MPT 1 – SAMPLE ANSWER 1

To: Gale Fisher, Senior Partner

FROM: Examinee

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

DATE: February 26, 2019

STATEMENT OF THE CASE:

Ashley Baker is the Owner of Little Tots Child Care Center. Franklin Department of Children and Families threatened to revoke her license to operate the child car center due to accusations of appliance issues. Ms. Baker filed a complaint and a motion seeking preliminary injunction to prevent the revocation of her license to operate her child care center. We represent Ms. Baker in this matter. She has requested that we prevent the Franklin Department of Children and Families from revoking her license.

STATEMENT OF THE FACTS:

Around June 2018, Ashley Baker operated the Little Tots Child Care Center. Little Tots is the only child care center in the neighborhood that serves low-income families. Her child care facility is open for extended hours, which is beneficial for parents who must work early and late throughout the work week. Ms. Baker received a grant that allows her to

charge reduced fees to parents whose income falls below a certain level and it allows her to hire more staff and expand the number of children that Little Tots serve.

On July 16, 2018, Ms. Baker received her first Notice of Deficiency, stating that she violated (1) enrollment procedures, (2) staff qualification, and (3) Staffing standards pursuant to the Franklin Admin. Code. It was alleged that there were 37 incomplete enrollment forms, a lack of background checks for four employees, and an improper ratio for her 2-year-old (9:1) and 3-year-old rooms (11:1). Ms. Baker promised to take care of the noncompliance issue. On October 19, 2018, Ms. Baker received a second Notice of Deficiency, stating that she violated (1) enrollment procedures, (2) staff qualification, and (3) staffing standards pursuant to the Franklin Admin. Code. It was alleged that there were 16 incomplete enrollment forms, a lack of background checks for 3 employees (one being a new employee), and an improper ratio for her 2-year-old room (9:1). Ms. Baker satisfied most of her promises since the last notice. On January 23, 2019, Ms. Baker received her third Notice of Deficiency, stating that she violated (1) enrollment procedures, (2) staff qualification, (3) Staffing, and (4) Meals and nutrition standards pursuant to the Franklin Admin. Code. It was alleged that there were 5 incomplete enrollment forms, a lack of background checks for two employees, an improper ratio for her 2-year-old room (9:1), and a lack of supervision of the food area because Child "A" had an allergy to dairy products. As of February 22, 2019, Ms. Baker received a Notice of License Revocation from the Dept. of Children and Families stating that on March 5, 2019, her license would be revoked for accusations of noncompliance with critical standards pursuant to Franklin Civil Code 35.1.

ARGUMENT:

I. Preliminary Injunction Standard

Preliminary Injunctive relief may be granted in appropriate cases to preserve the status quo pending a decision on the merits. Lang v. Lone Pine School District. A party seeking a preliminary injunction must meet this four-factor test: (1) that the moving party is likely to succeed on the merits, (2) that the moving party will suffer irreparable harm if the injunction is not granted, (3) that the benefits of granting the injunction outweigh the possible hardships to the party opposing the injunction, and (4) that the issuance of preliminary injunction serves the public interest. id.

THERE IS A HIGH LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE MS. BAKER'S CHANCES OF SUCCEED ON HER CLAIM TO HER LICENSE IS MORE THAN A MERE PROBABILITY.

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

In Lang, Blake and Olivia Lang, parents of Michael (seven year old child), sued the Lone Pine School District for violating Michaels rights as a child with disabilities and sought preliminary and permanent injunctive relief. Lang v. Lone Pine School District, Franklin Court of Appeal (2016). The motion was for the District to allow Michael to attend school with a service animal. The motion was granted. The District filed an interlocutory appeal arguing that the court erred in granting the motion. The case was appealed to the Franklin Court of Appeals for review. Under the first element of granting a preliminary injunction

(likelihood of success) the trial court found that there was no dispute that Michael is a child with a disability and requires an accommodation. The court saw that the Langs have established that the service animal may well be the sort of accommodation needed, hence the Langs have shown a fair question regarding the rights of their son and the likelihood of receiving a remedy. id. Here, Ms. Baker argues that she is entitled to her license because she has shown her attempts to comply with the the Franklin Admin. Codes. Therefore, there is a liklihood that she would receive a remedy if the motion is granted.

MS. BAKER WOULD SUFFER FROM IRREPARABLE HARM BECAUSE DAMAGES WOULD NOT ADEQUATELY COMPENSATE HER FOR THE LOSS OF HER CHILD CARE CENTER.

An alleged harm or injury is irreparable when the injured party cannot be adequately compensated by damages or when damages cannot be measured by any certain pecuniary standard. In Lang, the alleged harm is the harm to Michael of continuing to attend school without the accommodation that may be most helpful to him. Lang v. Lone Pine School District. Here, Ms. Baker's loss of her child care center would not be sufficiently compensated by damages because she cannot measure the proper amount of damages. Her passion for the children and her center far exceeds any compensation that could be offered.

MS. BAKER WOULD SUFFER GREATER INJURY IF THE INJUNCTION WAS REFUSED BECAUSE SHE, ALONG WITH THE PARENTS, WOULD NOT HAVE A CHILD CARE CENTER THAT IS AFFORDABLE FOR THE CHILDREN.

The court must weigh the benefits of granting the injunction against the possible hardships to the party opposing the injunction. Lang v. Lone Pine School District. The court must determine whether greater injury would result from refusing to grant the relief sought than

from granting it. Here, Ms. Baker would suffer tremendous injury if her license was revoked and the parents in the neighborhood would as well. Jacob Robbins, a parent of a child who attends Ms. Baker's child care center is one of a dozen parents who would suffer from the closing of the center. His kids love it at her facility and have grown to become better more outgrowing children. He stated that if Ms. Baker's license is revoked, his wife would have to quit her job and care for the kids; this would place this family in an economic hardship which is against the Franklin Child Care Center Act. The Franklin Child Care Center Act states that: "There is a need for affordable and safe child care centers for low-income parents in underserved and economically depressed communities. By providing affordable and safe child care centers, the State of Franklin encourages employment of parents who, without these child care centers, could not be employed." Not granting this motion would cause Ms. Baker to suffer greater injury and the parents would too because there are no other affordable child centers in the area. If Ms. Baker's license was revoked, the domino effect of the center being closed would place an undue hardship on her and the parents who support her.

THIS INJUNCTION SHOULD BE GRANTED BECAUSE THERE IS A PUBLIC INTEREST WHERE THE PARENTS IN THE COMMUNITY AND THE CHILDREN WOULD BENEFIT FROM.

A court must consider whether issuance of the preliminary injunction serves the public interest. As stated above, the public interest is an affordable child care facility remaining open. Not only is Ms. Baker's child center affordable, but it is a clear benefit to the children in the neighborhood. The children are safe and smarter and there are no reported incidents that occurred in her child care center.

II.Compliance with the Codes

MS. BAKER'S LICENSE SHOULD NOT BE REVOKED BECAUSE SHE COMPLIED TO EACH CODE AND USED A GOOD FAITH EFFORT TO ENSURE THAT SHE WAS IN COMPLIANCE.

Enrollment Forms

Pursuant to Section 3.06 under the Franklin Admin. Code, a written application with the signatures of the enrolling parents shall be on file for each child. Here, Ms. Baker fully complied with this code. Despite her first notice of noncompliance, parents were given enrollment forms. Over time, the number of enrollment forms needed decreased from 37 incomplete forms to 5 incomplete forms. Also, some parents did not return the forms in a timely fashion and unfortunately for our client, she cannot force the return of these forms. She can only make a good faith effort to constantly request the forms from the parents. Therefore, Ms. Baker made good faith effort to not only retain the forms but she reduced the amount of empty forms tremendously. The court should take into consideration that she is in compliance with the code and by the time the injunction is lifted, the 5 incomplete forms should be returned to Ms. Baker.

Staff Qualifications

Pursuant to Section 3.12 under the Franklin Admin. Code, "each child care center shall subject all persons who work with children to criminal background checks and shall require them to authorize the background checks and to submit to fingerprinting. No person who has been convicted of a felony shall be employed at a child care center."

Staffing Ratio

Pursuant to Section 3.13 under the Franklin Admin. Code, Ms. Baker is in compliance

with this code. Since receiving the first notice, Ms. Baker has reduced the number of children to employees within a reasonable time. She no longer has a ration issue with her 3-year old classroom. The reason for the additional student in her 2-year-old classroom is because one of the students were leaving.

Meals and Nutrition

Pursuant to Section 3.37 under the Franklin Admin. Code, A child requiring a special diet due to allergic reactions shall be provided with meals and snacks according to the written instructions of the child's parents of legal guardian. There is nothing to show that Ms. Baker violated this rule because Child "A" was provided with everything he/she needed regarding meals and snacks. Although allergic to Milk, Child "A" was never exposed to the milk while in the custody of Ms. Baker. Therefore, she did not violate this code.

III. Conclusion

Therefore, the motion for preliminary injunction should be granted because Ms. Baker would likely would likely succeed on her merits, she would suffer irreparable harm, greater injury would result from refusing to grant the injunction, and the injunction would serve a public interest. Ms. Baker has made good-faith attempts to comply each requirement and numerous parents of the neighborhood support her and the child care center. Not only is the case law of this jurisdiction, but a court would likely rule in favor of Ms. Baker because of the persuasive case law cited within. If her license wold be revoked, the child care center would close and the effect on the surrounding neighborhood would suffer because the nearest center is 15 miles away. This is neither fair to our client nor the parents in the area. As such, the court should rule in favor of granting our motion for preliminary injunction.

MPT 1 – SAMPLE ANSWER 2

STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES,

Plaintiff, v. LITTLE TOTS CHILD CARE CENTER,

Defendant.

Defendant's Brief in support of Motion for Preliminary Injunction

Statement of the Case: [omitted]

Statement of the Facts: [omitted]

Argument:

The issue here is whether or not to allow Little Tots to continue to operate the child care center, although there are some issues regarding compliance with the standards of the Franklin Administrative Code regarding child care centers. Franklin courts allow preliminary injunctive relief in appropriate cases in order to preserve the status quo pending a decision on the merits. In order to be granted a preliminary injunction, the seeking party must meet a four factor test: (1) that the moving party is likely to succeed on the merits, (2) that the moving party will suffer irreparable harm if the injunction is not granted, (3) that the benefits of granting the injunction outweigh the possible hardships to the party opposing the injunction, and (4) that the issuance of a preliminary injunction serves the public interest. Here, we argue that Little Tots Child Care Center meets all of the requirements and therefore, preliminary injunctive relief is appropriate and should be granted in this matter.

Likelihood of Success on the Merits

First, as to the likelihood of success on the merits, the moving party need not meet the standard of proof required at trial on the merits but must raise a fair question regarding the existence of the claimed right and the relief he will be entitled to if successful at trial on the complaint for permanent relief. A party seeking preliminary relief need only demonstrate that his chances to succeed on at least one of his claims are better than negligible. Smith

v. Pratt (Fr. Ct. App. 2001). This standard requires only a showing that the movant's success on the claim for relief is better than a mere possibility.

Here, there is no dispute that Little Tots failed to keep their center up to the standards of the Franklin Child Care Act. The dispute, however, lies in determining whether or not Little Tots has taken substantial steps to remedy the noncompliance and whether they will be able to bring the center up to standards. Little Tots has submitted evidence showing that at each inspection, substantial efforts were made to bring the Center up to standard, there were only issues on account of technicalities of newly enrolled students and one statement of a busy teacher. The evidence presented by Little Tots and their efforts to comply with the Code are issues to be determined on the merits of the case. Hence, Little Tots Child Care Center and the owner, Ms. Baker, have shown a fair question regarding the rights of the center to remain open and the likelihood of receiving a remedy at trial.

Irreparable Harm

An alleged harm or injury is irreparable when the injured party cannot be adequately compensated by damages or when damages cannot be measured by any certain pecuniary standard. In other words, if the moving party, the Little Tots, can be compensated through damages for the wrong suffered, they would not have suffered an irreparable injury. The alleged harm here is the harm to Little Tots of not being able to continue to operate the child care center in a community that is underserved and where the need for the center is great. There is also the harm to the Center Operator, Ms. Ashley Baker of great financial hardship by way of losing the center's grant, default on business loans, and the great likelihood that the center would not be able to be reopened even after she was able to get the license reinstated. While the trial court could award damages to Ms. Baker after a trial on the merits to recover any pecuniary damages that she faced such as the loss of the grant, the business loan, and loss of income, there is no amount of

monetary damages could substitute for providing the community and the children the care that they so desperately need. Lang v. Lone Pine School District (Fr. Ct. App. 2016).

Balance of Benefits and Hardships

The court must weigh the benefits of granting the injunction against the possible hardships to the party opposing the injunction. Put another way, the court must determine whether greater injury would result from refusing to grant the relief sought than from granting it. There is a great likelihood that the Department will argue that by continuing to run a child care center that is not compliant with the Franklin Administrative Code, Chapter 34, there would be actual or potential harm to children.

We agree that the safety and care of the children is of the utmost importance in this matter, and that it is true that the standards were put in place to secure the best interests and safety of the children. However, the Department's Code currently provides that "if the operator of a child care center is in noncompliance with those standards deemed critical, the Director may, after notice, impose penalties including but not limited to a civil fine of at least $500 but not more than $10,000..." Franklin Child Care Center Act §3(f). Therefore, the Department currently allows for provisions that do not necessitate the revocation of the license of the operator. To permit the Little Tots Child Care Center to continue to operate during the interim until trial on the merits, the harm to the Department would not match the harm done to the children and families if the children are faced with no where to go. Although an incident involving a child being picked up by the wrong person, a child ingesting the wrong foods outside of their dietary restrictions, and having teachers with criminal backgrounds could cause substantial harm to the Department and to the children, in this instance the likelihood of that happening has diminished greatly since the first inspection. In fact, the likelihood of harm done to the children has decreased in each inspection. In weighing the harms cited by the District against those of Little Tot's, as well

as the community's loss of a child care center that meets the needs of the underserved, it is evident that the loss of care of the children and the service that is provided to this community is by and large a greater benefit than the lack of 5 completed forms, a child with a milk allergy who has not had any incidents, and one background check could bring harm. While we do agree that the standards need to be met, we also acknowledge that Ms. Baker has been working diligently to correct those noncompliant areas and has shown substantial progress in bringing the center up to code. The hardship in revoking the license of the Center, and therefore closing it to the community in which it sits and serves, would greatly outweigh the benefit in revoking the Center's license due to a few small noncompliant factors. In sum, the weighed hardships to benefits tip in favor of Little Tots and the families of this community.

Public Interest

Fourth, the court must consider whether issuance of the preliminary injunction serves the public interest.

Franklin Child Care Center Act §1 provides:

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

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

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

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

This criterion cuts both ways on the facts of this case. On the one hand, the Department correctly notes that its need to regulate the standards applied to child care centers because of the actual or potential harm to children serves the public interest. On the other hand, Little Tots also contends that the injunction will serve the statutory purposes of the laws protecting children and families by providing a safe, nurturing environment and providing a service to underserved and low-income families that can not be replaced. Additionally, the absence of such a program in this community will cause a domino effect in households where working parents are not able to attend work due to the lack of childcare. Many parents, including those that will testify in court proceedings, attest to the fact that they feel safe leaving their children in the care of Little Tots Child Care Center and that the Center provides a service, where the loss of that service would cause a detrimental effect on the community.

The Center also provides services to the State University Early Learning Center, as students observe the innovative program. This allows for the opportunity to create more centers that are subsidized and that will service those under served families in need of care for their children so that they can secure job, promote the economy, and properly care for their children. The trial court did not err in concluding that issuance of the injunction served the public interest.

In conclusion, the court should grant Little Tots Child Care Center a preliminary injunction effective until trial on the merits.

MPT 1 – SAMPLE ANSWER 3

A. The Court Should Issue a Preliminary Injunction to prevent the Franklin Department of Children and Families (FDCF) from revoking Ms. Baker's License to operate Little Tots

until a hearing on the merits because the balance of the facts favor maintaining the status quo.

Courts have noted that "[p]reliminary injunctive relief is an extraordinary remedy and is disfavored by the courts, but this relief may be granted in appropriate cases to preserve the status quo pending a decision on the merits." *Lang v. Lone Pine School*. In determining whether a preliminary injunction will be issued, the Court will apply a four factor test: (1) the moving party is likely to succeed on the merits, (2) the moving party will suffer irreparable harm if the injunction is not granted, (3) the benefits of granting the injunction outweigh the possible hardships to the party opposing the injunction, and (4) the issuance of a preliminary injunction serves the public interest. *Id.*

(1) Ms. Baker is likely to succeed on the merits because Ms. Baker can show revocation of her license would be improper.

The moving party need not meet the standard of proof required at trial on the merits but must raise a fair question regarding the existence of the claimed right and the relief he will be entitled to if successful at trial on the complaint for permanent relief. *Lang v. Lone Pine School*. A party seeking preliminary relief need only demonstrate that his chances to succeed on at least one of his claims are better than negligible. *Smith v. Pratt*. If the movant shows that his chance of succeeding on his claim for relief is better than a mere possibility, the court should grant the motion for preliminary relief. *Lang v. Lone Pine School*.

In *Lang v. Lone Pine School*, parents of Michael Lang, a child with a disability that requires an accommodation, moved for a preliminary injunction. The issue to be tried on the merits was the type of accommodation needed for Michael and whether a service animal is a proper or necessary accommodation. The Langs presented evidence that established the service animal may well be the sort of accommodation needed, and the

Court concluded that the Langs showed a fair question regarding the rights of their son and the likelihood of receiving a remedy at trial.

The question to be heard on the merits is whether the deficiencies of Ms. Baker were sufficient to warrant revoking her license. Here, Ms. Baker is having her license for Little Tots revoked by the FDCF under the Franklin Child Care Center Act (FCCA), Fr. Civil Code section 35.1 *et seq*. Ms. Baker was found to be in violation of several sections of the Code. Specifically, Ms. Baker was found to be in violation of the Enrollment Procedures, Staff Qualifications, Staffing, and Meals and Nutrition. *See Notice of Deficiencies*. Ms. Baker had her licensed revoked without an administrative hearing. *See id.* Accordingly, Ms. Baker has not had an opportunity to have her arguments heard on the merits. Further, Ms. Baker has been improving the operation of little tots with each deficiency and will likely be in full compliance in a couple weeks. Therefore, Ms. Baker is likely to succeed on the merits because Ms. baker can show a chance of succeeding on her claim because she substantially complies with the FCCA.

The FDCF may assert that Ms. Baker is unlikely to succeed on the merits because she was repeatedly found in violation of the critical standards. However, her deficiencies regarding the staffing were short by 1 child in each instance, which equates to approximately a 10% deficiency. Further, Ms. Baker has improved upon the enrollment procedures (by receiving enrollment forms from parents) and staff qualifications (by proceeding with background checks for all employees except for an old employee who is a hold over from the previous owner and a newly hired employee) through each deficiency. Additionally, the meals and nutrition violation asserted by the FDCF does not appear to violate the FCCA. The FCCA merely requires that a child requiring a special diet due to medical reasons shall be provided with meals and snacks according to the written instructions of the child's parents or legal guardians. *FCCA*, section 3.37. Here, the child was provided additional accommodations for their milk allergy, the child was 5 years old

and knew not to drink milk, and nothing in the statute says the child must have supervision while consuming food. Thus, Ms. Baker substantially meets all of the standards contrary to the assertions of the FDCF. Further, even if Ms. Baker is in violation of the FCCA, the FDCF should at most impose a fine rather than revoking her license.

(2) Ms. Baker will suffer irreparable harm if the injection is not granted because she will lose her only source of income, will lose a government grant, and will be unable to repay her business loans.

An alleged harm or injury is irreparable when the injured party cannot be adequately compensated by damages or when damages cannot be measured by any certain pecuniary standard. *Lang v. Lone Pine School*. The harm in *Lang* was Michael of continuing to attend school without an accommodation that may be most helpful to him. While the court could provide monetary remedies, no amount of monetary damages could substitute for providing Michael the education he needs.

Here, Ms. Baker will suffer irreparable harm because she will be without any income, will lose a government grant, and will have to find a way to repay her business loans. While these can be labeled as mostly monetary damages, the amount of time between the revocation of Ms. Baker's license and the final hearing of a court on the merits would cause Ms. Baker to become delinquent on her business loans, which may cause her to go into bankruptcy before the hearing on the merits. Accordingly, Ms. Baker will suffer irreparable harm if the child care center is closed.

(3) The benefits of granting the injunction for Ms. Baker outweigh the possible hardships to the FDCF opposing the injunction.

The court must determine whether greater injury would result from refusing to grant relief sought than from granting it. *Lang v. Lone Pine School*. In *Lang*, the court stated that the

court must determine whether greater injury would result from refusing to grant the relief sought than from granting it. In *Lang*, the court found that hardship favored the Langs even though the school district would be faced with hardship in accommodation Michael because the impact to Michael would be significantly greater.

Here, the hardship to Ms. Baker is great. As stated above, Ms. Baker would lose her sole source of income, she would lose her government grant, and she would be unable to repay her business loans. Thus, much like the Langs, the hardship to Ms. Baker is quite significant. In contrast, the FDCF would not suffer great loss. While there would be some minor hardship in having to continue monitoring the day care center, this would be in the normal routine of the FDCF. Thus, the hardship to FDCF is quite minimal in comparison to Ms. Baker. Accordingly, the benefits in granting the junction far outweigh the possible hardships to the FDCF.

(4) The issuance of a preliminary injunction serves the public interest because Little Tots provides assistance to low income Parents.

The Court must consider whether issuance of the preliminary injunction serves the public interest. *Lang v. Lone Pine School*.

In Lang, the court noted that the public policy cuts two ways, much like in this case. Specifically, the court in Lang found that the school district needs to conserve resources and ensure the well being of the children of the district. On the other hand, the court found that the Langs were correct that the injunction would serve the statutory purpose of the laws protecting disabled children.

Here, much link in *Lang*, a preliminary injunction would serve the statutory purpose of the FCCA. The legislative purpose of the Franklin Child Care Center Act is to ensure the safety and well being of children while providing safe and affordable child care to low income parents that, without these child care centers, could not be employed. *See FCCA*,

section 1. Further, the parents of Little Tots indicate that Little Tots is affordable and allows parents to work. Specifically, Jacob Robbins asserts that if Little Tots closes his wife will have to quit her job to take care of the kids because Little Tots is the only low-income child care center within 15 miles of their home. Further, the State University is sending students to observe the program in Little Tots so the state education of students will be impacted if the preliminary injunction is not issued. Accordingly, much like in *Lang*, issuing a preliminary injunction would support the statutory purpose of the FCCA, while also provide assistance to the public interest at large.

The FDCF may argue that denying the preliminary injunction would support the statutory purpose of protecting the children. However, the FDCF can continue to monitoring little

tots while the case proceeds so that the main purpose of protecting children under the FCCA is met. Thus, contrary to the FDCF's possible assertion, both purposes of the FCCA would be met by granting the preliminary injunction instead of denying it.

Conclusion

Accordingly, for at least the above reasons, Ms. Baker has shown that she is likely to succeed on the merits, that she will suffer irreparable harm, the benefits in granting the injunction outweigh the hardships, and the public interest supports issuing preliminary injunction. Therefore, Ms. Baker respectfully requests that the court grant her preliminary injunction.

MPT 2 – SAMPLE ANSWER 1

Memorandum

TO: Susan Daniels

FROM: Examinee

DATE: February 26, 2019

RE: Andrew Remick matter

This memorandum analyzes and evaluates whether our client, Andrew Remick, has a viable negligence claim against Larry Dunbar. Because all of the elements of negligence are likely established, Remick will likely be able to prevail on a negligence claim against Dunbar.

I. Duty

First, Remick must show that Dunbar owed Remick a duty, which is a legal obligation requiring the actor to conform to a certain standard of care. Weiss. An affirmative duty to act only exists if it is created by statute, contract, relationship, status, property interest, or some other special circumstance. Boxer. While the common law imposes no duty to act, where an act is voluntarily undertaken, the actor assumes the duty to use reasonable care. Boxer.

A. Restatement Section 42

An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if (a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or (b) the person to whom the services are rendered relies on the actor's exercising reasonable care in the undertaking. Section 42 Restatement. Reasonable care can be breached by either an act of commission (misfeasance) or by an act of omission (nonfeasance). Section 42 Restatement comment c. An "undertaking" requires an actor to voluntarily

rendering a service on behalf of another, where the actor knows that the undertaking serves to reduce the risk of harm to another, or of circumstances that would lead a reasonable person to the same conclusion. Section 42 Restatement comment g. Furthermore, Section 42 envisions the assistance of a private person to a person in need of aid. Weiss.

Here, Dunbar had a duty of reasonable care to Remick because he undertook to render services and knew or should have known that his assistance would reduce the risk of physical harm to Remick. Under Section 42(a), it is unclear whether Dunbar's failure to intervene as he did would have increased or decreased Remick's harm. Dunlap did not move Remick's car or put out any emergency lights. Remick Transcript. Instead, by pulling over to the shoulder, he closed of another means of moving the car from the road. However, under Section 42(b), Remick likely relied on Dunlap exercising reasonable care. Dunlap purported to be a mechanic, and was looking in the hood of the car. Dunlap who did not have much knowledge in these issues, likely relied on this expertise.

Therefore, under Restatement Section 42, Dunbar likely had a duty to Remick to exercise reasonable care.

B. Restatement Section 44

Even if an actor has no duty to do so, but takes charge of another who reasonably appears to be "imperiled" or "helpless or unable to protect himself or herself," the actor has a duty of care to exercise reasonable care while the other is within the actor's charge. Restatement Section 44. This duty is limited in scope and duration to the peril to which the other is exposed and requires that the actor voluntarily undertake a rescue and actually take charge of the other. Restatement Section 44 comment c. Furthermore, this rule is applicable whenever a rescuer takes charge of another who is imperiled and incapable of taking adequate care. Section 44 Restatement comment g. It is also applicable to one

who is rendered helpless by his or her conduct, the tortious or innocent conduct of others, or by a force of nature. Id. The rule requires that the rescuer "take charge" of the helpless individual with the intent of providing assistance in confronting the then-existing peril. Id. The major difference between Sections 42 and 44 is that Section 44 requires an individual to be an imperiled, helpless position. Thomas (finding that where an actor, without any duty to act, voluntarily takes charge of an intoxicated person who is attempting to drive, changes the other person's position for the worse). For example, in Weiss the court found that Section 44 could apply to a homeowner that hosted an individual that fell and hit her head, went home, and where the homeowner did not tell the husband that the injury was suffered. Weiss. The determination of whether an individual is "imperiled" or "helpless" is made in the context of each case. Thomas. The mere fact that a car is being repaired, or that an individual is distraught, do not render an individual helpless. Boxer. For example, where an ill passenger is attacked after being left in an unlocked, running vehicle at night, the driver can be held liable. Sargent. But an individual does not "take charge of" an individual just by driving him where both individuals decide to participate in the decision-making process. Boxer.

Here, Remick will also likely be able to show that Dunbar had a duty. Like Thomas, Remick was likely placed in a worse position by Dunbar's help. Remick was likely "imperiled" or "helpless" according to the statute because of his swollen ankle where he could not really move. He twisted his ankle by trying to move his car, which likely satisfies the statute because comment g states that it applies to one who is rendered helpless by his own conduct. Because Remick was likely imperiled and helpless, Dunlap likely had a duty to take charge of Remick and provide assistance. While Remick was not helpless just because his car was being repaired (like Boxer), the addition of his aggravating injury likely does count. This case is more like Sargent, because being ill like the plaintiff there is similar to Remick being injured here.

Therefore, a court would likely determine that Dunbar has a duty under Section 44.

II. Breach

Remick must also show breach of duty, or that the conduct was unreasonable in light of foreseeable risks of harm. Weiss.

Here, a court would likely find that Dunlap breached the duty to Remick. Dunlap had a duty to act reasonably under the circumstances. He held himself out to be a mechanic, and Remick likely relied on this expertise. Although Dunlap was no longer technically a mechanic, there is no evidence that Remick knew that, or that the standards of mechanics have changed. There were three possible alternatives here whereby Dunlap could have made the situation safer: he could have (i) moved the stalled car, (ii) set out emergency flares, or (iii) turned on the hazard lights on his truck. He did none of these, even though Remick specifically suggested emergency flares and pushing the car to the side of the road. This was all exacerbated by the fact that it was become dark (at dusk), that the car stalled just beyond a turn, and that it was rural and only a two-lane highway. Additionally, while Remick attempted to move his car or turn on the hazard lights himself, the car would not start and Remick became injured. Dunlap's nonfeasance (which qualifies under the statute) of not doing any of the things he could have done to act reasonably was likely a breach of his duty.

Therefore, a court would likely determine that Dunlap breached his duty of care.

III. Causation

Remick must also show causation. Weiss. To demonstrate causation, a plaintiff must show a "reasonably close causal connection between the actor's conduct and the resulting harm. Id. In Weiss, the court found that a defendant could be liable even though an

individual fell and hit her head, fell asleep, woke up, walked home, and went to sleep at home again. Weiss. And in Thomas, the court found that the defendant could be liable even though the golf course was the party that served the driver alcohol. Thomas.

Here, Dunbar, who claimed to be a mechanic offered to help Remick. Interview Transcript. Because it was getting dark, Remick told Dunbar he was worried about the fact that it was getting dark and that his care was still parked on the road. Id. Remick, due to his pain and swelling, was unable to do this himself. Dunbar told Remick not to worry about moving the car, and also not to worry about emergency flares. Id. Therefore, there were no warning signs that Dunbar could have rectified, and Gibson did not see the unlit car and collided with the car despite going under the speed limit. See Gibson's Statement to Police.

Therefore, because Dunbar had a duty to Remick and breached that duty (see supra), and the collision happened as a result of Dunbar's nonfeasance, a court would likely consider that Dunbar's nonfeasance caused the collision.

IV. Damages

Finally, Remick must demonstrate damages. Weiss. In order to demonstrate damages, a plaintiff must include at least one of the following: lost wages, pain and suffering, medical expenses, or property loss or damage. Fisher.

Here, the impact of the collision dislocated Remick's shoulder, broke his arm, and give him a minor concussion. Interview Transcript. An orthopedist thinks that he will probably need surgery to repair the damage to his shoulder, and his broken arm will need to heal for at least another three to four weeks. Id. This will also include physical therapy for several months to regain full function in his left arm and shoulder. This all demonstrates medical expenses. See Fisher. Additionally, Remick owns a small landscaping

business, and without the use of his shoulder and arm, he likely will be unable to work. This demonstrates the potential for lost wages. See Fisher. He also estimates it will cost him at least $4,500 to repair the damage to his car, which constitutes "property loss." See Fisher.

Therefore, Remick has likely demonstrated damages.

MPT 2 – SAMPLE ANSWER 2

To: Susan Daniels

From: Examinee

Date: February 26, 2019

Re: Andrew Remick Matter

You asked me to review whether our client, Andrew Remick, has a valid negligence claim against Larry Dunbar. As discussed below, Mr. Remick does have a valid negligence claim based on the "Good Samaritan" doctrine set forth in Sections 42 and 44 of the Restatement of Torts (the "Restatement"), which has been adopted by the Franklin courts.

In Franklin, in order to establish a claim for negligence the plaintiff must prove four elements: 1) duty - a legal obligation requiring the actor to conform to a certain standard of conduct; 2) breach of that duty - unreasonable conduct in light of foreseeable risks of harm; 3) causation - a reasonably close causal connection between the actor's conduct and the resulting harm; and 4) damages - including at least one of lost wages, pain and suffering, medical expenses or property loss or damage (*Fisher v. Brown*). In order for our claim against Mr. Dunbar to survive any motion for directed verdict that he may file, we must show that Mr. Remick's complaint properly states a cause of action when viewing the evidence and all reasonable inferences therefrom in the light most favorable to the

party against whom the verdict is directed (*Ellis v. Dowd*).

Below, I will discuss each of the elements of Mr. Remick's negligence claim in turn.

Duty

Dunbar by volunteering to assist Remick in fixing his vehicle assumed a duty under both Section 42 and Section 44 of the Restatement to protect Remick against unreasonable harm.

As noted above, a duty is a legal obligation requiring an actor to conform to a certain standard of conduct. A duty must be recognized by law and must obligate a defendant to conform to a particular standard of conduct in order to protect others against unreasonable harm (*Brown*). If there is no duty in a negligence action, the defendant is entitled to a directed verdict (*Ellis v. Dowd*).

Under common law there is no legal duty unless an act is voluntarily undertaken, in which case the actor assumes the duty to use reasonable care (*Ellis*). Sections 42 and 44 of the Restatement (otherwise know as the "Good Samaritan" doctrine) set forth the duty required of an actor when he or she, otherwise without any duty to do so, voluntarily takes charge of a person. Specifically, Section 42 of the Restatement states that an actor who undertakes to render services for another has a duty of reasonable care to the other for the purpose of reducing the risk of harm to another if the failure to exercise reasonable care increases the risk of harm beyond that which existed without the undertaking or the person to whom the services are rendered relies on the actor's exercising reasonable care. Section 42 applies even with respect to the assistance of a private person to a person in need of aid (*Weiss v. McCann*).

Here, Dunbar being a private citizen does not preclude him owing a duty to Remick. In *Weiss*, McCann hosted a party at his home with friends, including Weiss. Later in the

night, Weiss fell and hit her head after drinking and walked herself home the next day.

While McCann witnessed her injury and called her family the next day to check on her, McCann didn't mention the injury until it was too late and Weiss suffered brain damage. The court held that based on the plain language of the Restatement, it could not as a matter of law preclude application of Section 42 to a homeowner such as McCann. This principle should be even more applicable in this case as Dunbar was previously a trained mechanic who should be familiar with car safety principles.

Also in this case, Dunbar undertook to render services for Remick and Remick relied on him using reasonable care to perform those services. In *Thomas v. Baytown Golf Course*, two men played golf together and consumed alcohol after which Thomas appeared intoxicated causing a Baytown employee to take his keys. Parker then informed the employee said he would drive Thomas's car, but Parker later gave the keys to Thomas who crashed into a tree. In *Thomas*, the court found that Parker had a duty under Section 42 to use reasonable care by taking charge of Thomas for reasons of safety. Had Parker not told the employee he would get Thomas home safely, the employee may have taken steps to avoid the accident.

Here, as in *Thomas*, Dunbar took charge of Remick's safety by offering to help, grabbing his toolbox and trying to jump Remick's car. Dunbar also informed Remick he was a mechanic thus causing Remick to rely on his services and take his advice as to certain safety measures such as putting on flashers, setting up flares or moving the car to the shoulder. As in *Thomas*, had Dunbar not volunteered his expertise in this manner Remick could have taken steps to protect himself as he mentioned in his statement that he had flares in his trunk and had previously been attempting to move the car off the road. Dunbar therefore increased the risk of harm to Remick by discouraging from a place of authority to engage in basic safety measures. Thus, by volunteering to assist Remick and offering

his expert services, Dunbar had a duty to use reasonable care in rendering those services under Section 42 of the Restatement.

Dunbar also had a duty under Section 44 of the Restatement. Section 44 of the Restatement requires that an actor who takes charge of another who reasonably appears imperiled and helpless has a duty to exercise reasonable care while the other is within the actor's charge, which applies when the other person is imperiled and unable to adequately protect himself, including someone who is rendered helpless by his own conduct. A person is deemed to be helpless even through his own voluntary actions (Comment g. to Section 44 of the Restatement). Determination of whether an individual is "imperiled" or "helpless" must be made within the context of each case (*Thomas*). A defendant "takes charge" of another when, through affirmative action, he assumes an obligation or intends to render services for the plaintiff's benefit (*Thomas).*

In *Boxer v. Shaw,* Shaw drove Boxer around town when his car was being repaired for the pair to engage in various social activities. They later had an argument and Shaw pulled over on the highway letting Boxer out, after which time Boxer was hit and killed while later trying to cross the highway. The court found that the mere fact that a car was being repaired did not make Boxer helpless and that Shaw did not take charge of Boxer because there was no indication Shaw directed where the men should go or took any affirmative action intending to "take charge" of boxer.

Here, while Dunbar may argue that like in *Boxer* Remick's car needing repair did not make Remick helpless, Remick can argue that his sprained ankle made it such that he could not repair the car himself or move the car to the side of the road. This is true despite the fact that Remick's injury was caused by his own actions. In addition, Dunbar took charge of Remick by voluntarily rendering his services to jump Remick's car knowing that Remick was injured and could not assist himself. This case is similar to *Sargent v.*

Howard, in which a driver was held liable for injuries sustained by ill passenger who was attacked after being left in an unlocked, running vehicle at night. Remick was similarly helpless in that he could not move his car or jump his battery himself and Dunbar by volunteering his services assumed a duty to Remick to use reasonable care. Therefore, Dunbar will be found to have a duty to use reasonable care in rendering his services to Remick under both Section 42 and 44 of the Restatement.

Breach

As noted above, Dunbar had a duty to use reasonable care to render his services to Remick. A breach of that duty will be found when a party engages in unreasonable conduct in light of the foreseeable risks (*Brown*). Here, the foreseeable risks of leaving Remick's car in the lane of traffic at dusk on the other side of a curve instead of moving it to the shoulder or using some other signaling device such as flashers or flares is that the car will be hit by another motorist. Here, Remick had flares (and communicated this to Dunbar) and both cars had working flashers, therefore it was unreasonable for Dunbar to not take these minor steps to ensure their safety. The facts also show that the motorist that hit Remick was traveling under the speed limit and which proves even further that the risk of getting struck by another vehicle was foreseeable. Therefore, Dunbar will be found to have engaged in unreasonable conduct to avoid foreseeable risks and breached his duty of care.

Causation

In order to show that Dunbar's actions caused Remick's injuries there must be a reasonable close connection between his actions and the harm. Here, as noted above, Dunbar had the ability to engage in several safety measures that could have reduced the risk and by not doing so caused the harm. Dunbar may argue that because the motorist

was not speeding and hit the brakes immediately, putting flashers on or using flares would not have reduced the risk and thus he did not cause the harm. However, he should have at least attempted to move the car to the shoulder, especially after Remick suggested he do so, because of the increased risk of being around a curve at night. Therefore, by not engaging in this conduct there is a close connection between his actions and the accident.

Damages

Finally, Remick must prove he suffered damages, including at least one of lost wages, pain and suffering, medical expenses or property loss or damage. All can be shown here by Remick. By his own statement he suffered a broken arm, needs surgery to repair his shoulder, and has to undergo physical therapy. This is clear evidence that he suffered pain and suffering as a result of the accident. He also indicated that he owns a lawn care business and has not been able to work since the accident. He can thus pecuniary damages from his lost work. Finally, the accident caused $4,500 in damages in addition to the original broken alternator. All of these are provable damages that were caused by Dunbar's negligence and satisfy this element of Remick's claim.

MPT 2 – SAMPLE ANSWER 3

To: Susan Daniels

From: Examinee

Date: February 26, 2019

Re: Andrew Remick matter

Introduction

You have asked me for a memorandum analyzing and evaluating if our client, Andrew Remick, has a viable negligence claim against Larry Dunbar. To establish a viable cause of action in negligence, a plaintiff's complaint must allege the following four elements: (1) duty: a legal obligation requiring the actor to conform to a certain standard of conduct; (2) breach of duty: unreasonable conduct in light of foreseeable risks of harm; (3) causation: a reasonably close causal connection between the actor's conduct and the resulting harm; and (4) damages including at least one of the following: lost wages, pain and suffering, medical expenses, or property loss or damage. *Weiss* (citing *Fisher v. Brown* (Fr. Sup. Ct. 1998)). As set forth below, Remick can likely establish all four elements of a negligence claim against Dunbar.

(1) Duty

The common law "affirmative duty" or "Good Samaritan" doctrine set forth in Sections 42 and 44 of the Restatement (Third) of Torts has been adopted by Franklin Courts. *Weiss v. McCann* (Fr. Ct. App. 2015). You have asked me to analyze each of these sections to determine whether a duty exists under either, neither, or both.

A. Section 42

Under Section 42 of the Restatement, "an actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if: (a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking; or (b) the person to whom services are rendered . . . relies on the actor's exercising reasonable care in the undertaking." This provision "envisions the assistance of a private person . . . to a person in need of aid." *Weiss*. The touchstone,

therefore, of Section 42 is that the actor's actions increased the risk of harm or the victim relied on the actor. The comments to Section 42 provide that the duty is one of reasonable care, and it may be breached either by an act of commission or omission. An undertaking, according to the comments, entails an actor voluntarily rendering a service on behalf of another. The actor's knowledge that the undertaking serves to reduce the risk of harm to the another, or of circumstances that would lead a reasonable person to the same conclusion, is a prerequisite for an undertaking under this section.

The first issue here is whether Dunbar changed Remick's position for the worse. On the one hand, it is hard to see how Remick was in a worse position because of Dunbar's actions or omissions. Had Dunbar never come along, Gibson likely would have encountered Remick in an identical situation--in his car, in the middle of the lane, with no lights on. Remick could argue that he would have lit his flare lights had he been on his own, thereby preventing Gibson from hitting him, which happened primarily because it was dark and she couldn't see Remick's car until it was too late. On the other hand, Remick was alone for over 45 minutes before Dunbar showed up, and thus if he was going to light the flares, he should have done so in that time.

As for the second issue under Section 42, Remick relied on Dunbar to take reasonable care in assisting him. He told Dunbar about lighting th flare lights, and asked him multiple times to move his car to safety on the side of the road. Remick was unable to do these things because of his ankle. Ultimately, because Remick's position was likely not made worse because of Dunbar, there is likely no duty under subsection (a) of Section 42. But because Remick relied on Dunbar's exercising reasonable care in helping him, a duty under Section 42(b) probably exists.

B. Section 44

"The major difference between Section 42 and section 44 is the requirement of Section

44 that the person be in an imperiled, helpless position. *Thomas v. Baytown Golf Course* (Fr Ct App 2016). Specifically, under Section 44 of the Restatement of Torts, "an actor who, despite no duty to do so, takes charge of another who reasonably appears to be imperiled and helpless or unable to protect himself, has a duty to exercise reasonable care while the other is within the actor's charge." The comments further provide that Section 44 is limited to instances in which an actor takes steps to engage in a rescue by taking charge of another who is imperiled and unable to adequately protect himself. The duty is limited in scope and duration to the peril to which the other is exposed and requires that the actor voluntarily undertake a rescue and actually take charge of the other. "The determination of whether an individual is "imperiled" and "helpless" must be made within the context of each case." *Thomas v. Baytown Golf Course* (Fr Ct App 2016).

Here, although a twisted ankle might not render an individual "imperiled" and "helpless" in all situations, the injury rendered Remick unable to move his car out of the road. He also could not turn on his own hazard lights, as they would not work, and he couldn't call anyone for help, because his cell phone couldn't get a signal. He was essentially immobilized in his broken down car in the middle of the road, unable to do anything about it because of his injury and the condition of the car. It is likely that Remick was therefore "imperiled and helpless." In addition, Dunbar clearly "through affirmative action, assumed an obligation or intended to render services" for Remick's benefit. *See Thomas*, *Sargent v. Howard*. Dunbar opened the hood of Remick's car and began working on it. He stated that he would be happy to work on the car, and to provide a jump start, as he had experience from being a car mechanic. Accordingly, Dunbar owed Remick a duty under Section 44 of the Restatement.

(2) <u>Breach</u>

Dunbar may have breached the duty of reasonable care in several ways. A breach

requires unreasonable conduct in light of foreseeable risks of harm. *Weiss*. In this situation, a reasonable person in Dunbar's shoes arguably should have pushed the car to the side of the road (especially because Remick asked him to), where it would have been safe from oncoming cars. This is especially so because it was dark outside and Remick's car was located just beyond a bend in the road. Given these facts, a reasonable person also likely would have lit the emergency and/or turned on his own hazard lights, given that Remick's hazard lights were broken. These were likely breaches of the duty of reasonable care. And the harm that the breaches caused were certainly foreseeable: a car crashed into Remick's car, because the driver could not see Remick's car in the middle of the road in the dark with the short notice because of the bend. Accordingly, Remick can likely establish breach.

(3) <u>Causation</u>

Dunbar's conduct will also likely be found to have caused Remick's injuries. Causation required a reasonably close causal connection between the actor's conduct and the resulting harm. *Weiss*. Conduct includes both commissions and omissions. See Comments to Restatement Section 42, 44. The conduct here was failing to move Remick's car to the side of the road, failing to light the emergency flares, and failing to put on his own hazard lights. These omissions are "causally connected" to Remick's injuries, which were sustained when Gibson crashed into the back of his car, even though she "immediately" breaked when she saw the vehicle. The causal connection is made apparent by the evidence that Gibson was driving *below* the speed limit, yet still crashed into Remick because she couldn't see the car. And she couldn't see in large part because it was dark, and there was a bend. The lack of lights (emergency flares and/or hazards) and position of Remick's car in the middle of the road there is causally--and closely--connected to Remick's injuries, and causation is satisfied.

(4) <u>Damages</u>

Remick easily satisfied the showing for damages. Actionable damages include at least one of the following: lost wages, pain and suffering, medical expenses, or property loss or damage. *Weiss* (citing *Fisher v. Brown* (Fr. Sup. Ct. 1998)). Here, Remick suffered a dislocated shoulder, he broke his arm, and suffered a minor concussion. HE will likely need surgery to repair the damage to his shoulder, and his broken arm will need at least 3 to 4 more weeks to heal. He will also have to undergo physical therapy to regain full function in the left arm and shoulder. These are all items of medical expenses that could be recoverable. He is also likely to suffer lost wages, as he works in landscaping, and will be unable to work in the short term--and potentially in the long term depending on his recovery--because of the injury. Property damage would also be recovarable. Here, the car suffered damages of $4,500.

ESSAY 1 - SAMPLE ANSWER 1

1. The property venues for this suit are Middle County or South County, but not North County. Under Georgia law, venue is proper where a substantial portion of the act or omission giving rise to the claim occurred or where substantial performance of a contract is to occur, where a defendant resides, or if none of those are applicable, in a venue that can properly exercise personal jurisdiction over the defendant. Here, the facts state that the tort involving personal injury inflicted on Philip for which the basis of the complaint is formed occurred in Middle County, and as such, venue is proper in Middle County. Further, South County is where ABC Corporation's registered agent for service is located, thus making South County a proper venue for this suit. For venue, where a corporation's registered agent is located is the proper venue for a suit. Also, if a suit is filed in a county where a company is authorized to transact business and holds an office, the venue is proper. However, if the suit is filed in a county where the company does not have an office,

the company has 45 days from notice of suit to file for removal to a proper venue.

North County is not a proper venue for this suit, as North County would only be relevant when determining ABC's Corporation's citizenship in a potential diversity case. Citizenship for diversity issues and venue are often confused- a corporation is a citizen of each state is is incorporated and where it holds its principal place of business (which is usually where high level executives, the headquarters, etc. are located). For venue purposes, corporations reside in the county its registered agent is located. Here, ABC Corporation's agent is located in South County, but its principal place of business is located in North County. As only venue is in question, North County is not proper.

East County is also an improper venue for this suit. Although Philip is an East County resident, venue is proper in any county where a defendant resides if the defendant is a citizen of Georgia. ABC Corporation is a citizen of Georgia, as it is incorporated in Georgia and likely authorized to transact business in Georgia. Therefore, venue is proper where ABC Corporation resides (which is South County), or where the act/omission giving rise to the claim occurred, not where Philip resides.

2. ABC Corporation has a few grounds to file a motion to dismiss.

a. Outside the Statute of Limitations

First, the tort involving personal injury inflicted on Philip for which he alleges ABC Corporation is responsible occurred on January 10, 2017. In Georgia, the statute of limitations for personal injury/tort claims is typically two years. Philip did not file his complaint with the East County Superior Court until January 14, 2019, outside of the two year statute of limitations. Without any additional facts, the court will likely rule in favor of ABC Corporation, as the statute of limitations has run, and Philip can no longer file suit. However, if the statute of limitations was tolled for some reason, the statute of limitations will not have run, and the court will likely find in Philip's favor. The statute of limitations

begins to run when the plaintiff has knowledge/should have reason to know of the injury. It will be tolled for a few situations, one of which being incapacity. It is unclear what the actual tort is that Philip alleges ABC Corporation committed, but if it rendered Philip incapacitated (ex. his car was hit by one of ABC Corporation's employees and he was in a coma for two months), the statute of limitations is tolled until Philip gains capacity. Further, if Philip is committed/determined to be mentally incompetent, the statute of limitations is tolled until he is again competent. The facts do not state that this occurred however, so therefore the court is likely to rule in ABC Corporation's favor.

b. Improper Service

Service of process is sufficient when a copy of the complaint and a summons (together, called "process") is served on the defendant. Service can either be by personal service (which in GA includes: someone over 18 and appointed by the court or a sheriff/deputy personally serving defendant; service on someone of adequate age at defendant's usual abode, or on defendant's registered agent), or mailed/substituted service. For substituted service, the plaintiff must mail service to the defendant, with a form requesting defendant essentially waive service. If defendant fails to waive service, he may be required to pay for any fees the plaintiff may incur as a result of attempting to service defendant personally if it is determined there was no reason for the denial of waiver of process. Service of process must be made timely, usually within five days of filing the complaint. Here, it seems that Philip served process through substituted service, however, he did not do so until one week after filing his complaint. If it can be shown that Philip took good faith efforts to attempt service (maybe he attempted personal service but was unable to locate ABC Corporation's address, etc.), the court may allow the delayed service. It also is unclear if Philip also included the waiver of service form with service of process. The court will likely find in favor of ABC Corporation due to improper service.

c. Insufficient Service

As stated above, service of process includes a copy of both the complaint and a summons. Here, the facts state that Philip did not include the summons with service. It is also unclear from the facts if he included the waiver of service form. As such, the court will likely find in favor of ABC Corporation for insufficient service.

d. Improper Venue

The facts state that Philip filed in the Superior Court of East County, where he is a resident. As discussed above, Philip filed this suit in the Superior Court of East County, where he resides. This is an improper venue, which the court will likely agree with. However, the court will not grant a motion to dismiss because of improper venue if a proper venue in Georgia exists- the court will likely order the suit to be transferred to a more proper venue (either Middle or South County), rather than dismiss. In the interest of justice, the court will not dismiss for improper venue unless the proper venue lies outside of Georgia (either another state or internationally, which would invoke forum non conveniens). Here, the proper venue options are within the state of Georgia, so the court will not grant a motion to dismiss for improper venue, and will transfer the suit to either Middle or South County.

3. Philip could file an entry of default judgment against ABC Corporation. In Georgia, if a defendant fails to file an answer/motion within thirty days of receipt of service, an automatic default is entered against the defendant. If the defendant waives service of process, he will receive sixty days to file an initial response. Within fifteen days of entry of default, defendant can file to open the default, and only be liable for costs associated with the default. However, if defendant does not file to open, plaintiff can file for an entry of default to be entered against defendant. The clerk of court can enter such default if damages are liquidated/determined. If the damages are unliquidated or speculative, the

court will hold a hearing for damages to be determined.

Here, ABC Corporation filed its initial response thirty two days after receiving the complaint. The facts also do not state whether ABC Corporation returned a waiver of service form, so ABC Corporation had thirty days from January 21, 2019 to file an initial response. Therefore, ABC Corporation did not file a timely response, and was subject to an automatic default. Unless ABC Corporation files to open the default, the clerk of court could enter the default and grant Philip his nonspeculative damages (such as his medical bills), or the court might hold a hearing to determine what damages Philip is due (lost wages, pain and suffering, etc.).

ESSAY 1 – SAMPLE ANSWER 2

1. Venue is proper in either South (registered agent) or North County (principal place of business).

The issue here is the proper county in which a tort claim against a corporation may be filed. As a general rule in Georgia, venue is proper in the county in which the defendant resides. There are exceptions and different considerations where there are certain types of claims involved or where there is more than one defendant to the claim.

In this instance, the only defendant is ABC Corporation. A corporation may be sued in the county in which its registered agent is located, as identified in its filings with the Secretary of State. That county is South County. Philip may also be able to obtain proper venue where the corporation's principal place of business is located. While Georgia venue laws do allow a corporation to be sued in the county where the cause of action arose if the corporation has a business and agent there. However, the facts do not state such. Under these considerations, South or North would be proper venues.

2. ABC Corporation can file Motions to Dismiss based upon the relevant statute of limitations and based upon improper service of process. However, the service of process defense will fail because it has effectively been waived by the corporation.

The relevant issues here are what defenses ABC Corporation has available based upon the facts stated and whether a Motion to Dismiss on such grounds would be untimely now that the company has already filed its answer.

ABC Corporation has a viable defense on the grounds that the suit is barred by the two-year statute limitations. This defense should be successful, assuming that there was not a holiday and weekend around the 10th and 14th. A claim's relevant statute of limitations serves as an absolute bar to the suit. Thus, if a plaintiff does not bring his or her claim within the specified statutory period, she will be absolutely barred from asserting it after such time. In this instance, the claim is one that lies in tort, personal injury. In Georgia, personal injury torts have a 2-year statute of limitations, which begins to run at the time of the alleged negligent act/omission. The accident that gives rise to this claim occurred on January 10, 2017. Therefore, Philip had two years to bring this claim- until January 14, 2019. He did not do so. While courts do extend the statute of limitations period where the deadline falls on a weekend or holiday (for example, if January 10th as a Sunday and the claim was filed on the 11th), this should not be the case here because the claim was not brought until the 14th- 4 days after the statute of limitations had run. However, the facts do not state some facts that may be relevant for purposes of tolling. For instance, if Philip was a minor, then the claim may not be barred due to tolling. However, the facts do not suggest that, so we should assume that this defense will succeed.

Additionally, Philip's service of process was inadequate under Georgia law; however, ABC will not prevail on this defense due to waiver.

Georgia law allows for various forms of service, including personal service, abode service, service on a registered agent, waiver, or service by the Secretary of State in some instances. Because ABC is a corporation with a registered agent, service should have been effected on its registered agent in South County. This was not done. In fact, certified mail, return receipt requested is not a recognized form of proper service in Georgia. Moreover, the attempted service did not contain a copy of the summons attached to the complaint, as is necessary.

Unfortunately, this Motion to Dismiss by ABC will be likely denied due to waiver. Waiver of service of process can be achieved by mailing a waiver request along with a waiver form and copy of the summons and complaint to the defendant. The defendant then has the choice to either waive service or not, but will have to pay the costs if he chooses not to waive. Waiver also occurs were a party does not timely raise the defense of improper service. Improper service is a waivable defense which must be raised in the first responsive pleading of the party. Because ABC has already filed its answer, it has effectively waived this argument.

3. Philip can raise a Motion to Dismiss based upon the improper answer by ABC Corporation on the grounds that it was an answer by a corporation without representation by a licensed attorney, and because it was untimely (filed more than 30 days from receipt of the complaint) Philip should file a motion to enter default judgment after waiting the appropriate amount of time.

A party's responsive pleadings must be filed and signed by a licensed attorney. Notably, individuals are allowed to represent themselves pro se, but that is not true for a corporation. Therefore, a corporation must be represented. By signing the answer, ABC's non-attorney President essentially violated the law by essentially engaging in legal practice without a license. Furthermore, the lack of attorney certification on the answer is invalid.

Additionally, the Answer likely was not timely. While Federal law requires answers to be filed within 21 days of receipt of service, Georgia procedure allows for the answer to be filed within 30 days. After the 30 day period, the case is said to be in default. However, the defendant has 15 days after default to move to have the matter removed from default as a matter of right, so long as the defendant pays the proper fees. After this 15 day grace period, the plaintiff may move to have default judgment entered. The appropriate means entering a default judgment- by which the defendant is deemed to have admitted liability- depends on whether the party has responded or appeared in the matter or not. Where default is entered and reasonable damages are specified, those should be awarded. Where no damages are specified in the complaint, the court will conduct a hearing solely on the issue of damages since liability has already been established.

ESSAY 1 – SAMPLE ANSWER 3

1. Normally, venue is appropriate in the county where any defendant resides. However, if the defendant is a non-resident, venue is appropriate where the cause of action arose. Against a corporation in a tort action, venue is appropriate where the cause of action arose (in a contract action, it is where the contract was supposed to be performed) or where the principal place of business or registered agent is located. If venue is based on these grounds, within 45 days from receiving service, the corporation may move to have venue transferred to where it keeps its principal place of business.

In this case, venue would have been appropriate in Middle Georgia because that is where the cause of action arose. It could also be brought in North and South County, as that is where ABC's principal place of business and registered agent are located. ABC could have moved to have the case transferred to North Georgia, where its principle place of business is located. Moving to transfer venue on these grounds is not barred by failing

to raise at the earliest possible time.

2. ABC may file a motion to dismiss on venue, lack of service of process, insufficient process, and failure to state a claim. With the exception of failure to state a claim, all of ABC's defenses will be rejected.

Service of Process

To properly serve process, the plaintiff must personally serve the complaint and summons attached to the corporation's registered agent or officers. If the agent cannot be served, the plaintiff may serve process on the secretary of state by filing an affidavit that states he has attempted service and it does not appear the corporation maintains a registered agent in Georgia. He must then send service by certified mail to other known entities who represent the corporation outside the state of Georgia. Service of process must be effected within five days after receiving the summons, or in a reasonably prompt manner or the case will not be considered commenced for statute of limitations purposes.

In this case, ABC is not a foreign entity so using alternative service would not be appropriate. Outside of alternative service, serving by certified mail is not appropriate unless you are attempting to get the other party to waive service (which ABC would be required to do but it is not what P sought). Although service was made on ABC Corporation, it was by certified mail. Additionally, it did not get to ABC within five days so the SOL would not be tolled. Accordingly, service by certified mail was ineffective. This defense is waived (see waiver below).

Insufficient Process

The process served must include a copy of the complaint and summons. In this case, service was only made with a copy of the complaint, summons was not attached. This is

ineffective process. The court will not grant this defense. (See wavier below)

Waiver of Defenses

To raise any pretrial defense except failure to state a claim and lack of subject matter jurisdiction, the party must raise the defense at the earliest opportunity. Failure to do so waives these defenses. Accordingly, because ABC filed its answer, it waived defenses based on venue, service of process, and insufficient process.

Failure to State a Claim

Unlike the other defenses, failure to state a claim is not waived. A complaint must state a short plain statement showing a right to relief. An action based on personal injury is barred by the statute of limitations if it is not brought within two years from the action. In this case, P was injured on January 10, 2017, and he did not file his complaint until January 14, 2019. He did not perfect service within the five days after filing the complaint but even if he made reasonably prompt efforts to serve process, his claim is barred by the statute of limitations. Accordingly, the court will grant a motion to dismiss based on failure to state a claim.

3. P may file a motion to strike A's answer. First, an answer must be filed within thirty days from receiving service of process. Additionally, a corporation cannot represent itself pro se. In this case, the answer was filed more than 30 days after the deadline for filing an answer had run. However, given that service was deficient, the court may extend the time to file an answer. However, because the corporation does not have the ability to represent itself, President's answer may be insufficient.

When a party fails to file an answer within thirty days, the clerk automatically enters default. The party then has 15 days to open its default by paying costs, after that time, the

opposing party can move for entry of default judgment. After the 15 day deadline, the party can only open the default by filing an affidavit providing (a) a meritorious defense, (b) paying costs, & (c) offering to plead instanter. In this case, since ABC failed to file its answer within the thirty day deadline, it was in default when it filed its answer. The court may construe the answer as a motion to open default, but ABC has not provided costs.

ESSAY 2 – SAMPLE ANSWER 1

1. Larry did not correctly designate the names on the two accounts when he created his law firm bank accounts with Atlanta Bank on January 1, 2019. According to the Georgia Rules of Professional Conduct (RPC), attorneys are to keep client and attorney funds separate, and hold client funds in a client designated interest bearing account in the state of Georgia, or the state the attorney's office is located. Here, although Larry did open two separate accounts, he did not name the accounts properly. Larry did not specify with the bank which account was for client funds, which could have been done simply by adding "Client Account" to the end of the account name. Further, Larry did not give the bank any direction regarding to whom the interest on the trust account should be remitted, so it is possible he did not even tell the bank that one account was meant for client funds. As such, the likelihood of confusion and commingling of assets is high, and Larry likely violated the RPC.

2. Per the RPC, interest on client accounts are to be distributed to the clients, or allocated to state Interest on Lawyer Trust Account (IOLTA) account. This IOLTA account helps fund legal services for indigent clients and those unable to access legal aid because of financial constraints. Larry should have instructed Atlanta Bank that the payment of interest on the law firm's trust account was to be paid to his other account in order to be properly distributed to the IOLTA, or to be paid to the client account (as it was).

3. Fees and expenses are not due to an attorney until earned. As such, an attorney cannot

deposit fees for their work until they have actually completed the work. Here, Larry deposited $5,000 of Calvin's retainer directly to the firm account, with the remaining $10,000 being deposited to the client account. This was a clear violation of the RPC. At the point in time that Larry deposited the $5,000, he had performed little to no work for Calvin. It seems that Larry and Calvin had only had an introductory meeting and agreed to the fee agreement, with Larry completing no actual work on Calvin's behalf. Larry therefore had not earned any of the money he deposited into the firm account, and the full $15,000 should have been directly deposited into the client account. Larry could then deduct fees and expenses actually incurred as they were earned/incurred, as agreed to in the fee agreement.

4.a fee agreement should include how expenses will be calculated, how fees will be calculated and billed, if any contingency fees will be collected (contingency fees are fees collected only if the attorney prevails- these fees are not allowed in criminal cases or domestic cases. However, contingency fees for enforcing domestic cases [i.e. enforcing collecting alimony or a divorce judgment] are allowed under the RPC), and the attorney must advise the client to review the agreement and seek independent counsel. Fees must be reasonable, based on the skill involved, the attorney's experience and knowledge, difficulty of the matter, and the local market. Summary statements, itemized or not, are not required by the RPC to be sent to the client unless the client requests so. However, most attorneys do so as a matter of good business practice. Here, Larry did not violate any RPC rules by sending Calvin a non-itemized, summary statement on January 31, 2019. The fact that Larry had not actually earned the amount he billed Calvin for is discussed above (as the facts state Larry anticipated working at least 20 hours on Calvin's case during January, but the facts do not state the amount of hours Larry actually worked on Calvin's case).

Further, Calvin and Larry agreed that Larry would charge $250/hour for his services, and that Larry would submit an itemized statement to Calvin at the end of each month for services rendered, plus expenses incurred, also with a $15,000 retainer from which Larry would draw upon for payment of monthly expenses/fees. This fee agreement seems reasonable, and no other fees or financial terms were incorporated. The facts do not state whether Calvin sough the advice of independent counsel regarding the fee agreement, but he signed it and gave Larry the $15,000 retainer check. Larry violated this fee agreement by failing to provide Calvin with an itemized statement for services rendered. Larry provided a statement, but merely listed "professional services rendered" as the reason for charging Calvin $5,000. Larry should have provided a statement listing how many hours he spent on Calvin's divorce case and what he did for each of those hours (Larry could have kept it simple, with writing "responded to client inquiry re: deed to house- .25 hours", or "discussed possible settlement with Wife's attorney- 1.5 hours"). Larry's barebones summary statement listing the $5,000 charge does not adhere to the fee agreement between Larry and Calvin, and as such Larry violated the terms of the engagement letter with Calvin.

5.

a. Larry was not authorized under the terms of the engagement letter to charge Calvin the additional 15% fee resulting from the $500,000 divorce settlement between Calvin and his wife. The engagement letter did not mention any fee owed to Larry pursuant to any settlement, and as such, Larry was not authorized to charge such a fee. Also, as discussed above, even if it was authorized by the fee agreement, contingency fees cannot be charged in domestic cases, so the fee agreement would be held invalid.

b. If a client and attorney have a dispute as to client's property in the attorney's possession, the property must be held in a separate client account until the dispute is

resolved. The attorney also has a duty to promptly deliver all client assets to the client at the conclusion of the representation. Larry is not authorized under the RPC to pay himself the additional fee directly from his trust account over Calvin's objections. Here, the representation has concluded, with a settlement being reached by Calvin and his wife. Larry has received the $500,000 settlement money and the quitclaim deed to the marital residence from Calvin's wife and her attorney. As such, Larry has a duty to promptly deliver the settlement money and deed to Calvin. However, Larry and Calvin have a dispute as to Larry charging Calvin a 15% fee/$75,000 on the divorce settlement money. Even though this charge/fee is improper, Larry believes he is entitled to the $75,000. Larry should distribute the deed to the marital residence and $425,000 out of the $500,000 to Calvin, and keep the disputed $75,000 in the client account, not his own account, until a court determines the proper distribution of the funds and settles the dispute. Larry should not pay the $75,000 to his account out of the trust account, as this is a violation of the RPC.

ESSAY 3 – SAMPLE ANSWER 1

1.

The State may bring several criminal charges against Bob, discussed individually below.

First, the State may charge Bob with conspiracy. A defendant is guilty of a conspiracy when two or more individuals create a plan to commit a criminal offense. In order for the conspiracy to be completed, an overt act must be taken in furtherance of the conspiracy -- mere thoughts are not enough to constitute criminal liability for conspiracy. Should a conspiracy to commit a particular crime come to fruition, the conspiracy charge merges into the completed offense in the state of Georgia.

Here, Bob can be charged with a conspiracy to commit burglary. A conspiracy was completed when Bob, Willie, and Rocco made plans and began to act on plans (through packing a backpack and heading to the warehouse) to steal copper wire from the warehouse at which Willie worked. While the elements of conspiracy are clearly met, Bob will assert the defense that the conspiracy charge should merge into the completed offense of burglary.

Second, the State may charge Bob with burglary. The elements of burglary are entering or remaining in a dwelling or commercial building with the intent to commit a felony or theft therein. A burglary may take place at any time of the day; Georgia eliminated the requirement that a burglary occur at night. In addition, a burglary no longer requires a breaking in Georgia.

Here, Bob and Rocco broke open a locked door and began loading spools of wire from inside the warehouse into Bob's truck. By doing so, Bob entered the warehouse without authority with the intent to commit a theft therein. The elements of burglary are clearly met, and Bob does not appear to have any defenses to such charge.

Third, Bob may be charged with theft. Theft requires the taking of property with an intent to permanently deprive the rightful owner of such property of the property.

Bob committed theft when unspooling the copper wire into his truck with Rocco. His intent to deprive the warehouse of the copper wire appears evident. However, Bob will argue the defense that the theft charge should be dismissed because it is a lesser included offense of burglary. Because one of the elements of burglary is intent to commit theft, Bob will argue that the theft charge should be dismissed.

Fourth, Bob may be charged with first degree murder. To sustain a charge for murder, the State must prove the unlawful taking of the life of another person with intent or while during

the commission of a felony. Intent may be met by the specific, premeditated intent to kill or by malice, which includes a reckless disregard for human life. When charging a defendant with felony murder, a defendant is liable for the death of any person proximately killed in the commission of a felony, whether that party was a party to the crime or not. The death must be a foreseeable one that could happen during the felony.

Here, Bob undoubtedly killed Rocco by slashing him with a sharp metal pole, which caused Rocco to die of a loss of bled, per an autopsy. The state may charge that such act was committed with reckless disregard for human life. Alternatively, the State could charge that the death was a proximately caused during the commission of a felony (burglary). The state will argue that it is foreseeable that violence and extreme danger can take place during the commission of a burglary, and thus the felony murder rule should apply.

Bob may offer three defenses.

First, Bob may argue that he did not intend to kill Rocco and did not know that he suffered from hemophilia. Bob will argue that but for the hemophilia, Rocco would not have died, and that Bob did not actually intend to kill Rocco. However, Bob's lack of knowledge of Rocco's hemophilia is immaterial, as a criminal defendant must take a victim as they find them. In addition, Bob's conduct of swinging a sharp metal pole at Rocco would likely be found to be in reckless disregard of human life, which meets the malice requirement of murder.

Second, Bob will likely argue the defense of self defense. Self defense may be successfully argued if a defendant acts with lethal force when in reasonable fear that they will face death or serious bodily injury. Georgia does not require that a defendant retreat when faced with deadly force; instead, a Georgia defendant has the legal right to "stand their ground."

Bob will argue that he acted in reasonable self defense when Rocco began swinging a metal pole and cursing at him. Even though Rocco may have been subjectively joking, his actions appeared angry, and the act of swinging a metal pole could cause death or serious bodily injury. In addition, Bob was in the midst of completing a criminal conspiracy which had already created friction with one party to the conspiracy (Willie) and could have reasonably felt that Rocco was attacking him for a larger split of the loot. Finally, Bob will argue that he swung and struck Rocco before Rocco was able to finish his sentence, "Hey, man -- I was just messing with you," such that a reasonable person would not yet realize that Rocco was joking. On the other hand, before Bob struck Rocco, Rocco dropped his pole and put his hands in the air. Upon doing so, it was very likely unreasonable that Bob still could believe himself to be under threat of death or serious bodily injury. When Rocco dropped the pole and put his hands in the air, Bob lost his legal justification of self defense in using lethal force against Rocco.

Finally, Bob will argue that Rocco's death was unforeseeable and thus the felony murder rule should not apply.

In addition, Bob can be charged with evading law enforcement after commission of the above crimes, because he knowingly evaded arrest and prosecution for these offenses by hiding in Willie's basement.

2.

Willie could be charged as a party to the crimes that were a foreseeable result of the conspiracy as well as a party to the crime of murder for harboring Bob after Bob committed murder.

In Georgia, a defendant may be charged with crimes committed by a principle if they are "concerned in the commission" of such crimes. To be concerned in the commission of a crime is to aid or encourage a principle in the commission of a crime. A party concerned in the commission of a crime can be charged with the crime itself. It is also a criminal offense to harbor a felon, and it is a criminal offense to prevent apprehension of an individual suspected of murder. In addition, parties to a conspiracy are criminally liable for all crimes committed in furtherance of the conspiracy that were foreseeable, even if they withdraw from the conspiracy.

First, Willie could be charged with the completed burglary because he conspired to commit such burglary with Bob. Though Willie will submit defenses concerning his leaving the conspiracy (discussed below), the burglary was a foreseeable result of plans Willie participated in.

Second, by harboring Bob in his home knowing that Bob had killed Rocco, Willie became concerned in the commission of the crimes Bob committed. Willie aided Bob not only by hosting him in his basement after being told about the completed burglary and Rocco's death, but also by falsely telling police that Bob was at his mother's house when Bob was actually hiding in Willie's basement. By becoming concerned in the commission of the murder and burglary by hiding Bob after the fact, Willie could be charged as a party to murder.

3.

Willie may assert the defense of abandoning the conspiracy.

In Georgia, in order to effectively abandon a conspiracy, a party must unequivocally communicate to the other parties that they are exiting the conspiracy. The party abandoning the conspiracy may still face liability even after communicating their desire to

exit the conspiracy if they do not take steps to prevent the accomplishment of the object of the conspiracy.

Here, Willie will argue that he should not be charged with the burglary because he told Bob and Rocco "I'm out." Further, Willie took his backpack of tools that were going to be used in the burglary with him. Willie will likely argue that this unequivocal communication coupled with the act of taking tools that they parties planned to use in commission of the crime are adequate to defend himself from liability for the burglary. However, Willie did not effectively stop Bob and Rocco from committing the burglary, nor did it appear he took any serious steps to prevent them from doing so. Willie did not call law enforcement or otherwise prevent Bob and Rocco from burglarizing the warehouse. As such, his defense is likely to fail.

Further, if Willie is charged with murder, he will argue that Bob's actions were unforeseeable. He will argue that at the time he abandoned the burglary, death of another was an unforeseeable result given that the burglary was to take place at night without others present. However, Willie would still be a party to this offense because of his actions to hide and protect Bob from law enforcement after Rocco's death.

ESSAY 3 – SAMPLE ANSWER 2

1. Bob may be charged, and assert defenses, as discussed below:

Conspiracy: Conspiracy requires that an individual enter into an agreement and plan with at least one other person to commit a crime, with the intent that the crime actually be committed, and that at least one of the individuals involved takes some step taken in furtherance of the crime. The step taken in furtherance of the crime need not be a significant one, and may be performed by any individual involved in the conspiracy. Here,

there were three individuals who entered into an agreement to steal copper wire from the warehouse: Bob, Willie and Rocco. The individuals entered into the agreement to steal the copper wire evidenced by the fact that the three men formulated a plan to steal the wire. Multiple steps were taken in furtherance of the crime with the first likely being when Bob drove his truck to pick up the others to go to the warehouse which occurred either before or concurrently to Willie packing up the tools in order to commit the crime. Either of these would be sufficient. Bob has no defense to a charge of conspiracy because the only potential defense to voluntary withdrawal which was certainly not done here since he was involved in the break in, he and Rocco loaded spools of wire into his truck, and presumably the wires were still loaded when he drove off. Though he can be charged, conspiracy merges into the ultimate crime in Georgia so he would not be convicted of both conspiracy and the intended crime.

Theft by Stealing: Theft by stealing requires that an individual take and carry away the possession of another with the intent to deprive the person of such property (theft by stealing is similar to "larceny" under common law statutes). In this case, Bob took possession of the copper wire, with the intent to deprive the warehouse owner of the copper wire permanently, and carried away the copper wire in his truck. Bob does not have a defense to this charge. Bob has no defense to this charge because he had no claim of right, whether actual or mistaken, to the copper wire.

Burglary: Unlike the common law of burglary which required that an individual break and enter the dwelling house of another at night with the intent to commit a felony therein, the Georgia statutes are not so limited. An individual may commit burglary by entering or remaining in the occupied or unoccupied dwelling of another with the intent to commit a felony or any theft therein. However, the Georgia definition of "dwelling" in the statute is broad, but for a first degree or second degree burglary is still, generally, limited to types of dwellings that may constitute an individual's home or residence. A lower charge of

burglary may be applied here whereby the definition of dwelling tends to include all buildings. Bob has no defense to this charge because the commission was completed upon entry to the warehouse with the intent to commit theft by stealing therein.

First Degree (Aggravated) Battery: Aggravated battery is the intentional infliction of severe harm to another that renders the person's use of a member of their body impossible, severely limits such use, or has disfigured the member of the person's body. Here Bob took a metal pole with a sharp end on one side and began swinging it at Rocco, intending to hit him with it or at the least with the knowledge that holding the sharp, metal pole and swinging it at Rocco is likely to result in the severe injury. Bob may assert self defense, because he only picked up the sharp metal pole after Rocco picked up a metal pole and swung it at him and "cursed him." Self defense must be reasonable, so it is not automatically enough that Bob though Rocco's threat was real. It was likely reasonable to believe that someone holding a metal pole, swinging it at you, and cursing you intended to do you harm. The next requirement for self defense is that the self defense is proportionate - you cannot use deadly force for a non-deadly attack or one not likely to result in substantial bodily harm. A large metal pole may constitute reasonable apprehension of severe bodily harm or death. The issue, however, is that Rocco effectively retreated. Rocco dropped the pole and threw his hands up in the air before Bob struck him; he even began to say that he was just joking. Since Rocco retreated to the point that the pole was dropped and his hands were in the air, a jury may determine that Bob was no longer entitled to use self defense likely to result in death or great bodily harm. This, however, is a question ultimately for the jury.

Aggravated Assault: The intent to commit a battery or reasonable apprehension of a battery with either the use of a deadly weapon or the intent to rape, murder, or rob. Here Bob had a deadly weapon. Though a completed battery occurred, this requires an additional component in the form of a deadly weapon so would not be a lesser included

offense to the batter above. The substantive analysis showing intent and the potential defense would be the same.

Felony Murder: Felony murder occurs when a death results in the course of a commission of a dangerous felony. Here there are multiple dangerous felonies (theft by stealing, burglary, battery, assault) and Rocco died. Unlike the common law, in Georgia felony murder may be charged in the event that a co-felon is the individual who dies. Bob ultimately killed Rocco while the initial theft was still occurring and while committing battery or aggravated assault against Rocco. Therefore, Rocco's death would constitute the grounds for felony murder. Bob will likely to to raise a defense regarding Rocco's hemophilia, because the wound would otherwise have been superficial on anyone else. However, under the "eggshell victim" doctrine, victims are essentially taken how they are found. This means that issues such as the victim's stronger susceptibility to bleeding out, as here, is irrelevant to the charge.

2. Willie can certainly be charged with conspiracy since he took part in the agreement and plan to steal the copper wire. The analysis for conspiracy, other than the defense (discussed below), is the same as for Bob, above. Co-conspirators may also be charged with all other crimes that occur during the commission of the planned crime. This would mean that Willie may be potentially charged with each and every crime for which Bob charged (not even getting into any accessory after the fact, obstruction of justice, and related charges that may otherwise be charged for his actions relating to his interaction with the police later, which are outside of the scope of this question). Willie, however, has a stronger defense of abandonment of the conspiracy that would cut liability off to only being liable for conspiracy and any crime committed up until he abandoned the crime, though it is unlikely to succeed (discussed below) and, therefore, he may be charged for each of the same crimes listed in (1).

3. Under Georgia law, Willie's potential charges and convictions turn on his ability to establish that he abandoned the conspiracy because abandonment is, essentially, the only defense available to a charge of conspiracy. In order to show establish a defense of abandonment for conspiracy the abandonment must be both complete and voluntary and must be done before the over act in furtherance of the conspiracy. Here, Willie grew frustrated while en route to the warehouse and announced that he "[doesn't] like how this is coming down" and that "[he's] out". He then grabbed his backpack and exited the truck and was not involved at all until after the commission of the above listed crimes when the police came to question him. His announcement that he's done with the plan, he doesn't like how it's going down, that he's out, and removal of the tools he brought to aid in the crime may constitute a fully voluntary and complete abandonment because he made it known that he was done, that he was done of his own accord and not (as far as we know) due to any added difficulties in committing the crime, and he removed all of his tools.

However, the overt acts to establish a conspiracy have already been committed. They planned *and then* Willie packed up a backpack of thieving tools while Bob got his truck and picked them up to go commit the crime. It was, simply put, too late to easily cut off his liability. In order to have stood a chance at a claim that he abandoned the conspiracy, Willie would have had to taken some act in furtherance of the abandonment; namely, Willie would have had to contact the authorities. Accordingly, Willie did not abandon the conspiracy when he left the truck and remains liable for all of the crimes that were committed in the course of the originally planned crime. Since the violent crimes and felony murder were committed in the originally planned the theft of copper wires, Willie may be charged with each as a co-conspirator. Notably, in Georgia a co-conspirator may be charged even if the other(s) are not.

ESSAY 3 – SAMPLE ANSWER 3

1. Burglary, Aggravated Assault, Conspiracy, Involuntary Manslaughter, Felony Murder.

Conspiracy

Bob can be charged with conspiracy. Conspiracy is an agreement between two or more people to commit a crime. In GA, an overt act in furthering the conspiracy is not needed to be guilty. Here, Bob, Willie and Rocco all came up with a plan to rob the warehouse and the conspiracy was formed. (In GA, conspiracy would merge into the crime that he is charged to have conspired in.)

Although it was Willie that told them of the existence of the copper wire, all men helped formulate the plan to steal the wire and is unlikely to have a valid defense to conspiracy.

Attempted Theft

In GA, theft is the intent to dispossess another of their property. Here, the conspiracy was to steal the copper wires from the warehouse, and permanently deprive the property from the warehouse.

Bob may claim that he never succeeded in the theft. However, attempt is a specific intent crime and was accomplished the moment he started putting the spool of wire inside his truck.

Burglary

In GA, one commits the act of burglary when the break and enter a premises with the intent to commit a felony. Here, Bob and Rocco broke open a locked door with the intent to steal the copper wires inside the warehouse. He forced entered a locked premises with the intent to steal and therefore can be found guilty of burglary.

The fact that they only loaded the truck with the spool and the fact that Bob ran away without the spool is will not be a defense to burglary. The failure in not completing the

felony is not a defense to burglary.

Aggravated Assault

Bob can be charged with aggravated assault which requires the person to intentional create apprehension or fear of imminent serious bodily harm to another with a deadly weapon. Aggravated assault does not need to make actual contact. Here, Bob picked up a pole with a sharp edge and began swinging at Rocco. Apprehension of fear was created, evident by Rocco's reactions, when he dropped the pole and threw his hands up in the air. Seeing a pole with a sharp edge would qualify as a deadly weapon and amount to aggravated assault.

Bob would have a defense of Self-Defense. In GA, a person is allowed to use reasonable force proportionate to the force that he is in imminent danger of. When Rocco started swinging a metal pole and cursed him, Bob would have been reasonable to fear, at the very least, serious bodily injury, and found the need to protect himself. Bob's defense may be mitigated if the Prosecution can prove that Bob knew of Rocco's joking nature. However, here, Rocco started cursing and swinging a metal pole at Bob. To Bob, who was in the middle of a felony, could reasonably believe that Rocco was serious. Although using a metal pole with a sharp edge may have been disproportionate to a metal pole, it is reasonable that Bob would have picked up any metal pole in his vicinity. Therefore, Bob may be successful in his self-defense claim.

Felony Murder

Murder requires the malice aforethought, but does not require intent to kill. Malice aforethought it is the prior intent to commit the act. Felony Murder is murder committed during the commission of a felony. In GA, parties to a crime are liable for the deaths of their co-party members. In GA, aggravated assault without malice is not considered a

felony for felony murder. Therefore, Bob will be guilty of felony murder only if he is found guilty of Burglary.

Bob can still raise his self-defense claim which may lower his charge to involuntary manslaughter. However, it is unlikely because the death was committed during the commission of a felony,

Involuntary Manslaughter

An involuntary manslaughter is when a person kills someone while criminally negligent, without an intent to kill. If Bob is successful in raising his self-defense claim, he is may be able to prove that there was no malice aforethought.

2. In GA, a person is a party of a crime when he aids and encourages in furthering the criminal act. The party to the crime would be liable for all crimes naturally occurring out of the crime and up to the point of commission of the crime. Therefore, Willie would be liable for conspiracy, burglary, and attempted theft. However, Willie will not likely be charged for aggravated assault, felony murder, and involuntary manslaughter, since these flow of events happened outside of the conspiracy Willie as a part of. No one in the conspiracy took a deadly weapon with them to the burglary site and there were no talks of hurting anybody. It would have been unforeseeable that Rocco would act in such a way that

caused Bob to hit him with a deadly metal pole during a burglary.

However, Willie will also be charged as an accessory after the fact because in GA, it is illegal to intentional obstruct a law enforcement officer from the apprehension of a criminal suspect. The obstruction charge will equal the underlying charge of the crime, which in this case, would be a felony. Here, Willie intentionally mislead the police to believe that Bob had left for his mother's house, when in fact, Bob was hiding in Willie's basement. Therefore, Willie would be charged with obstruction as an accessory after the fact, in

addition to the charges mentioned above.

3. Willie may make a defense that he withdrew from the crime. If he is successful, a successful withdrawal could relieve him on all liability, except to conspiracy. In order to withdraw from a crime, you must expressly state it to his conspirators and make all affirmative actions to prevent the commission of the crime. Here, Willie did make an express statement to Bob and Rocco, and Bob let Willie get out of the car. In addition, Willie took the bag of tools he had with him. However, this would not amount to a full withdrawal as he could have done more to prevent the commission of the crime; call the police or alter the warehouse. Therefore, this defense not likely to be successful.

ESSAY 4 – SAMPLE ANSWER 1

1. Was the execution of George's Will Legally sufficient?

The execution of George's will was legally sufficient.

To have a valid will in Georgia, a testator must have capacity, intent to make a will, the will most be reduced to a permanent written form, and must be witnessed and signed by two witnesses in the presence of the testator. Presence means in the same room as the testator or in a separate room while in the testator's line of sight. A disinterested witness is preferred but the signature of an interested witness (i.e. one provided for in the will in question) will not destroy the validity of the will. Rather, the conveyance in the will to the interested party will be considered void.

Here, there are no facts to suggest George lacked testamentary intent or capacity - the facts don't indicate George didn't know he was signing a will or didn't understand it's contents or who the beneficiaries were. Furthermore they don't indicate his intent was a product of a monomania influenced delusion or that he was the victim of undue influence

from Samantha. His will looks to have been written and it was executed in the presence of three witnesses who signed in the presence of the testator. Though the witnesses were interested parties as George had added a provision in the will to give them $500 as a token of thanks, this will not destroy the will's validity. Rather, these provisions will simply be considered void.

Because George's will met the requirements for a valid will in Georgia and was properly witnessed, George's will, if it can be found, will be considered properly executed.

2. Can the copy of George's will be offered to probate in the absence of the original?

Generally, if a testator is believed to have a will and the original of the will cannot be found, the testator is presumed to have died intestate. The court wants to affect the intent of the decedent and if the will cannot be found, the court presumes the will was destroyed and the decedent did not want it to be the instrument by which his property was distributed.

The copy of the will can be admitted, but Samantha will have to bring forth valid evidence to rebut the presumption that George died without a will and show that the copy she has is a valid copy of the original. She can do this by introducing testimony of the witnesses or anyone with knowledge to the will. Disinterested parties and witnesses would present the strongest evidence.

The ultimate ruling of whether to admit the will to probate is in the discretion of the court. The court will try to affect the decedents intent as it is reasonably inferred from the evidence (or lack of evidence) presented.

3. What effect did George and Samantha's marriage have on George's will?

Life events can change the provisions of a will unless it is determined form the document

that the will was anticipating these changes and was still not accounting for them (i.e. the testator knew the change was happening, but still did not want to change the provisions of the will). A marriage is generally one of these life changes. Here, the marriage looks to have been anticipated by George, and even if it wasn't, it would not have a significant effect on his will. His will already provided for Samantha.

We do not know how long Samantha and George were married, but if it was for a relatively short amount of time, Samantha could possibly not be allowed to take the share Georgia

law requires a spouse give their spouse. However, because George's will already provided for her, and because even though common law marriages in Georgia are no longer recognized, George intended to live with Samantha as his wife and provide for her in his will, the marriage will not have a significant effect on the will assuming it could be probated and validated. Based on the facts, George intended to take care of Samantha and provide for her.

The marriage will give Samantha the right to elect a years support from George's property. For a spouse (as opposed the children) a years support must be instead of taking under the will. The spouse must choose between what was left her in the will and the amount of a years support based on the standard of living in the marriage.

If George's will cannot be proven in probate, the marriage will allow Samantha to take a 1/3 share via intestacy. Georgia distributes shares of an intestate estate per stirpes. The spouse of a testator takes all the testators property if there are no other heirs. The wife splits the property evenly with other heirs if the decedent provided that the wife shall not take less than 1/3 of the estate. Here, because George has two children, Samantha will take evenly with them and will get her one third share.

4. Legal basis for George's children to set aside the transfer Samantha made from

the Joint Trust to herself after George's death?

The Children could argue that Samantha breached her fiduciary duty as trustee by spitefully transferring the property out of the trust to herself. A trustee has a duty to not self deal with trust property, to not convert trust property, and to take reasonable measures to make trust property increase in value by investing the property in various ways.

George's children, per the terms of the trust, are now beneficiaries of the trust and Samantha is the trustee. Samantha, purely out of spite, converted the trust property and transferred it to herself. This is self dealing and violated her duty the beneficiary children. It also violated her duty to adequately invest the trust property for the benefit of the beneficiary.

ESSAY 4 – SAMPLE ANSWER 2

This is a wills, trusts, and estates question.

1. The issue is to determine if the execution of George's Will was legally sufficient.

In Georgia, in order for a will to be valid, the testator must have had capacity, intent, and certain formalities must have been met. A testator has capacity if he is eighteen or older and of sound mind. A testator is of sound mind if he understands the natural objects of his bounty and understands what he is doing in regards to the disposition of his property by signing the will. A testator is presumed to have had capacity unless the person opposing the probate of the will can prove otherwise. A testator must have intent that this particular document be his will and distribute his property upon his death. Georgia requires the following formalities: the testator must sign the will and two disinterested witnesses must sign the will. The testator does not have to sign the will in the presence of the witnesses but the witnesses must sign the will in the presence of the testator. Any mark, including an

x, can be a signature for the testator and witnesses as long as they intend that to be their signature. The capacity a witness must have is a very low bar and they do not have to have had contractual capacity at the time of signing the will. An interested witness is someone who takes under the will. If there are not two uninterested witnesses also attesting to the will, the existence of interested witnesses creates a problem and will invalidate any gifts given to the interested witnesses. The overarching principal that governs will construction is to try and carry out the testator's intent.

A lawyer prepared George's Will for him. After he developed health problems, he and Samantha had three friends join them at a local tavern to witness the will, along with three other documents. Even though George was having health problems already when he executed the will, there are no facts to suggest they were severe enough to comprise his sound mind and so he will still be presumed to have had the capacity to execute the will when he signed it. At the tavern, the three friends signed the will as witnesses. There is no problem that three people signed as witnesses rather than just two, this is just called supernumeracy and is not a problem. However, there is an issue since George added a hand-written provision will to give each of the three witnesses $500.00. This makes the witnesses interested. Generally a court will not hold the entire will to be invalid due to the existence of interested witnesses, the court will more likely just invalidate the gifts to the three interested witnesses because courts want to carry out the testator's intent and don't like resorting to intestacy. There is also a question about whether the witnesses had capacity to sign as witnesses since they were at a local tavern and potentially intoxicated. Regardless, they would likely be considered to have had capacity. George signed his will himself too. Even though it is unclear if this was in the presence of the witnesses or at a later time, under Georgia law it is sufficient that he signed it. Thus, the formalities are met for George's will and so while the lawyer definitely erred by not having a proper, formal execution ceremony, a court would probably hold the will as legally sufficient nonetheless.

Yes, the execution of George's Will was legally sufficient.

2. The issue is to determine if the copy of George's Will can be offered for probate in the absence of the original.

If the original will is lost, a copy can be admitted to probate if the proponent of the will can explain why they cannot admit the original and prove that this is a copy. With the original will missing, there is a question of whether the testator revoked the will through a physical act of destroying it. If it was last in the testator's possession there will be a presumption that a lost will at the time of death meant that the testator revoked the will. A testator can revoke a will if he has the intent to revoke it and physically destroys the will (among other things).

After George died, Samantha could not find the original will. Samantha could offer the copy of his will for probate but would have to prove to the court that it is an exact copy and explain why no one can produce the original. This is likely to be difficult to show. If the will was last in George's possession, Samantha will have to rebut the presumption that he revoked the will which will be even more difficult.

Yes, the copy of George's Will can be offered for probate in the absence of the original but a court will only accept it if the proponent, Samantha, can prove it is a copy and that the reason why the other will is missing is not because George revoked it.

3. The issue is to determine what effect, if any, George and Samantha's marriage had on George's Will.

If a testator creates a will and then later gets married, and the will did not contemplate the marriage, then the subsequent spouse will be entitled to take either their share under the will or their intestate share. In Georgia, if a decedent's children and spouse are still alive,

under intestacy the children and spouse will split the estate equally but the spouse gets a minimum of one-third of the property even if there are many children.

George made his will before he married Samantha. The will, on its face, does not seem to contemplate their later marriage and neither do the circumstances since they were already considered themselves married. Therefore, Samantha would be eligible to take her portion under the will or her intestate share. Under the will, Samantha is entitled to one-half of George's estate. Under intestacy, Samantha would only be entitled to one-third of George's estate because each of his two children would also take one-third under intestacy. Therefore, Samantha will likely choose to take what she is given under the will itself, especially since she seems to hate George's children and not want them to receive anything.

George and Samantha's marriage after the creation of the will would allow Samantha to opt for her intestate share over the amount specified in the will, but since her intestate share is smaller than the amount allotted to her in the will, it will likely have no practical effect.

4. The issue is to determine what legal basis, if any, George's children would have to set aside the transfer Samantha made from the Joint Trust to herself after George's death.

Any ascertainable beneficiary to a trust can sue to stop a trustee from breaching their fiduciary duties with respect to the trust. Even if a beneficiary is not currently entitled to a portion of the trust corpus, if they are ascertainable and have a vested interest they can sue to protect their future interest in the trust. A trustee must carry out the terms of the trust, if it is legal to do so, and owes fiduciary duties (including duties of care and loyalty) to all the beneficiaries.

George and Samantha set up the Joint Trust by filling it with identifiable trust corpus

property, namely the home and checking account. George and Samantha both served as co-trustees. The trust was to be used for the health and welfare of the survivor between George and Samantha until both died. After they both died, the remaining trust property was to be distributed one-half to George's two children in equal shares and one-half to Samantha's sister. After George died, Samantha, as sole trustee, deeded the real property from the trust to herself. She said she did this because she did not like George's children, not because she needed the money. This is clearly a violation of her fiduciary duty to follow the terms of the trust. Samantha, as trustee, was permitted to transfer property from the trust to herself, but only for the maintenance of her health and welfare, not to deprive future beneficiaries of this property because she did not like them. George's two children are beneficiaries of this trust with vested interests and so they can approach the court to force Samantha to remedy this wrong.

George's children could ask the court to set aside the transfer Samantha made from the Joint Trust to herself after George's death on the legal basis that she breached her fiduciary duty as trustee.

ESSAY 4 – SAMPLE ANSWER 4

1) The execution of George's will appears to be legally sufficient. A will in Georgia must be (1) signed by the testator; (2) with the requisite testamentory intent; (3) in the presence of at least two witnesses. Here, George personally signed the will in the presence of at least three witnesses at the local tavern. There is no indication from the facts that the witnesses did not personally see George sign the will. While George may have "developed health problems" before he signed his will, there is no indication given that these health problems affected George's ability to be aware of the extent of his property or of the persons that he was devising his property to or that, by signing his will, he was

devising his property to certain individuals.

The presence of the hand-written gifts to the witnesses also does not affect the validity of the will. Although it is not a best practice, the presence of gifts to witnesses to the signing of the will does not call into doubt the legitimacy of the will. Instead, the gifts to the witnesses will simply be automatically struck from the will, so the witnesses will not be able to receive the $500 gifts that were hand-written into the will.

2) The copy of the probate will can potentially be admitted to probate in the absence of the original under certain circumstances. In Georgia, a will may be revoked by complete physical destruction of the original copy of the will. If the original copy of the will cannot be found, there is a rebuttable presumption that the will was physically destroyed with the intent of revoking the will unless there are circumstances that show that revocation of the will was clearly not intended when the will was destroyed (such as if the will was in a house that was burned to the ground due to lightning). Here, there is no indication from the facts that there were any circumstances, such as a house fire, that show that the will might have been destroyed without the intent to revoke the will. Thus, there will be a rebuttable presumption that the original copy of the will was destroyed by George with the intent to revoke it, and, thus, the copy of the will will not be validly admitted to probate unless Samantha can show facts to rebut that presumption.

3) The effect of George and Samantha's subsequent marriage on the will could potentially be significant if the copy of George's will is thrown out. If a testator gets married after the execution of a will, and the will does not otherwise provide for that spouse, under Georgia law, a surviving spouse may be entitled to elect to receive one-third of the probate estate in lieu of whatever was provided for that person in the will. Thus, if George's will is allowed into probate and allowed to control the distribution of property, Samantha, as George's surviving spouse, would be entitled to at least one-third of the value of George's estate if

she so chose. However, since George provided in his will that one-half of his residuary estate would go to Samantha, she would probably instead elect to receive what George had provided for her at the time of the will, along with what George provided for her through the creation of the Joint Trust, so the effect of the marriage would probably not be significant.

However, if the children are successful in throwing out the copy of the will that was provided to the probate court, the fact that George married Samantha would be a more significant factor in the divvying up of George's estate. If the will is thrown out and George is deemed to have died intestate, then Samantha, George's wife, and George's two children, as George's closest relatives, would then divide up the property *per stirpes*, which would result in Samantha receiving one-third of the probate estate and each of George's children receiving one-third. If George and Samantha had not married, and George had died intestate, then Samantha would have received nothing since she would not be deemed a close relative of George despite the fact that they had been dating and living together for a long time.

4) The children may have a legal basis to set aside the transfer of the Joint Property through their status as potential beneficiaries of the Joint Trust. A trustee has the duty of loyalty to the beneficiaries of a trust, a duty to take care of the trust property and to invest it properly and increase its value, and a duty not to commit waste of the trust property. The trustee also has the duty to equitably distribute the property between the beneficiaries of a trust and to ensure that the trust property provides for any future or secondary beneficiaries. Upon the death of George, the Joint Trust provided that Samantha would become the sole trustee and also the primary beneficiary of the trust through its language that noted that the trust would be "maintained for the health and welfare of the survivor" of the two of them. George's two children are beneficiaries of the trust through the trust's provision that they would receive shares of the trust property at the time of the sole

survivor's (i.e. Samantha's) death. As the sole trustee, Samantha owes a duty of loyalty to all of the beneficiaries of the trust, which includes George's children, and a duty to maintain the trust property for the benefit of those future beneficiaries in addition to her, as the primary beneficiary. Samantha probably violated that duty of loyalty through her commission of self-dealing by deeding the real property to herself. It is also likely that Samantha committed waste or violated her duty of loyalty because the Joint Property is most likely a significant portion of the value of the Joint Trust, and thus, she may be violating her duties as trustee to take care of the trust property and ensure that the property is equitably distributed between her and the other beneficiaries.