July 2004 Bar Examination Sample Answers

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Question #1 - Sample Answer #1

Memorandum

TO: Judge I.M. Wise

FROM: Clerk

RE: Issues regarding motions in Smith v. DOT and Billy Ray Brown

This memo is being written to discuss the issues set forth in the four motions filed in this case.

Motion 1

(a) The issue is whether a defendant can move to dismiss based on lack of venue and jurisdiction when it failed to raise these issues in its answer. At the time of answering, a defendant must raise such affirmative defenses as lack of venue, personal jurisdiction or sufficiency of service or such are deemed waived. Here, DOT failed to raise the lack of venue or personal jurisdiction in its answer and so these defenses are now waived.

However, subject matter jurisdiction can never be waived. If a court lacks subject matter jurisdiction the case must be dismissed. In Georgia, the court with subject matter jurisdiction over a tort claim alleging negligence is the Superior Court.

Because the DOT is a state agency, and the claim is a tort by a state agency, it is possible that it can only be sued in Fulton County, the county where it has its principal place of business. If so, and Georgia Tort Claims Act may so dictate, then subject matter jurisdiction is improper in Warren County and must be dismissed.

(b) The issue is whether a state agency has sovereign immunity when its employees or itself acts in violation of the law and commits a tort against a citizen in Georgia and then fails to raise immunity as a defense in their answer. The laws in Georgia give sovereign immunity to state agencies because it is unconstitutional for states to be sued in federal court or their own state courts per the 11th amendment. Georgia has a Tort Claims Act that is said to deny immunity for specific acts committed by state agencies, but then it includes a laundry list of exceptions where immunity is still available. One of these exceptions is when an employee commits a tort within the scope of their employment. This also includes when the agency is acting in a discretionary way,

such as deciding to place stop signs at intersections. Therefore, the Georgia statute will protect the DOT with sovereign immunity if it is sufficiently pled. Here, however, DOT failed to raise the issue in their answer, and so it is deemed waived.

(c) The issue is whether an ante litem notice filed with the state is sufficient when it is faxed 14 months after the incident and states a claim for $5 million dollars. An ante litem notice, used when suing the state, must be filed within one year and the damages should be commensurate with the injury. Here, the notice was filed untimely and it did not state the facts necessary to respond. Furthermore, DOT was not required to respond because the notice was faxed, rather than served on the state. This is improper service and thus legally insufficient.

Motion 2

The issue is whether the defendant has a right to strike a cross-claim when the cross-claim is filed four months after the original suit. In Georgia, a cross-claim is filed when the original defendant has a cause of action against another co-defendant, or another whom he impleads into the case. These are permissive if the claims do not arise out of the same transaction and occurrence, and may be mandatory if they do so arise. It is not required that the defendant file the cross-claim in 30 days, which is the rule for counter claims. Therefore, DOT's motion to strike this cross-claim should not be granted.

Motion 3

The issue is whether a defendant can move to dismiss a complaint on the grounds that jurisdiction and venue is improper if the case is filed in the plaintiffs county and the claim did not arise there. In Georgia, venue is proper in any of the resident counties of the defendant(s) if all reside in Georgia.

Here, DOT and Billy reside in Georgia. Residence is where the defendant lives and intends to make his permanent home. Billy says he resides in Washington County and there is no evidence to the contrary. DOT residence will be Fulton, their principal place of business. Neither defendant lives in Warren, only the executor of the estate, Smith, which is irrelevant. The accident occurred in Jefferson County not Warren County so this cannot be given as a reason to let venue lie in Warren. The defendant has a right to be sued in his home county. Billy raised this defense in his first response to the complaint so it is not waived. Venue is not proper in Warren County, so Billy's motion for dismissal for lack of venue has merit.

Billy also moves to dismiss on the ground that the court lacks jurisdiction. Personal jurisdiction can be had since Billy is a Georgia resident and that is sufficient. Subject matter jurisdiction has been settled above as being proper in the superior court. Billy cannot have this case dismissed based on lack of jurisdiction, but venue does not properly lie in Warren County.

Motion 4

The issue is whether the plaintiff has a right to ask the Court to strike a counterclaim when it is filed four months after the original complaint. A counterclaim in Georgia is a mandatory action if the defendant has a claim that arises out of the same transaction and occurrence. The defendant has 30 days to file the counter claim or it is lost. Since Billy failed to assert the counter claim in a timely manner, it can now be dismissed.

Question #1 - Sample Answer #2

Memo

To: Judge I.M. Wise

From: Clerk

Date: July 27, 2004

Re: Smith v. Brown

Motion 1

(a) Venue is improper in Warren County. The Georgia Constitution provides that venue is proper in a defendant's home county. Where there are joint and severally liable tortfeasors, jurisdiction is proper in any county where any defendant resides. Here, neither defendant is a resident of Warren County, only the plaintiff. Therefore, venue was not proper.

However, the DOT waived this objection. The defense of venue is waivable if it is not raised in the first responsive pleading. Here, the DOT did not raise this issue in its answer. Therefore, because this issue was not raised in the DOT's answer, the defense has been waived, even though venue was improper.

(b) The DOT is not protected by a defense of sovereign immunity. The state cannot be sued by a citizen under this doctrine. However, the state can waive this defense by express act of the General Assembly. This has been done in Georgia in regard to tort claims. A citizen may sue the State (or a division thereof) if the tort was caused by an employee of the state acting in their official capacity. The DOT negligently designing an intersection would fall into this category. Therefore, the General Assembly has assented to the state being sued for a tort claim.

(c) The ante litem notice was legally deficient. To be proper, there must be included in the ante litem notice a listing of the facts that gave rise to the cause of action, i.e., location, date, circumstances, acts or omissions by the government which lead to the tort, etc. There is nothing in the facts that suggest that Smith included in her ante litem notice any of this.

Furthermore, an ante litem notice must be directed to the head of the department of human resources, as well as the head of the department which is actually being sued. Smith did not do this.

Additionally, the ante litem notice must be filed with the head of the DOT and the head of the department of human resources within one year of the alleged tort of the state. Here, Smith waited 14 months before her filing. Therefore, for these reasons, the ante litem notice is deficient and the state cannot be sued.

Motion 2

The DOT's motion should be denied because Billy Ray's cross-claim was timely. A defendant may join a co-defendant for contribution at any time. This is includes even a post-judgment suit for contribution. Therefore, Billy Ray's motion was timely.

Motion 3

Billy Ray's motion will be granted. As stated above, a defendant must be sued in his home county. Here, defendant Billy Ray was a resident of Washington County, and suit was filed in Warren County (the home county of the plaintiff). Therefore, suit should have been filed in Washington County, and filing in Warren County was improper.

Motion 4

Smith's motion to strike the counterclaim will be granted. A counterclaim must be filed within 30 days of the service of the complaint. Here, Billy Ray waited 4 months. Therefore, it is not timely and should be struck.

Question #1 - Sample Answer #3

To: Judge Wright

From: Applicant

Re: Smith v. Brown

Date: 7/27/04

1.(a) Venue is not proper in this case. At issue is whether venue is proper over the DOT in Warren County, Georgia, the home county of the executrix. The general rule is that venue is proper in the county where the defendant is a resident, however, if there are more than one defendants and the claim against both defendants arise out of the same transaction/occurrence venue is proper in either county where the defendants are residents. In this case there are two defendants and the claim arises out of the same transaction or occurrence, therefore, jurisdiction would be proper in Washington County, GA – the home county of Billy Ray. What is certain, however, is that venue is not proper in Warren County, GA unless the DOT is deemed a resident of that county.

At issue is whether personal jurisdiction and venue were waived. In Georgia, personal jurisdiction and venue should be raised in the first responsive pleading or they are waived. The facts state that the DOT filed an answer and then, after the answer was filed, later raised jurisdiction and venue. Therefore, it is likely that both personal jurisdiction and venue are waived. If the jurisdiction challenge was based on subject matter jurisdiction, however, jurisdiction would not be waived because Subject Matter Jurisdiction can never be waived and can be raised at any time during the litigation.

(b) Generally, under the 11th Amendment the sovereign may not be sued unless it consents to suit or clearly and unreasonably violates a citizen's rights. Georgia has consented to suit under the Georgia Tort Claims Act for suits of its agents acting in the scope of employment, however, it is my understanding that it has not consented to be sued as an entity such as the DOT. This 11th Amendment sovereign immunity would be an affirmative defense to any suit based on negligence, and therefore, it would be waived if not raised in the answer because all affirmative defenses must be raised in the answer.

(c) The ante litem notice was deficient because an ante litem notice must be filed with the state within one year of the accrual of the claim and it must be in written form and not faxed to the DOT. In this case, the ante litem notice was not filed until 14 months after the accident,

therefore, it is deficient by two months. Furthermore, improper notice to sue the sovereign would also be an affirmative defense and would need to be raised in the answer.

2. At issue is whether Billy Ray's cross-claim was timely filed. Billy Ray's cross-claim was timely filed. Although a party must implead a party within 10 days of filing their answer, since the DOT was already a party to this case and had sufficient notice of the relevant claims and facts, it is likely that Billy Ray's cross-claim will be allowed and, therefore, the DOT's motion will fail.

3. At issue is whether there is proper personal jurisdiction and venue over Billy Ray. Billy Ray sufficiently plead lack of venue and personal jurisdiction in his answer, therefore, these claims are procedurally proper at this stage. Personal jurisdiction is proper where an individual is domiciled. Domicile is where a person is present and intends to stay. The facts state that Billy Ray is a resident of Washington County, Georgia. Therefore, since Billy Ray is domiciled in Georgia, his motion to dismiss on grounds of improper personal jurisdiction will fail. Also at issue is whether venue was proper. Venue is not proper in this case because as stated earlier, venue is proper in the county where the defendant is domiciled and if there are joint tortfeasors in either county where the tortfeasors are domiciled. Billy Ray is domiciled in Washington County, GA and it is unclear where the DOT is domiciled. What is certain, however, is that jurisdiction in Warren County, GA is improper because that is the home county of the executrix and is improper. Instead of granting Billy Ray's motion to dismiss and throwing out the plaintiff's claims altogether, the court is most likely to transfer venue to the proper county, in this case, Washington County.

4. At issue is when a counterclaim must be timely filed. A counterclaim must generally be filed with the answer unless the court permits the counterclaim to be alleged at a later date. The facts in this case state that the counterclaim was not filed until four months after Billy Ray had already answered, therefore, it is likely that the counterclaim was untimely. The facts also state that Billy Ray did not obtain a court order allowing the filing of his counterclaim, therefore, Billy Ray's motion will likely fail.

Question 2 - Sample Answer 1

(disclaimer)

1. Sue did not enter into a valid common law marriage with Pete Smith and, as such, her marriage to Joe was valid. To have a valid common law marriage the parties must have the capacity to marry and must participate in a "hold out" as husband and wife. Common law marriages in Georgia are not recognized, however, if they were entered into after January 1, 1997. Since these two did not hold themselves out as married until July 1997, this is not a valid common law marriage. In other states, however, their activities would probably have validated their standing. Also, Sue's age at the time of "holding out" did not give her the capacity to enter a

legal marriage - you must be 16 in Georgia.

2. In Georgia the Superior Court has exclusive subject matter jurisdiction over divorce. Personal jurisdiction and proper venue are based on where the defendant is domiciled at the time of commencement of the action. Here Joe lived in Clarke County when the petition was filed and is subject to personal jurisdiction and venue in that county. The fact that he rented a home, registered to vote, and registered his auto shows his intent to establish citizenship in Greene County but that is not enough. To allow the case to be moved there would be to allow "forum shopping" in a divorce case which is typically against public policy.

3. Alimony is defined as rehabilitative maintenance, allowing the receiving party to maintain a similar standard of living as that she enjoyed during the marriage. Adultery, however, bars an award of alimony completely. Sue's admission of adultery would keep her from being entitled to receive alimony. Equitable division is the means by which the courts divide property acquired during the marriage (not the result of gift or inheritance). Adultery is a factor that can be considered when completing an equitable division, but not a complete bar. Sue's admission of adultery may get her less than the share of property she would have received had she not committed adultery.

Condonation is a defense to adultery if the non-adulterous party learns of the conduct and remains with the adulterer, he is deemed to have condoned the conduct and cannot use it against her later. Here, there is a question of fact as to whether Joe knew of the adultery before the separation. This will have to be decided by the judge, or if the parties elect to have a jury trial, by the jury.

If it is found that Joe condoned the adultery then Sue's right to seek alimony will still stand. The adultery may still be a factor in determining equitable division of property, however.

4. Joe's claim that the lottery winnings should be treated as separate property is false. Separate property is that deemed to be acquired by one party either before the marriage or by gift or inheritance during the marriage. The lottery winnings do not fall into any of these categories and will be classified as marital property subject to equitable division.

Factors the court should consider when beginning an equitable division of property include the standard of living during the marriage; the contributions to the household, both monetary and non-monetary; the earning capacity of both parties, both present and future; any real property and its distribution to the parties; and any wrongdoing on the part of either party. Georgia does not require courts to look at other sources of income when making these determinations.

Here, Sue was a student during the marriage and Joe was employed as a truck mechanic. The court will look at what position Sue will be in when she finishes school, whether Joe can go back to school and get more training, and what each party contributed to the household during the marriage such as who maintained the house and did the everyday chores, etc. If there were children of the marriage that would be a factor, too, but there are none here. The court will also look at Sue's adultery and determine if she should receive less due to her conduct during the marriage. Based on these factors the court will determine what constitutes an equitable division of the property acquired during the marriage, including the lottery winnings.

Question 2 - Sample Answer 2

1. It is unlikely that Sue would be found to have been in a common law marriage such that she was suffering from a legal disability.

Until 1997, common law marriages were valid in the state of Georgia. The law required that in order to have a valid common law marriage, a couple must hold themselves out to the public as husband and wife, reside in a marital home and engage in the activities associated with being a named couple. However, a valid common law marriage required the parties have the capacity to consent to marriage, including being of the proper age to enter into a marriage. Georgia law requires a person to be at least 16 years of age in order to have the capacity to marry. A marriage may be ratified by a person upon reaching the requisite age. Sue did not have the legal capacity to enter into a common law marriage when she did because she was only 15 years old. Ending the "marriage" prior to her reaching the legally required age of 16 resulted in the common law marriage being void. As such she was able to enter a valid marriage with Joe.

2. Proper jurisdiction and venue for divorce and alimony action for Joe and Sue is Clarke County, Georgia. Jurisdiction and venue for divorce and alimony action is the location of the marital domicile. At the time of their marriage until their divorce, the couple resided in Clarke County. As such, venue and jurisdiction are properly laid in Clarke County. Joe's argument that jurisdiction should be placed where he currently resides is not legally sound, particularly because Joe moved to Greene County after the divorce petition had been served on him. As such, Clarke County has proper jurisdiction and venue.

3. Whether Sue's admitted act of adultery prohibits her receiving alimony from Joe is determined by whether the court accepts that Joe knew of and condoned Sue's adultery or whether he was unaware of the adultery. Georgia law will not order payment of alimony to a spouse who has engaged in adultery. However, if a spouse has been adulterous and the other spouse is aware of the adultery but continues to live as husband and wife, thus condoning the adulterous spouse's

behavior, alimony will likely not be withheld. If the court believes Sue's version of events, that Joe was aware of her adultery and upon her fulfilled promise to remain faithful, condoned her actions, alimony is still available for Sue. However, if the court believes Joe's version, that he was unaware of the adultery, the court will refuse Sue's alimony.

Adultery does not effect the equitable division of the couple's property. As an equitable division state, Georgia divides a couples property, first into marital and separate property, then divides the marital property equally between the parties. Separate property is that property owned by the individuals prior to coming into the marriage, or received by will, gift, or in some instances, property purchased with entirely separate, non marital funds. Marital property is all else acquired during the marriage. Whether Sue committed adultery does not impact the equitable division of the marital property.

Although cruel treatment is a basis for divorce in Georgia, it is not a basis for denial of equitable division on alimony. As such, if Sue's allegations of Joe's cruel treatment proved to be true, it would have no impact on alimony or distribution.

4. It is likely that the lottery proceeds would be viewed as marital property and subject to equitable division. In determining whether property is marital property, factors to be considered are when the property was acquired, the uses of the property, and whether the property was enjoyed by both parties. The lottery proceeds were received in January 2001 and used by the couple presumably until their split in January 2004, for a total of three years. Although the facts do not indicate the specific uses of the lottery proceeds, it is logical to presume that they were used in the daily goings on of the couple. However, as the facts limit information to the time period of possession of the proceeds, it is likely that by virtue of the proceeds coming to Joe while he was married to Susan, they would be considered marital property and thus subject to equitable division.

Question 2 - Sample Answer #3

1. Common Law Marriage

As of January 1, 1997, common law marriage was no longer recognized in Georgia. Any common law marriage prior to this date was recognized, but none afterwards. Sue and Pete attempted to enter a common law marriage in July of 1997. Even though many of the acts that they committed like living together, holding themselves out as man and wife, Sue changed her name, and the joint bank account would lead to a common law marriage, the marriage could not be recognized by the state after January 1, 1997.

Since Sue was not married to Pete through the doctrine of common law marriage and they did not actually conduct a marriage ceremony, receive a license, have it signed by the official presiding over the marriage and file the license, the two are not married and Sue was free to marry Joe. Sue did not have any legal disability.

Additionally, Sue was not of age to marry Pete either. She was only 15 and in Georgia, you have to be 16 to marry. She has no disability and was free to marry Joe.

2. Jurisdiction

There are two basis of jurisdiction in the state of Georgia. One is personal jurisdiction. The basis of jurisdiction allows an individual to be sued in the forum state. Since Joe is a resident of Georgia and the marriage was in Georgia, the state of Georgia has personal jurisdiction over Joe. This personal jurisdiction is general and he can be sued for basically anything in the state of Georgia.

The second type of jurisdiction is subject matter jurisdiction, which allows the court in question to hear the particular matter. In this case, we have a divorce being filed in the Superior Court of Clarke County. The Superior Court of Clarke County has appropriate jurisdiction over this matter because in Georgia, the superior Court has exclusive jurisdiction over divorce cases. The Superior Court is the only place to file a divorce case. Since Sue filed in the Superior Court of Clarke County, there is proper subject-matter jurisdiction over this matter.

Venue

Joe will lose a challenge to venue. In Georgia, venue must be laid in the county where the defendant resides. At the time of suit, Joe (the defendant) resided in Clarke County, Georgia. The couple's marital domicile was Clarke County, Georgia. Joe worked in Clarke County, Georgia. Joe can be properly sued in Clarke County, Georgia.

His move to Greene County, Georgia is of no significance to venue because he moved after the suit was filed. There should be no transfer of the suit to Greene County, Georgia.

3. Adultery

Sue's alleged adultery could have been considered by the court in determining whether she should receive alimony or an equitable division of the marital property. Alimony is spousal support awarded to maintain the standard of living of a spouse even after the divorce or separation. Equitable division of property is when the court fairly divides the marital property, which was owned by the marital unit, between the two ex-spouses.

There are several considerations in determining the proper amount for alimony or an equitable division of property. One of these considerations is the adulterous acts of one of the ex-spouses. The court will not reward a spouse's adultery by forcing the innocent spouse to pay the adulterer alimony, so Sue would have forfeited all rights to alimony due to her adulterous act.

Adultery is one of the many considerations in an equitable division of property. Adultery serves as the cause of the divorce, so the court will not give the person at fault a great deal of consideration in dividing the property. The Court would not usually preclude the adulterer from receiving anything, but the adulterous act would weigh heavily against the adulterer in the division of the property. The adulterer would probably come out on the short end of the equitable division stick, but the adulterer would probably get some stuff. The division is up to the Court's discretion as to what's fair, so preclusion is an option of the Court.

Joe's taking Sue back, living with her, and presumably forgiving her adulterous activity does serve as a condonation (defense) and would allow her to receive alimony and help her in the equitable division of the property. Joe basically condoned the adulterous activity and attempted to work it out, so at this point, he cannot hold the adultery against Sue now. The marriage is back on equal footing after the condonation and Sue can receive alimony and equitable division of property.

The allegations of Joe's cruel treatment does serve as a grounds for divorce in Georgia. These allegations would be heard by a jury in the Superior Court and could lead to the Court granting the divorce to Sue. The condonation would in effect allow Sue to regain her footing in the marriage and now she can prove cruel treatment, get her divorce, and she's entitled to her equitable division of the marital property.

4. Lottery Proceeds

The lottery proceeds will most likely be subject to equitable division. Any property gained during the marriage except by gift or inheritance is marital property. The lottery proceeds came into the marriage and they are not a gift or inheritance. They should be considered earnings because Joe had to pay to play the lottery and he was not just given the money. One could look to tax law to

see how they view lottery proceeds, which it views as earnings.

The lottery proceeds should be divided between Sue and Joe. The court should consider her standard of living, her earning potential, her contribution to the marriage and household, Joe's earnings and the length of the marriage to name a few factors. In looking to all of these factors, a 3 year marriage, where Sue supported Joe mentally/emotionally and he won the lottery and treated her cruel, she should be entitled to the lottery proceeds and any potential "reasonably certain" earnings thereon.

Question 3 - Sample Answer 1

(disclaimer)

1. GF may try to claim that denial of this permit for failure to comply with the bike path ordinance where the property is zoned for GF's intended use constitutes a taking for which just compensation must be paid under the 5th Amendment of the U.S. Constitution. The 5th Amendment prohibits taking property from a private citizen for public use without just compensation and has been incorporated to apply to the states through the 14th Amendment. A "public use" is construed broadly to include any accrual of a benefit to the public. This can be anything in furtherance of the state's police powers to promote the health, safety & welfare of its citizens. The means, the taking, must only be nationally related to the legitimate government purpose the public use, and the burden is on the challenger to show no such rational relationship. Further, if a taking is merely regulatory and there is no physical invasion, a taking within the meaning of the 5th Amendment does not occur unless the property in the hands of the owner is deprived of all economically viable use. Providing bike paths along the river meets the public use test because the government has a legitimate interest in its citizens' enjoyment of this natural wonder and in preservation if river banks which is rationally related to the bike paths. Further, this is possibly merely a regulatory taking because the government is not invading GF's property. GF may try to argue that the government is facilitating an invasion of GF's property by requiring GF to grant access to the public before receiving a permit. If the court finds that this is merely a regulatory taking; GF will not be entitled to just compensation because there is still likely some economically viable use of the property, even if it isn't what GF had hoped. If the court finds that there is an actual physical invasion, there will be just compensation to GF.

GF may also want to argue that the bike path ordinance is unconstitutional because it is not proportionate or rationally to the government's interest. GF's business does not appear to bring in a lot of auto traffic, so if a reduction in pollution were the espoused goal, there would be no rational basis for the ordinance. A less restrictive means analyses is not applicable in things so it does not matter whether the government could accomplish the goal of preserving access to the river.

Equal Protection – Rational Basis because not protected class

2. GF could assert that the organization doesn't have standing, but this will probably fail. Standing is a requirement in all cases and asks whether the plaintiff is the proper party to bring suit. Generally, to have standing the plaintiff must show an actual or imminent injury that is concrete and particularized, caused by the defendant, and capable of redress by a favorable court ruling. Third party standing is generally disallowed, but organizations may bring suit on behalf of members where 3 criteria are met:

(1) the members could sue in their own right; (2) the individual members are not necessary to a fair resolution; (3) the interest is germane to the organization's purpose. The last 2 are probably met here. The organization is concerned with preserving nature and can adequately represent the members without their participation. It is more questionable whether the members could sue in their own right to enforce an ordinance that is essentially left to the discretion of the local government. Generally a citizen may not bring an action as a citizen to compel the government to perform a discretionary duty. Likewise, it is difficult to see how they could compel compliance with the ordinance by GF. There are not facts that suggest the existence of a covenant, equitable servitude, or easement.

Question 3 - Sample Answer 2

The constitutional claim GF is likely to raise in its challenge to the building permit refusal is a takings claim. Under the constitution's prohibition of taking property without just compensation, this regulation may be subject to this type of claim. Takings not only applies to categorical (complete) takings of land but also to partial, regulatory takings. Under *Lucas* and *Penn Central* Absent the loss of all economically viable use (probably not the case here although the facts are not sufficient to tell us what else the land might be used for if the research center isn't allowed), courts apply the *Penn Central* balancing test, which requires balancing of the public purpose to be served, the burden on the property owner, and the investment – backed expectations of the property owner. Also, under *Nolan* and *Dollan* (sp?), in a case like this where a development condition or "exaction" is involved, there must be a nexus between the exaction and the public purpose to be served.

There are no facts regarding the purpose to be served here. It may be public access to the river (similar to the Nolan case). The burden on the property owner is also unclear because we

don't know how much the bike trail will cost or how much of the property the trail will "take." However, this case is very similar to the facts of *Nolan,* where a beach easement along the front of the property was found to be a taking because allowing people to walk along the beach wasn't rationally related to allowing people to see the beach (the public purpose in that case). The facts are also close to Dolan, where a bike trail on a lighting and hardware store's lot was not found to be rationally related to the public purpose in that case.

We also don't know the exact nature of the investment – backed expectations in this case, but presumably GF expended significant money buying the land and planning for the building.

This case is very difficult to call given that often courts require a near total economic wipeout in the face of an effective and appropriate public purpose, but GF has at least a cognizable claim and could win if the city has no clear public purpose behind the trail requirement, and/or if the trail takes a significant part of the property.

2. The issue here is citizen standing under the Constitution. Generally taxpayers and citizens have no right to sue to enjoin actions of the government they don't like (a la the milk case where the woman sued to stop distribution of free milk). However, if a citizen can show particularized harm that can only be recognized and remedied through allowance of standing, it will so be allowed. The next issue is whether a citizen group like River City Citizens for Nature has standing. They do if their members are/may be subjected to particularized harm and those claims may otherwise go unrecognized unless the citizen group is allowed standing. However, GF is probably not the proper party to sue in this case. GF has a proper permit issued by River City and is entitled to stand on that permit. Rather, the action should be against River City, seeking to compel them to withdraw the building permit unless the bike trail is built. There is not right of action of a citizen against another citizen to compel compliance with a law or ordinance, especially if the government has already excused such compliance.

Question 3 - Sample Answer 3

1. GF can bring an action against River City for violation of its rights under the Takings Clause. The Takings Clause of the Fifth Amendment, as incorporated against the states, provides that the government may not take private property for any public purpose without just compensation. The United States Supreme Court has held that a taking occurs not only where the government conditions the granting of a building permit on a landowner's use of property for some public purpose. Under the Supreme Court's test, for a condition on a building permit to be constitutional, there must be some reasonable nexus between the condition imposed and the activity that the

landowner intends to use the property for. If such a nexus is not present, the condition is an exaction, the reasonable value of which the government must compensate the landowner.

Here, it does not appear that there is a reasonable nexus between the condition imposed on GF (building a bike path on the property along the river) and the intended use of the land (construction of a research center). It is hard to imagine that the construction of a bike trail would be necessary, since it is unlikely that the employees of GF will ride their bikes to work in any large numbers. Accordingly, the condition is unlikely to pass constitutional muster and the city cannot require GF to construct a bicycle path without compensating GF for the exaction.

GF cannot bring an action for violation of its substantive due process rights under the Fourteenth Amendment. Economic regulations are subject to only a rational basis test. That is, if a regulation has a rational relationship to a legitimate government interest, the regulation does not violate due process. Here, River City has a legitimate interest in preserving recreational space around the Chattahoochee River, and the city could reasonably believe that requiring landowners who want to develop land along the river to build a bike path as a condition to receiving a building permit furthers that interest.

2. First, GF can assert that the plaintiffs fail to state a claim upon which relief can be granted because GF is not a proper party to the dispute. Since the city has already granted GF a building permit that does not require construction of the bike trial, GF is not in violation of the ordinance, which is directed not at individual landowners seeking building permits but at the branch of the local government that grants building permits. The plaintiff's dispute is, in fact, with the local government for its granting of a building permit apparently in violation of the statute. The proper action would be for the plaintiffs to seek a writ of mandamus in the Superior Court to compel the city to abide by the ordinance in granting building permits, since the duty to require construction of a bike trail as a condition to granting building permits is apparently a mandatory duty of the city under the statute.

Second, even if plaintiffs do have a cause of action against GF, GF can assert that the plaintiffs lack standing to bring the action. Generally, in order for a party to have standing the party must show that he or she was injured by the conduct of the defendant, that his injuries were caused by the defendant's conduct, and that the court can redress those injuries. In addition, when the plaintiff seeks to bring an injunction, as plaintiffs do here, the plaintiff must also show that he has a significant likelihood of being injured by the defendant's actions in the future if the defendant's conduct is not enjoined. Here, the plaintiff organization fails to meet such requirements. While an organization can have standing to sue on behalf of its members the organizations' individual members must have standing in order for the organization to have standing. Here, there is no indication that the plaintiff's members have suffered any injury or will suffer any injury by GF's failure to build a bike path. Even assuming that the plaintiffs have an

aesthetic interest in bicycling on the area along the river, there is no indication under these facts that that interest is in any way impaired, since there was apparently no bike path along the river previously and the plaintiffs have therefore lost nothing.

Third, GF could assert that plaintiffs have no right to an equitable remedy of specific performance or injunction. If the petition to compel GF to build a bicycle path is construed as a request for injunction, the action fails because plaintiffs have an adequate remedy at law – intervening in the earlier action to compel the city to prohibit the building, it will so be allowed. The next issue is whether a citizen group like River City Citizens for Nature has standing. They do if their members are/may be subjected to particularized harm and those claims may otherwise go unrecognized unless the citizen group is allowed standing. However, GF is probably not the proper party to sue in this case. GF has a proper permit issued by River City and is entitled to stand on that permit. Rather, the action should be against River City, seeking to compel them to withdraw the building permit unless the bike trail is built. There is not right of action of a citizen against another citizen to compel compliance with a law or ordinance, especially if the government has already excused such compliance.

Question 4 - Sample Answer 1

(disclaimer)

Question One:

(a) An arrest is valid if it is based on probable cause and the police may

arrest an individual without an arrest warrant if the arrest occurs in a public place. Here, Meyers certainly could have been arrested for failure to properly license his car. However, the facts do not suggest any probable cause for arrest on the robberies. Although guns, ski masks, and clothing were found, there is no suggestion that the convenience store robbers wore these items. Thus, the police had no probable cause to arrest Meyers for the robberies and it was an invalid arrest.

(b) If the trunk contained a green sombrero and the camera showed the

robber wearing a green sombrero, the arrest would be valid because probable cause would be established. A green sombrero is a fairly unique and uncommon item and the hat, combined with the guns, and the fraudulent license plate creates a reasonable suspicion or probable cause that Meyers was involved in the robberies.

(c) The Fifth Amendment requires that, before conducting any custodial

interrogation of a defendant (or potential defendant), the police give the defendant the Miranda warnings. These are: that the individual has the right to remain silent, anything he does or says may be used against him, he has the right to an attorney. If Meyers received these warnings and waived his Miranda rights, the police may question him without fear that the questions would be inadmissible on Fifth Amendment grounds.

(d) If the police questioned Meyers on the street, this may not constitute

custodial interrogation and the police may not be required to give Miranda warnings. Custodial interrogation exists when the police create a situation where the person is not free to leave and the police ask questions. Here, although the police had not taken Meyers into custody, their actions would be likely to be construed as creating the inability to leave since there were three officers for Meyers. Thus, even if the questioning was on the street, it was likely to be custodial interrogation and Meyers should have received Miranda warnings.

Question Two

(a) First, I would file a motion to exclude the items found in Meyers' trunk as

items retrieved from an unreasonable search and seizure in violation of the Fourth Amendment. The search was by governmental actors. Though the state may claim that Jason was not a governmental actor, he was in the employ of the police and was acting for the police. Meyers had a reasonable expectation of privacy in his car because he owned the vehicle. The search of the trunk was conducted without a valid warrant and I would argue that the search did not meet any exceptions.

The state could raise two exceptions. First, it would need to show by a preponderance of the evidence, that under the automobile exception, the police had probable cause to search the car for instrumentalities of a crime. However, as discussed in 1.2, the police had no probable cause to believe proof of a crime existed merely because of an invalid license.

The police could also argue that the search was incident to a valid arrest but this

will fail because the search occurred before the arrest.

(b) I would move to strike this prior conviction because its effect is more

prejudicial than probative. The state could argue that the prior robbery conviction is permissible to show a common scheme or plan but this is likely to fail because the conviction would have impermissible prejudicial value to lead jurors to believe that Meyers had a propensity to commit convenience store robberies.

(c) I would move to exclude the conviction of child molestation on the

grounds that it is irrelevant and more prejudicial than probative. The child molestation conviction has no relatedness to make any issue more probable than not in the present case and is likely to prejudice jurors against Meyers.

(d) As previously mentioned, the statements Meyers made at the scene,

before he was in custody and while not under interrogation are admissible, generally. He blurted these statements out. However, in Meyers' defense I would argue that they too are fruits of an unlawful search that should be suppressed by motion. The state will argue admissible because no Miranda required. However, the prosecutor will have to show that the statements were not the fruits of the poisonous tree.

Question 4 - Sample Answer 2

Question One

(a) Meyers' arrest may not have been valid. An arrest without a warrant may

be made under certain circumstances – (1) when an officer is present during commission of the crime; (2) when the perpetrator is fleeing; (3) when the officer believes an act of family violence is about to occur; (4) when a vulnerable adult is in danger; or (5) when the circumstances and justice deem it proper and there is a reasonable suspicion based on probable cause that the arrester committed the violation. It is doubtful that this arrest was based on probable cause – there are no articulable facts that can link Moose to the armed robberies, except the guns and they are probably not strong enough evidence to link him to that particular crime. However, it is very suspicious that

Moose had guns and ski masks. The items in the trunk are not closely linked enough to justify arrest without a warrant.

(b) If the hypothetical presented were true, then the arrest would have been

valid. The arrest would have been based on a reasonable suspicion that Moose committed the crime and Katz would have probable cause. The sombrero would provide a sufficient link between Moose and the robberies.

(c) The detectives must read Moose his rights under Miranda; they must

advise him of his right to remain silent, his right to an attorney, that if he cannot afford one, an attorney would be provided, and that anything he says can and will be used against him. When officers take a person into custody, they must inform him of his rights under the law.

(d) Yes, the answer would change. Absent custodial interrogation, an officer

has no duty to inform him of his rights because he is free to go at any time. If he were on the street and not handcuffed, Moose would probably understand that he did not have to answer the questions and that he was free to go at anytime.

Question Two

(a) i. A motion to suppress the items found in Meyers' trunk should be filed. It

should be argued that Jason was acting for the state in the capacity of an officer and that as such, he did not have probable cause to search the trunk. He also lacked consent, although the trunk was unlocked, it was still shut. Therefore, the evidence was illegally obtained and as such, should be suppressed.

ii. The state would argue that Jason was acting as a private citizen and the

evidence when the officers discovered it was in plain view. It is therefore admissible.

iii. The state must prove that the search was proper by clear and convincing

evidence.

(b) i. Meyers' prior conviction of armed robbery of a convenience store should

not be allowed. I would file a motion to exclude or suppress the conviction. A prior conviction of a criminal defendant may not be offered to prove the defendant acted in conformity therewith.

ii. The state would agree that the prior conviction would not be offered to

show Meyers acted in conformity therewith, but to prove modus operandi; that he knew how to rob and that this is the particular and distinct way that he robs that sets him apart from all others.

iii. The state must show the link between the prior conviction and the

charged offense, such that there is such a connection that it proves modus operandi by clear and convincing evidence.

(c) i. A motion to suppress or exclude should be filed on Meyers' prior

conviction of child molestation. Child molestation convictions are admissible only in other sexual assault cases. Prior felony convictions cannot be offered against a criminal defendant to show bad character unless he has put his character at issue by taking the stand and testifying to his good character. In this case, conviction of crimes (felonies) involving moral turpitude may be admissible to rebut good character. However the prejudicial nature of this testimony would likely outweigh any probative value.

ii. The state would argue defendant put character at issue by testifying to

good character.

iii. State must show defendant put good character at issue and crime

involved moral turpitude (most felonies).

(d) Meyer's statements at the scene: I would move to exclude. Here the state must show these statements were made voluntarily, and not while he was in custody. This is likely to be met; otherwise it is inadmissible as a violation of his 5th amendment rights not to incriminate himself. I would argue that this is hearsay evidence if the defendant does not take the stand. The state would likely argue that these statements were excited utterances made while the defendant was still under the excitement of the police searching the car. They are certainly admissions of a party opponent, so my motion will fail, then I can win on the 5th amendment grounds. I would argue that my client had not been given his Miranda warning at the time these statements were made, and that because of the presence of officers, the fact that he was being led to the car, and knew he could not leave, the statement made after the arrest is clearly a violation of his Miranda rights. Further, once he was arrested, he did not waive these rights, so the statements are while in custody. The interrogation aspect is met where the police do act in that are likely to induce the suspect to confess. Here, the police did not do anything that was likely to make him talk - they did not even ask him a question. Therefore, the statement may come in; if it is voluntary and spontaneously made and not during a custodial interrogation.

If the items in the trunk were seized in a search of a violation of the Fourth Amendment, then by the doctrine of "fruit of the poisonous tree" they will be excluded. Any statements made as a consequence of an illegal search are illegal via the exclusion doctrine, as the fruit of the illegal search. As to this motion to exclude grounds, I have a good chance the state's burden here would be to show that the confession was not a result of the items being located, or that the search itself was legal. Jason's classification as a private actor or state actor in the context here will again be critical.

Statements made before the arrest may be admissible because the state merely must show that although no Mirandas were given, none were needed because the Defendant was not in custody. "Keep away from my car" was made when one officer approached the car - there was no custody here. The officer did nothing that was likely to illicit a confession, so this statement will probably come in my motion to suppress or exclude.

Question 4 - **Sample Answer 3**

Question 1

a) For a valid arrest, an officer must have probable cause. Probable cause exists when an officer has reason to believe that the accused has committed a crime. The facts indicate that Meyers was arrested for armed robbery. Probable cause could have easily been established for arrest for stealing a vehicle since Katz ran the license plate and Meyers admitted owning the Cadillac. Disregarding evidentiary matters, Meyers arrest for armed robbery was tenuous. While the items in the trunk, which Meyers admitted were his, included a weapon and ski masks, it was conceivable that Meyers could have committed robbery or burglary but there is little or no connection between the items and seven convenience store robberies.

b) Finding a green sombrero would have been very convincing as to Meyers role in the store robbery and would allow for probable cause to connect Meyers with the convenience store robbery.

c) The detective must give Meyers his Miranda warnings. They must warn him that he has the right to remain silent, the right to an attorney and that whatever he says can be used against him in court. If Meyers invokes his rights but then decides to speak, the police must warn him again that he does not have to speak.

d) The detectives could talk to Meyers on the street without giving Miranda warnings. Meyers takes the chance that anything he says may be being told to an informer. The detectives would not have to disclose that they were police officers.

Question 2

I would file pre-trial exclusion order for the items in Meyer's trunk, Meyer's prior convictions for robbery and child molestation and also for the statement regarding ownership of the items in the trunk.

The items in Meyers trunk were the fruit of an unlawful search and should not be admitted into evidence. While Jason was not a police officer, he was with the police and was, more or less, their agent. A police officer could not have opened the trunk without a warrant or probable cause that criminal materials were in the trunk. The state might argue that there are no privacy rights regarding one's vehicle as it is held out to the public. While a person does not have a right to privacy, generally, to his vehicle, he does have a right to the contents of the trunk. Items in the trunk are not in plain view nor are they within the wingspan of the driver, even if he was in the car. The state might also argue that there are exceptions to exclusion of evidence from an unlawful search. If there was an independent source of information about what was in the trunk, the items could be used. There is no evidence of that in the facts. Id Meyers voluntarily admitted having items in the trunk, that would suffice. Here, Meyers admitted to ownership of the items

but not that they were in the trunk to begin with. Also, there is an exception if the items would have inevitably been discovered. A strong showing of inevitability is necessary and there is no evidence that the police would have found the items without searching the trunk.

Meyer's prior convictions cannot be brought into evidence to establish propensity to commit robbery. They can be used for impeachment purposes. Also, prior crimes can be brought in to establish motive, intent, absence of mistake, planning or common scheme. The burden would be on the state to demonstrate, to a judge, that this is the case. The facts indicate that several convenience store robberies show relatedness. If all include a robber with a green sombrero, Meyer's previous conviction for robbery while wearing a green sombrero could be brought in to establish common scheme. None of this is incident in the facts, however, and therefore the convictions should be excluded.

The child molestation conviction should also be excluded. By statute, Georgia sometimes allows child molestation convictions into evidence. However, this is only in subsequent child molestation prosecutions. The reason is a strong public policy to prosecute child molesters and protect children. In the present case, Meyers is charged with armed robbery and the molestation convictions are inapplicable and would only inflame and confuse the jury. The state would first have to demonstrate that the convictions were relevant since they seek to introduce them. The state would then have to demonstrate that the probative value outweighs the prejudice created. The probative value here is very slight and the prejudice is great and the convictions should be excluded.

Meyer's admission as to ownership of the Cadillac could not likely be excluded. The admission was voluntary and unsolicited by Detective Katz and Meyers had not yet been arrested. The state only had the burden of showing relevance, which is light. On the other hand, the admission of ownership of items in the trunk was subsequent to an unlawful arrest and therefore fruit of a poisonous tree and should be excluded. The exclusionary rule is a judge-made doctrine to deter police from abusing the rights of the accused. The state might argue for an exception to the exclusionary rule but none of these apply, as mentioned earlier.

MPT 1 - **Sample Answer 1**
(disclaimer)

Mr. William Drake, Esq.

RE: Proposed use of Dr. Marian Bonner's works by the success for Every Child Association

Dear Mr. Drake:

I write you on behalf of my client, Dr. Nicole Hall, concerning the Success for Every Child Association's (SECA) plans regarding the use of the writings and namesake of Dr. Marian Bonner. Dr. Hall, who is the daughter and sole heir of Dr. Bonner, has expressed concern that SECA's proposed commercial utilization of these materials may harm both Dr. Bonner's legacy and Dr. Hall's interest in her mother's estate.

As Dr. Bonner's sole heir, Dr. Hall holds the copyright to all of Dr. Bonner's writings. Furthermore, Dr. Hall is entitled under the law of the state of Franklin to assert and enforce Dr. Bonner's right of publicity.

I. Copyright Infringement

Federal copyright law protects original literary works of authorship. Including with the scope of this protection are exclusive rights to reproduce, distribute and publicly display the works. These rights are assignable and inheritable, and passed to Dr. Hall under the terms of the late Dr. Bonner's will. We believe that your client's plans to publish and distribute its proposed work entitled REDISCOVERING MARIAN BONNER'S LEGACY ("Legacy") violate Dr. Hall's copyright in Dr. Bonner's works and do not fall within the fair use exception. We have similar concerns regarding SECA's plans to sell Dr. Bonner's original works to collectors.

The fair use exception to copyright protection provides a limited right to reproduce copyright protected materials for purposes such as criticism, comment, news reporting, teaching, scholarship and research. In determining whether a particular use falls under the fair use exception, federal courts consider four factors: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a while, and (4) the effect of the use upon the potential market for the copyrighted work.

A. The Purpose and Character of the Use

The purpose and character of SECA's proposed use of Dr. Bonner's works does not qualify as a fair use. In evaluating the purpose and character of a proposed use of a copyrighted work, the courts ask "whether and to what extent the new work is transformative." As we understand it, your client's proposed "Legacy" book will consist of nothing more than excerpts from Dr. Bonner's writings. While this may involve a slight change in the form of Dr. Bonner's works, it is hardly

transformative. The United States Supreme Court has noted that copying a substantial portion of the infringing work verbatim from the copyrighted work "may reveal a dearth of transformative character." Because this is precisely the case in your client's proposed "Legacy" work, it fails the first prong of the fair use inquiry.

Your client's plan to publicly sell Dr. Bonner's copyrighted works also fails to qualify as a fair use. Assuming that it will include a public display of the works in their original form, there is no transformative element at work to qualify this display as a fair use of Dr. Bonner's works.

B. The Nature of the Copyrighted Work

The nature of Dr. Bonner's works also militates against SECA's proposed actions qualifying as fair uses. "If a work is unpublished, that is a 'key . . . factor' weighing heavily against a finding of fairness." Campbell. All of Dr. Bonner's works that SECA proposes to excerpt and display for sale are unpublished. It is therefore unlikely that SECA's plans constitute fair use. Furthermore, many of these copyrighted materials are creative works, and "courts accord greater copyright protection to creative works, as opposed to those that are factual in nature." Id.

C. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

Again, this factor of the fair use evaluation makes SECA's proposed actions unlikely to qualify. "A work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a mere superseding use." Id. As a book of excerpts, "Legacy" would be composed primarily (in fact, completely) of Dr. Bonner's original, copyrighted works, making it unlikely to qualify as a fair use under this prong of the test. The proposed display for sale would feature Dr. Bonner's original works in their original form, and would therefore clearly fail this fair use test.

D. The Effect of the Use upon the Potential Market for or Value of the Copyrighted Work

SECA's proposed use of Dr. Bonner's works would likely irreparably damage the potential market for and value of Dr. Hall's copyright in those works. By distributing excerpts of the work to state legislators and perhaps even basing its own private educational pilot programs on them, SECA would impair the value of Dr. Hall's copyright by providing an alternative source for the content of the works. Furthermore, "when a commercial use amounts to mere duplication of the entirety of an original, it serves as a market replacement for it." Id. This would clearly apply to any proposed display of Dr. Bonner's original works for public sale.

II. Violation of the Right to Publicity

Because the right to publicity is inheritable under Franklin law, Dr. Hall may assert this right on Dr. Bonner's behalf. SECA's proposal to change its name to the Marian Bonner Education Group violates Dr. Bonner's right to publicity. Dr. Bonner's fame was gained through non-commercial endeavors, so courts are particularly concerned with its exploitation. The fact that Dr. Bonner was reclusive and shunned publicity during life makes it unlikely that she would want her name exploited in this manner, and her commitment to public education makes it particularly unlikely that she would condone the exploitation by a private, for-profit education group. SECA may have violated Dr. Bonner's right merely by announcing its plans, and will certainly do so should it proceed.

Conclusion

SECA must stop its plans to change its name and publish Dr. Bonner's works.

Sincerely,

MPT 1 - Sample Answer 2

William Drake

Attorney for SECA

RE: For Your Review

Dear Mr. Drake:

I am contacting you today on behalf of Dr. Nicole Hall, daughter of the late Dr. Marian Bonner, concerning the use of Dr. Bonner's papers by your client SECA. It has recently come to our attention that SECA has obtained possession of 300 letters, 50 handwritten speeches, and 10 volumes of Dr. Bonner's journals, all apparently written in Dr. Bonner's handwriting. Additionally, we have learned that SECA intends to exploit Dr. Bonner's papers for its own commercial advantage.

As the sole beneficiary in Dr. Bonner's will, Dr. Hall was given all of Dr. Bonner's property and intangibles.

We ask that SECA refrain from the unauthorized use of Dr. Bonner's papers and the use of Dr. Bonner's name as they are infringements on Dr. Hall's ownership of the copyright and right of publicity.

COPYRIGHT

It is clear under §102 of Title 17 of the United States Code that the papers of the late Dr. Bonner have the protection of copyright as they are "original works of authorship fixed in any tangible medium of expression" and are clearly literary works. Additionally, under §106 of Title 17 of the United States Code, the owner of the copyright has exclusive rights to reproduce the copyrighted work, to distribute the copyrighted work, and to display the copyrighted work publically. Additionally, it is our position that Dr. Hall is now the owner of the copyrights to Dr. Bonner's work and we are relying on §201(d)(1) of Title 17 of the United States Code that states: "The ownership of a Copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the application of intestate succession." As the sole beneficiary of Dr. Bonner's will, Dr. Hall now is the rightful owner of the copyright of Dr. Bonner's papers.

Also, I am sure that you are aware of the Fair Use exception provided in §107 of Title 17 of the United States Code. The uses for which the material can be used under the Fair Use exception does not include use of material for commercial advantage, which is how SECA is using and intends to use Dr. Bonner's papers.

Fair Use Exception:

1. The first factor is the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. It is clear that the use of Dr. Bonner's papers are not going to be used for nonprofit educational purposes since SECA is a for profit organization. In Campbell v. Acuff-Rose Music, Inc. The court, in determining this factor, asked to what extent is the new work "transformative" and, ". . .the more transformative the work, the less will be the significance of others factors, like commercialism, that may weight against an finding of fair use." SECA's use of Dr. Bonner's papers is not transformative at all, they are reproducing her works in part, word-for-word, for the purposes of which Dr. Bonner intended except that they are using her papers for their own commercial advantage which weights heavily

against the Fair Use Exception.

2. The second factor is the nature of the copyrighted work. In Campbell, the court stated that “if a work is unpublished, that is “a key, although not a determinative factor,” weighting heavily against a finding of fairness. Additionally, the Court also stated that “courts accord greater copyright protection to creative works, as opposed to those that are factual in nature.” Accordingly, since Dr. Bonner never published her papers that SECA is intending to use that the fact that they were her creative works, we believe that they do not fall within the Fair Use Exception.

3. The third factor is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. In discussing this factor, the Court in Campbell stated from Harper & Rowe, supra, “Even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech.” Since Dr. Bonner’s works were not published, we believe that this factor will be against the fair use exception in this case.

4. The fourth factor is the effect of the use upon the potential market for or value of the copyrighted work. The Court in Campbell stated, “When a commercial use amounts to mere duplication of the entirety of an original, it serves as a market replacement for it, making it likely that cognizable market harm to the original will occur.” The use and reproduction of Dr. Bonner’s papers are clearly a market replacement for her papers.

RIGHT OF PUBLICITY

In Martin Luther King, Jr., Center for Social Change, Inc. V. Bolen Products, Inc., the Franklin Supreme Court stated, “we hold that, in Franklin, the right of publicity of a public figure survives his or her death if the unauthorized exploitation of that public figure for commercial purposes would not serve to reward or encourage effort and creativity that serves some significant purpose.” Thus, we believe that Dr. Hall now has the right of publicity of Dr. Bonner’s papers and SECA should cease their use of such papers.

Finally, in the Martin Luther King case, the Franklin Supreme Court stated that, “a person who avoids exploitation during life is entitled to have his or her image protected against exploitation after death just as much if not more than a person who exploited his image during life.” Thus, since Dr. Bonner clearly avoided exploitation during her life, it is clear that the Franklin Supreme Court will find that her life and/or papers cannot be exploited now.

I appreciate your attention to this matter and hope that we can resolve this matter informally.

MPT 1 - Sample Answer 3

Mr. William Drake, Esq.

Counsel

Success for Every Child Association

RE: Unauthorized and Improper Use of the Writings and Name of the Late Dr. Marian Bonner by the Success for Every Child Association

Dear Mr. Drake:

On behalf of our client, Dr. Nicole Hall, the daughter of the late Dr. Marian Bonner, we respectfully demand that you and the Success for Every Child Association (SECA) cease and desist in the unauthorized and improper use of the writings and name of Dr. Bonner. It has come to the attention of this law firm that your organization has announced plans to improperly adopt Dr. Bonner's name as its own, publish and distribute her works without authorization, sell Dr. Bonner's materials to collectors, and identify with the work of Dr. Bonner to further its own commercial goals, including the privatization of some public schools in Franklin. These actions are without the authorization of the rightful owner of Dr. Bonner's estate, her daughter, and must not be undertaken by the Success for Every Child Association. Upon thoughtful consideration, I am sure you will agree that it would be in the best interests of all involved parties that SECA abandons this ill-advised initiative, and spare us the burdens of litigation. SECA should take no action regarding the papers that have come into its possession and cease the violating of Dr. Bonner's right of publicity.

Dr. Bonner was a leading educator and education activist in our state and steadfastly committed to the goals of providing a quality, public education for all children. She devoted her entire life to the education of Franklin's children and the reform of the state's public school systems. Even with the shortcomings that plague the public schools, Dr. Bonner remained loyal to the idea that "a publicly funded, operated, and controlled school system was essential to racial justice and democratic participation."

Upon her passing, Dr. Bonner bequeathed her entire estate to her daughter. This estate consisted

of the entirety of Dr. Bonner's personal property, including her personal papers and the copyright in those papers. The physical papers belonging to Dr. Bonner, as well as their copyright, are the rightful property of Dr. Hall. Most of the papers included in the estate were the private writings and thoughts of Dr. Bonner, and were never published by the decedent in any form. We can infer from her will that these papers were intended to remain under the control of Dr. Bonner's nearest relative, her daughter.

1. SECA Should Abandon it's Plans to Use the Writings and Works of Dr. Bonner without the Permission of Dr. Hall and in Violation of the Copyright to these Works held by Dr. Hall

Dr. Hall holds the exclusive rights in the copyrighted works of her late mother as defined in §106 of the Copyright Statute. As owner of the copyright to these works under the code, Dr. Hall has sole and exclusive right to: reproduce the copyrighted work in copies; distribute copies of the copyright work to the public by sale or by other transfer of ownership; and, in the case of literary works, to display the copyrighted work publicly. As the beneficiary of Dr. Bonner's estate, Dr. Hall is the rightful owner of both the writings and the copyright to them. According to §201 of the code, ownership of a copyright may be transferred by any conveyance or operation of law, including bequeath by will. As such, Dr. Hall assumed the copyright to her mother's work upon the probate of her estate.

Our client's right to the control of these items is not absolute, however, and may be limited upon a showing of fair use by the party seeking to use the items. In Campbell v. Acuff-Rose, the United States Supreme Court laid out four factors to be used in determining whether fair use doctrine will allow publication that is otherwise in violation of the copyright: 1. The purpose and character of the use; 2. The nature of the copyrighted work; 3. Whether the amount of the copyright use by the other party is reasonable in relation to the purpose of the copying; and, 4. The effect of the use upon the market for or value of the copyrighted work.

Under the first factor, the court is concerned with the transformative nature of the proposed work, including an investigation into whether it would be for commercial purposes. As you know, a primary motivation for SECA's use of Dr. Bonner's work, name, and image would be for the furtherance of its for-profit educational goals. In this way, a court is likely to look unfavorably upon the use of Bonner's work for the advertisement of SECA's products. Secondly, the court will be concerned by the fact that SECA is proposing to publish work of Dr. Bonner that was previously unpublished. Her private memoirs were not intended for public display, and any future decision to publish should be made by their rightful owner. Thirdly, any court hearing this case would have to take a close look at the extent to which the work and writing of Dr. Bonner are taken out of context by SECA. The fact much of Dr. Bonner's work was in direct opposition to SECA's for-profit mission would shed a negative light upon SECA's potential argument that this copying would have a fair use. Under the fourth factor, the fact that SECA's bringing of these works to the market place for its own purposes would severely detract from any rights of Dr. Hall to bring these works to the market.

II. SECA Should Cease its Impermissible Violation of Dr. Bonner's Right of Publicity

The Franklin Supreme Court decided the issue of the right of publicity held by a deceased person that is also presented in this matter. The court held: that the state of Franklin recognizes the right of publicity; this right survives the death of this owner; and, the owner of this right does not have to commercially exploit it for it to survive. Our client is the rightful owner of this right of publicity originally held by Dr. Bonner, so SECA should cease any use that would capitalize upon Bonner's name and invade her memory.

MPT 2 - Sample Answer 1
(disclaimer)

Case Planning Memorandum

Claim: Breach of the Implied Warranty of Habitability

Legal Authority: Section 500 of the Franklin Real Property Law states that a landlord is deemed to warrant that leased premises and common areas are fit for human habitation and that occupants shall not be subjected to dangerous or hazardous conditions that would be detrimental to their life, health or safety (§500).

Element #1: There is a landlord-tenant relationship between the plaintiff and the defendant.

Evidence available to show that a landlord-tenant relationship exists between Brenda Chapin and Graham Realty, Inc. ("GRI")

- Testimony of Brenda Chapin that she completed the rental agreement forms and has paid rent, including checks for rent.
- Testimony from Herb London, the building manager and Victor, the superintendent of the building.

- Admission or stipulation by GRI because it is bringing a suit for eviction and recovery of back rent.

Element #2: Dangerous conditions exist on the leased premises that render the premises unfit for human habitation and subject tenants to dangerous and hazardous conditions.

Evidence available to show the presence of dangerous conditions at Graham Towers, owned by GRI, that render the premises unfit for human habitation:

- Testimony of Brenda Chapin about the problems throughout the apartment.
- Testimony of Brenda Chapin's daughter, Mary, age 14, about the apartment problems and specifically her injury.
- Letter to Mr. London setting forth several of the problems.
- Testimony of Mr. London concerning the initial showing of the apartment and repairs he said would be made.
- Testimony of Victor about the state of Ms. Chapin's apartment.
- The violation report from the City of Avon Department of Building, Office of the Building Inspector, dated July 6, 2004.

Element #3: Notification to the landlord about the state of disrepair allowing for a reasonable time for corrections.

Evidence available to show that GRI had notification of the conditions and failed to repair them in a reasonable time:

- Mr. London's testimony that he was aware of some repairs that needed to be made when Ms. Chapin moved into premises.
- Letter to Mr. London dated May 21, 2004 about conditions.
- Testimony of other neighbors about their complaints.
- Pictures of conditions and presence of Inspector on the premises; Inspection could testify about talks with ownership and the report filled out on July 6, 2004.

Remedy: Rent Abatement

Legal Authority: The Court has wide latitude to assess damages under section 500 of the Franklin Real Property Law, and its companion provision section 240 of the Franklin District Court Act. Abatement in the rental amount is the difference between the fair market value as warranted and the fair market value of the premises as it exists in its defective condition. (Virgil v. Landy).

Element #1: The fair market value of the premises given the defective conditions is far below the fair market value as warranted, as indicated by the agreed upon rent.

Evidence available to show that the defective conditions of the apartment have greatly reduced its fair market value:

- Testimony by Brenda Chapin to show the extent of the area affected by the problems (bathroom, ceilings and walls, hot water, etc.).
- Testimony from other tenants about the discomfort caused by a lack of hot water and non-functioning elevator.
- Testimony of Chapin family about Mary's injuries, rat problem, etc.
- The violation report from the City of Avon showing housing violations.

Remedy: Remedial Measures are Recoverable

Legal Authority: Separate damages are recoverable for remedial measures taken by the tenant after notification to landlord and failure to fix within a reasonable time.(Virgil v. Landy).

Element #1: The landlord was notified of the defect and failed to remedy in a reasonable time.

Evidence available to show GRI knew of defects and failed to fix them in a reasonable time:

- Testimony of Brenda Chapin, including the letter to Mr. London and the several messages she left with him.
- Violation report dated July 6, 2004 to show conditions still exist and the date they were reported.

Element #2: Out-of-pocket expenses to remedy the defect.

Evidence to show Brenda Chapin spent money to remedy problems:

- Receipt or bill/check for the $79 space heater.
- Testimony of Brenda Chapin about other expenditures.

Remedy: Punitive Damages

Legal Authority: Punitive damages are also available to punish conduct that is morally culpable. Such conduct that is punishable includes persistent failing to make repairs after received notice. (Virgil v. Landy).

Element #1: The landlord had notice of the defects and necessary repairs.

Evidence available to show GRI had notice of the problems in Brenda Chapin's apartment:

- Testimony of Brenda Chapin of her conversations with Mr. London and Victor.
- Letter to Mr. London and reported violations.

Element #2: The landlord persistently failed to make repairs necessary for health and safety to tenant.

Evidence available to show GRI persistently failed to make repairs:

- Testimony of Brenda Chapin about continued efforts to get problems fixed and the duration of the conditions.

- Violation report from the city of Avon showing the degree of the violations and the length of time since reported.

There is also other relief that Ms. Chapin should pursue outside of the summary proceeding. The case of Bashford v. Schwartz indicates that claims not traditional landlord-tenant problems should be resolved elsewhere. Ms. Chapin has such a claim pertaining to the injury of her daughter. Such a tort claim could assert damages including the injury to Mary, such as pain and suffering, and the medical bills resulting from the accident. Recovery for Ms. Chapin's lost wages may be too speculative, but some recovery under these conditions could be had because of a breach of duty in the landlord-tenant relationship.

MPT 2 - Sample Answer 2

Claim: Breach of Implied Warranty of Habitability

Legal Authority: Section 500 of Franklin Real Property Law states that in every written or oral lease or rental agreement for residential premises, the landlord is deemed to warrant that the premises leased or rented and all areas used in connection therewith are fit for human habitation and for uses reasonably intended by the parties. The landlord is also deemed to warrant that the occupants of such premises will not be subjected to any conditions that would be dangerous, hazardous, or detrimental to their life, health or safety. Upon showing that the tenant has notified the landlord of the defect or deficiency which was not known to the landlord and has allowed reasonable time for correction or repair, the tenant may bring a cause of action for breach of implied warranty of habitability (Virgil v. Landy).

A substantial violation of an applicable housing code shall constitute prima face evidence of a breach of the warranty of habitability (Virgil v. Landy).

Element #1: There is a rental agreement for residential premises giving rise to implied warranty of habitability.

Evidence available to show that there is a lease agreement between Ms. Chapin and Graham Towers for rental of a residential apartment.

- Ms. Chapin signed a three-year lease with Graham Towers agreeing to pay $1000 per month. Utilities are not included in said rental agreement.

Element #2: Tenant has notified the landlord of defects or deficiencies in property and allowed a reasonable time for repairs to be made.

Evidence available to show that Ms. Chapin has notified the landlord, Mr. Herb London, GRI's building manager, of the defects and allowed reasonable time to repair.

- Testimony of Ms. Chapin that when she was initially shown the apartment by Mr. London, she noticed that repairs were needed and alerted Mr. London to this fact who assured her that repairs would be made.
- Testimony of Ms. Chapin that after 5 months of paying full rent, the repairs still had not been made as promised.
- Testimony of Ms. Chapin that states Mr. London has repeatedly promised to make various repairs to numerous cracks and holes in the walls in the apartment and to paint, but nothing has been done in the year that she has lived there.
- Testimony of Ms. Chapin that she has notified the building's superintendent, Victor, numerous times about the needed repairs and he has said that he is unable to make any repairs without Mr. London's approval.
- Testimony of Ms. Chapin that she has made numerous phone calls to Mr. London about the needed repairs in the year she has been living in the apartment and left numerous messages but no repairs have been made.
- Letter from Ms. Chapin to Mr. London on May 21, 2004 outlining all of the problems and needed repairs and requesting that repairs be made and compensation be provided to her for her expenses relating to the repairs.
- Copy of Report of City of Avon Department of Buildings citing the apartment and building for numerous hazardous and immediately hazardous violations of the building codes.
- Testimony of Ms. Chapin that all of these notifications have been sent throughout the year and her tenancy and no repairs have been made.
- Photographs taken by Ms. Chapin of the various defects and needed repairs throughout the apartment.

Element #3: The tenant has been subjected to conditions that are dangerous, hazardous or detrimental to her life, health and safety. A substantial violation of the applicable housing code is prima face evidence of such breach of implied warranty of habitability.

Evidence available to show that Ms. Chapin and her two daughters have been subjected to dangerous, hazardous and detrimental conditions which threaten their health and safety.

- Copy of a Report from the City of Avon Department of Buildings showing that Ms. Chapin's apartment has five violations three of which are immediately hazardous violations for which the owner has 24 hours to repair before fines will be assessed, the other two violations are hazardous which require repair within 30 days before the owner will be assessed for fines.
- Testimony of Ms. Chapin stating that due to falling plaster, her daughter was seriously injured requiring 10 stitches in her head.
- Testimony of Ms. Chapin stating that the apartment is infested with rats, the bathroom ceiling leaks and the walls are covered in mildew giving off a noxious odor, the hot water works only intermittently, the heat is not operative most of the time requiring the tenants to heat their apartments with space heaters and stove. The elevator is often broken and walls need replastering and repairs.

Element #4: Substantial violation of applicable building codes is prima face evidence of breach of implied warrant of habitability.

Evidence that the relevant building authority has cited owners for a substantial breach of applicable building codes:

- Copy of the report of the building inspector citing the apartment and the owner with 5 citations, 3 of which are immediately hazardous.

Remedy: Rent Abatement

Legal Authority: Section 240 of the Housing Division of the Franklin District Court states that the court may employ any remedy program, procedure or sanction authorized by law for the enforcement of housing standards. These remedies include reduction of rent through abatement.

Rent abatement damages shall be calculated according to the difference between the value of the dwelling as warranted and the value of the dwelling as it exists in its defective condition multiplied by the number of months the tenant has been occupying the premises. In determining the fair rental value of the dwelling as warranted, the court may look to agreed-upon rent between the two parties. In determining the percentage of reduction of habitability, the court should consider the area affected, the amount of time the tenant has been exposed to the defect, the degree of discomfort and annoyance, the quality of the defect as health-threatening or just annoying, the extent to which such defect causes the tenant to find the premises uninhabitable. The court may look at testimony and other evidence to determine this reduction. The maximum amount that can be awarded under this formula for a breach of implied warranty of habitability is 100% rent abatement.

Element #1: The value of the dwelling as warranted.

Evidence of the value of the dwelling as warranted:

- The rental agreement between Ms. Chapin and Mr. London at the commencement of the three-year lease was $1000 per month, not including Utilities.

Element #2: The value of the dwelling as it exists in its defective condition.

Evidence of the value of the defective dwelling:

Area affected:

- Testimony of Ms. Chapin that the entire apartment and some of the common areas of the building itself are in serious need of repair.
- Amount of time tenant has been exposed to defects.
- Testimony of Ms. Chapin that at the signing of the rental agreement there existed defects for which Mr. London promised to repair.
- Testimony of Ms. Chapin and a letter from Ms. Chapin to Mr. London dated May 21, 2004 indicate that these defects have persisted and worsened throughout her entire tenancy which, to date, amounts to one year of being exposed to the defects.

Degree of discomfort:

- Testimony of Ms. Chapin indicates that her daughter has been severely injured by the falling plaster requiring medical treatment and 10 stitches.
- Testimony of Ms. Chapin indicates that they have been without heat on numerous occasions and that their make-shift remedies such as space heaters and using the stove to heat the apartment have been inadequate to fully heat the rooms and they have resulted in substantially higher electricity bills.
- Testimony of Ms. Chapin indicating that they have had to boil water on the stove to bathe and do the dishes.
- Testimony of Ms. Chapin and a letter from Ms. Chapin to Mr. London that indicate she has been forced to miss work on at least one occasion due to the state of disrepair of the apartment.
- Testimony of Ms. Chapin that everyone is very inconvenienced by the lack of properly working elevators.
- Testimony of Ms. Chapin and a letter from Ms. Chapin to Mr. London indicate that neither she nor her daughters can sleep at night for fear of the rats that currently infest the building.

Quality of Defect as Health-Threatening:

- Testimony of Ms. Chapin that the mildew in the bathroom exposes them to an “overpowering” odor.
- Testimony of Ms. Chapin that her daughter had to seek medical treatment and received 10 stitches from the plaster that fell from the ceiling of the apartment and struck her daughter on the head.
- Copy of the Inspection which states that the five violations found were either hazardous or immediately hazardous.
- Testimony of Ms. Chapin and letters to Mr. London as well as the inspection report all indicate rodent infestation threatening the spread of disease in the apartment.

Element #3: The amount of time the tenant has occupied the premises.

Evidence of the amount of time Ms. Chapin has been in residence and occupying the apartment in question:

- Testimony of Ms. Chapin that she has been in residence of the apartment for a total of 12 months.

Element #4: This amount cannot exceed 100% of the rental obligation.

Evidence of Ms. Chapin's total rental obligation:

- Testimony of Ms. Chapin indicates that she has paid a total of $5000 in rent and has withheld seven months of rent in the hopes of getting repairs to a total withholding of $7000.

Remedy: Remedial Damages

Legal Authority: Section 240 of the Housing Division of the Franklin District Court states that in the enforcement of state and local laws for the maintenance of housing standards, the parties may, in addition to other remedies, recover remedial damages. If the landlord has been notified of the defect and given reasonable time to repair, but the landlord fails to repair, the tenant is entitled to recover remedial damages for any out-of-pocket expenses incurred as a result of their efforts to remedy the defects (Virgil v. Landy).

Element #1: Landlord is given notice of defect and reasonable time to repair.

Evidence that tenant has given the landlord sufficient notice of defect and a reasonable time to repair.

- Testimony of Ms. Chapin that she notified Mr. London and Victor, the superintendent, of the faulty heating and the need for repair of plaster in the walls and ceiling.

- Letter from Ms. Chapin to Mr. London of May 21, 2004 notifying him of the lack of heat and the injury to her daughter from the falling plaster.

- Testimony of Ms. Chapin that she notified the superintendent on numerous occasions about the need for repair and his inspection of the property.

- Testimony of Ms. Chapin that in the year of her occupancy, none of the repairs have been made.

Element #2: Out of pocket expenses incurred by the tenant for remedial measures.

Evidence that Ms. Chapin has incurred considerable expenses making remedial repairs to the property:

- Testimony of Ms. Chapin that she has spent $79 on a space heater to compensate for the lack of heat.

- Testimony of Ms. Chapin that her electric bills have increased as a result of the use of the stove and the space heater to compensate for the lack of heat in the apartment.

- Testimony of Ms. Chapin and letter from Ms. Chapin to Mr. London dated May 21, 2004 outlining the injury her daughter suffered as a result of the falling plaster, the medical bills from the required stitches and her loss of a day's wages as a result of the injury.

Remedy: Punitive Damages

Legal Authority: Section 240 of the Housing Division of the Franklin District Court states that the court may also impose punitive damages for the enforcement of housing standards. When a landlord, "after receiving notice of a defect, persistently fails to make repairs that are essential to the health and safety of the tenant, the landlord is morally culpable and an award of punitive damages is proper." (Virgil v. Landy). Furthermore, when the landlord's behavior shows "bad spirit" or intentional wrongs this would support a finding of willful and wanton misconduct sufficient for increased award of punitive damages (Virgil v. Landy).

Element #1: Persistent failure of the landlord to make repairs that are essential to the health and safety of the tenant.

Evidence that the landlord has persistently failed to make repairs necessary to the health and safety of the tenant:

- Testimony of Ms. Chapin that Mr. London has repeatedly failed to do any of the repairs necessary to protect her health and safety. Failed to repair the falling plaster that injured her daughter, failure to repair the heat, failure to exterminate the building for rats and other rodents, failure to repair the elevator and failure to cure the mildew in the bathrooms causing the noxious smell.

- Letter from Ms. Chapin to Mr. London stating that his failure to repair any of the essential defects in the property has resulted in personal injury and monetary loss to the tenant.

- Testimony of Ms. Chapin that upon informing the superintendent of the necessary repairs, he has stated his inability to make repairs without Mr. London's consent which apparently has not been given.

Element #2: Intentional wrongdoing or bad spirit on the part of the landlord.

Evidence that Mr. London has intentionally failed to make the repairs and his actions are done in bad faith warranting an increase in punitive damages:

- Testimony of Ms. Chapin that the superintendent has indicated that Mr. London is "waiting for the rest of us [tenants] to give up and leave in disgust" in the hopes of being able to re-let the apartments at a higher rent to more affluent people.

- Article in local paper quoting a tenant of the Graham Towers as saying that "management is trying to force existing tenants out by ignoring necessary repairs so they can bring in well-heeled tenants and charge substantially higher rent."

- Testimony of Ms. Chapin that her repeated, direct requests for repairs made to Mr. London have been received and promises for repairs made each time, but a failure to make said repairs.

Remedy: Negligence Damages

Legal Authority: Where the dispute involves questions of negligence requiring proof of proximate cause, damages, discovery and such, these claims are best tried outside the"limited sphere of the landlord-tenant proceedings." (Bashford v. Schwartz).

MPT 2 - Sample Answer 3

Chapin Case Planning Memorandum

Claim: Breach of Implied Warranty of Habitability

Legal Authority: §500 of the Franklin Real Property Law provides that a landlord shall warrant that the premises rented are fit for human habitability and for the reasons intended by the parties and that occupants shall not be subjected to conditions that are dangerous, hazardous or detrimental to their life, health or safety. An implied warranty exists with the lease, whether oral or written, that the premises shall be habitable for humans (Virgil v. Landy). The landlord must have notice of the stated deficiency of the premises . (Virgil).

Element #1: A lease must exist between tenant and landlord.

Evidence that a lease exists:

- Chapin signed a lease for Apt. 7B of Graham Towers.

Element #2: The landlord had notice of the deficiency of the premises and an allowable time for its correction (Virgil).

Evidence available to show notice to GRI or Herb London:

- When shown the apartment by Mr. London, Chapin pointed out that some repairs would be needed.
- Chapin has called and left messages with secretary and voice mail concerning problems with the premises.
- Chapin alerted Victor (building superintendent) of defects.

- Chapin wrote a letter to London further alerting of the defects.
- Violation report.

Element #3: The landlord failed to deliver the premises in a habitable condition, or maintain the premises in a habitable condition and had notice.

Evidence available to show that GRI and Herb London failed to deliver or maintain the premises in a habitable condition:

- Upon signing the lease London assured repairs were to be completed.
- Chapin has called and left messages with secretary and voice mail concerning defects with the premises.
- Chapin wrote letter to Mr. London to alert of the defects in writing.

Element #4: The leased premises shall be fit for human habitation and for the uses reasonably intended by the parties.

Evidence that the lease premises is not fit for human habitability:

- Chapin alerted London of deficiency before signing lease.
- Bathroom ceiling leaks.
- Plaster from said bathroom is falling.
- Some plaster has fallen and injured Chapin's daughter.
- There are cracks and holes in the walls of the apartment.
- Green slime is spreading from bathroom.
- Apartment needs plastering and painting.
- Chapin does not use rear bedroom since plaster fell in baby's crib.
- No heat to the apartment; she must use stove or space heater.

- Apartment is infested with rats.
- Elevator is out of order.
- Chapin wrote a letter to landlord describing defects.
- City of Avon has created a violation report confirming the above evidence and defining three (3) C class violations and two (2) B class violations.

Element #5: The leased premises shall not be subjected to conditions that would be dangerous, hazardous or detrimental to leasee's life, health or safety.

Evidence that the leased premises is subject to dangerous conditions:

- Chapin's daughter injured using bathroom by falling plaster.
- Plaster from ceiling fell in baby's crib.
- Rats are living in the apartment.

Remedy #1: Rent abatement damages

Legal Authority: Rent abatement damages shall be the difference between the value of the dwelling as warranted and the value of the dwelling as it exists in its defective condition. Damages for discomfort and annoyance are not susceptible to precise calculation; thus the maximum allowed recovery is 100% rent abatement. (Virgil). §240 of Franklin District Court Act provides that the court can provide any remedy.

Element #1: Value of dwelling as warranted.

- Signed rental agreement of rent was $1,000/month for 3 years.

Element #2: Value of dwelling as it exists in defective condition.

Percentage of reduction:

– Always exposed to the damage – plaster continues to fall; rates are everywhere

Degree of discomfort

– she always complains so she is always uncomfortable.

Quality of health

– rats are unhealthy; plaster falling is damaging people in the apartment and apartment has no heat.

Remedy #2: Separate damages.

Legal Authority: Separate damages are available for remedial measures taken by the tenant when landlord is notified of the defect, but fails to remedy it within a reasonable time and the tenant uses out of pocket expenses to remedy (Virgil).

Element: Plaintiff paid for remedy out of pocket because landlord failed to fix the defect.

Evidence of out of pocket expenses:

- rat traps
- space heater purchased for heat
- electricity bills for heat from stove

Remedy #3: Punitive damages

Legal Authority: Punitive damages may be awarded in order to punish the landlord. (Main v. Stocker Realty).

Element #1: Notice to the landlord of the defect.

Evidence – see above for element #2 of implied warranty breach.

Element #2: Failure to fix due to bad spirit and wrongful intention.

Evidence that landlord failed to fix and in bad spirit:

- see above for breach of implied warranty – same evidence is relevant.
- Also, Avon Gazette from July 20, 2004 creates the bad spirit of GRI's management is trying to force existing tenants by ignoring necessary repairs in order to get new tenants and charge higher rents.

Remedy #4: Other remedy

Legal Authority: §240 provides that the court can provide any remedy to protect and promote public interest.

Other relief available in a different proceeding: Claim seeking damages for the loss of property occurring as a result of the landlord's failure to provide adequate habitability.

Legal Authority: Where negligence, proximate cause, and damages are contested and require discovery and proof that would delay proceedings, the claims should be tried outside of the landlord-tenant proceeding [not before the Housing Division of the District Court ("HDDC")]. (Bashford v. Schwartz) §240 of the Franklin District Court Act would prevent a negligence suit to be brought in the HDDC, but allows the suit to be brought elsewhere.

Evidence of negligence include:

- daughter's injuries from falling plaster