son and daughter. The trustee abused his discretion not to distribute money to the son because of his apparent personal resentment for the son. This is evidenced by the fact that while the son and daughter earned similar salaries and the son had additional obligations (i.e. a family, loans, hospital bills, etc.) the trustee did not make any distributions to the son for 7 years and made $80K of distributions to the daughter, which is almost 1/3 of the entire trust property. Furthermore, the trustee called the son names and made personal attacks regarding him being an adulterer, a bad father, and told the daughter that the son was rude to him. This evidence shows that the trustee harbored personal resentment against the son and therefore, violated the trust instrument by not making support distributions to the son.

3. Creditor's rights to trust property

A trust with a spendthrift provision makes the trust assets inalienable. Therefore, the beneficiary cannot touch the trust property, and neither can most creditors unless a distribution is made. However, an exception to this rule is where the beneficiary of the trust has obligations such as child or spousal support. In that case, the government creditor can touch the trust property and withdraw directly from the principle without waiting for a distribution. Another exception is where the trust is a discretionary trust and the trustee abuses his discretion by not making a distribution when one is due.

Here, the settlor created a trust with a spendthrift provision. This made the trust's principle assets inalienable and untouchable by most creditors until a distribution is made. However, the government can require the trustee to pay their claims against the son from the trust's assets, for the $35K in judicially ordered child support based on the government obligation exception. Furthermore, as discussed above, the trustee should have made a distribution to the son for his hospital bill for $10,000 from the trust assets. Even though he did not, the hospital may be able to require the trustee to pay their claims, based on the trustee's abuse of the discretion in not making distributions from the trust.

However, the friend will not be able to force the trustee to pay his claim because it was not for a necessary, and therefore not within the support standard for distribution by the trustee, and is not a government obligation. The friend will have to wait for a distribution and then ask for or sue the son for the money directly after the distribution is made.

MEE Question 6

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

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

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

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

Two days later, the neighbor returned the painting to Ben, saying "Here's your painting. Give me back the print that I loaned you and we'll forget the whole thing." However, the previous day Ben had been so angry with the neighbor about his arrest that he had contacted an art dealer and had sold her the print. Ben did not tell the art dealer that the unsigned print was by the famous artist. Ben simply offered to sell the print at a very low price and told the art dealer, "I can sell this print to you at such a good price only because I shouldn't have it at all." Although the art dealer often investigated the ownership history of her purchases, she bought the print without further discussion. An hour after the sale, the art dealer contacted a foreign art collector famously uninterested in exploring the ownership history of his acquisitions, and sold him the print for 10 times what she had paid for it.

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

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

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

Prosecution v. Ben

The issue is what crimes the prosecution will be successful in charging Ben with regard to the events that took place with him, his neighbor and the art dealer.

1. Burglary Charge against Ben

The issue is if the prosecution will be successful in an action for Burglary against Ben when Ben broke and entered into his neighbor's home and tried to retrieve his painting. Burglary requires the 1) breaking and entering into 2) another's dwelling 3) at night with the 4) intent to commit a felony therein.

i. Breaking and Entering

Breaking can be the slightest touch of opening a door or entering through a window to satisfy this element. Here, Ben noticed that a ground-floor window was ajar and he pushed the window fully open. As soon as Ben pushed the window open, he effectuated a breaking. Ben then began to climb into the house. As soon as Ben began to break the barrier of the window to go into the home, he successfully entered the home and the elements of breaking and entering are satisfied.

ii. Into Another's Dwelling

The home must be another person's dwelling. Here, Ben was breaking and entering into his neighbor's home, not his own. Thus, this element is satisfied.

iii. At Night

The breaking and entering of another person's dwelling must occur at night. Here, the facts explain that this event occurred at 10:00 pm, which is considered nighttime and therefore satisfies this element.

iv. With the Intent to Commit a felony therein

The burglar must have the intent to commit a felony inside the home. Here, Ben lacked the requisite intent to commit a felony because the painting was his and not his neighbor's. Ben and his neighbor had an agreement that the neighbor would keep the painting for

safekeeping so that Ben's girlfriend would not continue to get upset because the artist was Ben's ex-wife's mother. Therefore, when Ben was going into this neighbor's home, it was to get his property back, and not to take anything of his neighbor's. Therefore, Ben did not intend to commit larceny inside his neighbor's home because he was going in to retrieve his own painting, and the burglary charge will fail with this element because it is not satisfied.

Thus, the burglary charge will not be successful against Ben.

2. Larceny or Embezzlement against Ben

The issue is whether the prosecutors will be successful in bringing a larceny or embezzlement charge against Ben with regard to his actions involving the unsigned print.

Larceny

Larceny is the trespassory taking and carrying away of personal property of another with the intent to permanently deprive them of their possession.

i. The Trespassory Taking and Carrying Away

The taking and carrying away element must be satisfied by a taking that was not given consensually by the property owner. Here, the neighbor gave Ben the painting to use in his home, pursuant to their agreement as described earlier. Ben took the neighbor's print but it was with his neighbor's permission, so this element is not satisfied.

ii. Of another's Personal Property

For larceny, the property that has been taken or carried away must not be the defendant's. Here, this element is satisfied because the print was his neighbor's and not his personally, although this claim will still fail on the trespassory element.

iii. With the intent to permanently deprive them of it

The defendant must have intended to permanently deprive the owner of their possession. Here, when the neighbor gave Ben his print, he was planning on keeping it for a while and not planning to steal it forever. Thus, this element is not satisfied.

Embezzlement

Embezzlement occurs when a person is in lawful possession of an item, and then comes to be in illegal possession, once they have gone beyond the scope of their previous amount of privilege with regard to the property.

i. Lawful Possession of an Item

The defendant must have initially been in lawful possession of the item. Here, Ben and the neighbor were both under an agreement and understanding that they were going to hold each other's paintings and prints for a specific amount of time so that Ben's girlfriend would not get jealous. Since Ben was granted this use from the neighbor who was the rightful owner at the time of the painting, Ben was in lawful possession of the item initially.

Thus, this element is satisfied.

ii. Exceeds the scope to be in unlawful possession

The defendant must exceed to scope of the initial lawful possession to make it so that they were in an unlawful possession, which will result in an embezzlement charge. Here, Ben was initially in lawful possession as discussed above. However, as soon as Ben contacted an art dealer and sold her the print, he went beyond the scope of possessing the painting in his living room and unlawfully converted the print because he did not have permission to sell it.

Thus, the prosecution will be successful if they bring an embezzlement charge against Ben for his actions with regard to the neighbor's painting.

3. Receiving Stolen Property Against the Art Dealer

The issue is whether the prosecution will be successful in bringing an embezzlement charge against the Art Dealer for her actions regarding the print.

To be liable for receiving stolen property, the defendant must have a reasonable suspicion or knowledge that the stolen property they are receiving was stolen. Also, if it is not normal according to industry customs or standards to accept the property without researching, and a person lacks any indication to research or make sure that it was rightfully given to them, they

are more likely to be deemed to be guilty of receiving stolen property.

Here, the art dealer is a person who is a merchant in the art industry, regularly buying and selling prints. Ben told the art dealer that he shouldn't have had the print at all. The facts indicate that the art dealer also normally did her due diligence by investigating the ownership history of her purchases, but as soon as Ben made that statement, the art dealer bought the print without further discussion. Further, the art dealer immediately called, an hour after the sale, a foreign art collector famously uninterested in exploring the ownership history of his acquisitions, and sold him the print for 10 times what she had paid for it. This is important because the prosecution will use that as circumstantial evidence that the art dealer knew she was buying a stolen print for a low price and wanted to get rid of it as soon as she could, quickly making a substantial profit before getting in trouble.

Thus, the prosecution will be successful in bringing a charge of receiving stolen property against the art dealer for her actions involving the print.