## ESSAY 1 – SAMPLE ANSWER 1

(1) Whether Andy was authorized to take managerial actions on behalf ABC, LLC

A limited liability company is an unincorporated entity that combines features of a partnership, like management and taxation, with features of a corporation, like limited liability. An LLC is created by filing articles of organization with the state. An LLC may adopt a written operating agreement that governs any or all aspects of its affairs, which generally takes precedence over contrary statutory provisions. Unless the articles of organization (AO) provide otherwise, management of the business and affairs of an LLC is vested in its members. Alternatively, an LLC may provide for centralized management of the LLC by one or more managers who need not be members of the LLC. In a member-managed LLC, the members manage the business and affairs of the LLC unless otherwise agreed. To approve an action, a majority of the members of the LLC must vote to affirm the action.

In this case, Andy was not authorized to take the managerial actions that he took on behalf of ABC, LLC. Because the members of the LLC did not adopt a written operating agreement, the terms of the AO and statutory law apply here. As such, ABC, LLC is likely a member-managed company because the facts do not indicate that the members elected to manage the business as a manager-managed LLC. As such, the actions taken by Andy would require a majority vote of ABC, LLC's members. At least two of the initial members were required to approve the transactions in order for them to be proper and effective.

(2) Whether it is necessary for ABC, LLC to have adopted a written operating agreement in order to become a recognized limited liability company for state law purposes

Once the LLC is created by filing the AO with the state, the LLC may adopt a written operating agreement that governs any or all aspects of its affairs. This operating agreement generally takes precedence over contrary statutory provisions.

In this case, the members of ABC, LLC chose not to adopt a written operating agreement. Pursuant to Georgia law, ABC, LLC was not required to adopt a written operating agreement in order to become recognized as a limited liability company for state law purposes. Although adopting a written operating agreement is generally the popular approach, it is not a requirement.

(3) Whether Charlie is required to pay the $10,000 assessment for the renovation of the rental house

A member of an LLC is generally not liable, solely by reason of being a member, for an LLC's obligations. However, a member or manager may agree to be personally obligated for the debts and liabilities of the LLC.

In this case, Charlie likely is not required to pay the $10,000 assessment for the renovation of the rental house. First, Andy's employment of the contractor to make renovations to the house was an inappropriate exercise of power because ABC, LLC is a member-managed LLC and thus this type of employment contract would require a majority vote of approval. Further, a member of an LLC is protected against being held personally liable for the debts and obligations of the company. As such, Charlie, as a member, is not personally liable for the company's obligation to pay $30,000 in renovation fees.

(4) Whether Charlie has a legal right to withdraw from the LLC and have his original investment returned

Unless provided for in the AO or the operating agreement, a member may not withdraw from an LLC. A person ceases to be a member when: (1) the person assigns all of his interest in the LLC and the assignee becomes a member; (2) the person is removed as a member in accordance with the articles of incorporation or the operating agreement; (3) the member's entire interest is purchased or redeemed by the LLC; (4) the member dies; or (5) the member is adjudged incompetent by a court.

In this case, Charlie does not have a legal right to withdraw from the LLC and have his original investment return. Rather, Charlie only ceases to be a member of the LLC when any one of the five events discussed above exists. However, Charlie has not assigned his interest in the LLC to another person; he has not been removed as a member in accordance with the AO; his entire interest was not purchased or redeemed by the LLC; he has not died; and he was not adjudged incompetent by a court. Thus, he cannot withdraw from ABC, LLC at this time.

## ESSAY 1 – SAMPLE ANSWER 2

1. Under Georgia law, members of an LLC may elect to become a manger-managed LLC instead of the default rule which is member-managed. This election must be made either in the Articles of Organization or Operating Agreement. The facts do not state that the members elected to be manager-managed under the Articles of Organization, and there was no Operating Agreement filed, thus, by default under Georgia law, this LLC should be member-managed and not manager managed. This follows that under GA law Andy was not authorized to take managerial actions on behalf of ABC, LLC. Any actions would require the majority approval of the members, that is a 2/3 approval.

2. Under Georgia law it is not necessary for ABC, LLC to have adopted a written operating agreement in order to become a recognized LLC for state law purposes. In order to be recognized as an LLC for state law purposes, GA only requires that Articles of Organization are filed with the Georgia secretary of state and it must include the name of the LLC including the "LLC" label at the end, the name of the organizers, street address of a registered agent or office, and principal place of business, if different form registered office. Although most LLC also have a written operating agreement, those that do not, such as ABC, LLC, will follow the state of Georgia's default rules governing limited liability companies.

3. If we are to assume that this was a member-managed LLC as per the default laws in GA, and Andy was acting in his capacity as a member when he entered into the renovation contract, under LLC default rules under Georgia law before entering into this agreement with the contractor, Andy would have to have sought majority approval from the members of the LLC. Either Bobby, Charlie, or both, in addition to Andy would have needed to approve of this contract. Thus, on its face Charlie would not be required to pay the $10,000 assessment for the renovation. But, under the laws of Agency and LLC in the state of Georgia, Andy is an agent of the LLC. Thus, Andy entered into a service contract with the contractor and because he was an agent of the LLC by virtue of law, Andy had apparent authority to enter into this contract. Thus, ABC, LLC will be liable under this contract. But the liability is to the LLC and not Charlie personally, thus, Charlie can escape personal liability for this amount.

4. Under Georgia law, a member can exit an LLC if the conditions of the Articles of Organization or the Operating Agreement are met. Further, unless there is a condition that allows for the exit, Members of an LLC cannot voluntarily withdraw or exit the LLC, absent a clear right in the Articles of Organization or the Operating Agreement. The facts here does not list what conditions must be met under the Articles of Organization for a member, such as Charlie, to voluntarily withdraw or exit the membership. Even though the facts do not list which conditions allow for a member to withdraw, it is unlikely, that if this is brought to a court, that a court will allow Charlie to withdraw simply because he has become unhappy with the direction the LLC is taking. As a member, he can require that they establish an Operating Agreement and fix these problems though an Operating Agreement. Common conditions that allow a member to be removed from the LLC is that the removal is allowed by the Articles or Operating Agreement, member is permitted by the Operating Agreement to transfer his membership share, or death of the member. Since none of those apply here, Andy's best solution would be to require an Operating Agreement to be drafted and filed to solve the issues that are making him unhappy, and to also provide for a manner in which he can withdraw in the future if he continues to be unhappy with the LLC.

## ESSAY 1 – SAMPLE ANSWER 3

1. Under Georgia law, Andy, alone, was not authorized to take managerial actions on behalf of ABC, LLC. Rather, managerial duties, if not provided for in a written operating agreement, are vested in the LLC's members.

Here, ABC, LLC did not have an operating agreement to provide for which person would have managerial control over the business. Therefore, such duties fell on all members of the LLC. However, a decision about renovations to the house owned by the LLC does not have to be unanimously agreed to by all members. Unless otherwise provided in the articles of organization or operating agreement, only a few select decisions must be made unanimously, and the renovations are not contained within those categories. Therefore, if Bobby agrees to the renovation, then Andy likely has authority to act.

2. ABC, LLC does not need to have adopted a written operating agreement in order to become a recognized LLC.

In Georgia, LLC formation only requires that there be filed with the Secretary of State articles of incorporation. The articles must contain the name and address of each organizer, the street address of the LLC's registered office and the name of its registered agent at that office, and the mailing address of the LLC's principal place of business. Although an LLC may adopt an operating agreement, they need not. In the absence of such an agreement, statutory law and case law will govern. The properly filed articles of incorporation is the only thing needed to form an LLC in Georgia.

3. Charlie is not required to pay the $10,000 assessment for the renovation of the rental house, but he may be required to share equally in any losses.

Charlie cannot be directly compelled to pay the LLC $10,000 for the renovation because there is no operating agreement which states the members shall pay certain sums on demand. There is no requirement that the members contribute more money than what they

already agreed to contribute to start the business. In the absence of such an agreement, Charlie cannot be compelled to pay. However, unless the articles of organization or operating agreement provide otherwise, profits and losses are allocated equally among the members. Therefore, in the event the market value of the home declines or is not enhanced by the renovations, Charlie will suffer the loss equally.

4. Charlie may not withdraw from the LLC and demand return of his investment without consent.

Under Georgia law, members of an LLC may not withdraw, but they will cease to be a member under certain conditions. One such condition is that the member's entire interest is purchased or redeemed by the LLC. Here, Charlie may ask Andy and Bobby if they will contribute funds sufficient to the LLC to buy Charlie's interest. However, he cannot just tell them he is withdrawing and demand $50,000.00. Even were Charlie to assign all of his interest in the LLC to someone else, he could not withdraw unless that person also becomes a member. A person who is not named as an initial member of the LLC in the articles of organization may only become a member with the consent of all of the other members of the LLC. Charlie could find someone to purchase his interest and ask for Andy and Bobby to consent to that person becoming a member.

## ESSAY 2 – SAMPLE ANSWER 1

(1) Service was proper on Donna through abode service by a sheriff's deputy.

In Georgia, service of process must be completed by someone who is wholly disinterested and can either be appointed by the court (for the specific case), a certified process service with standing appointment, or a sheriff of the county where the case is brought, or the sheriff of the county where the defendant is found. Further, such service can occur by these methods: (1) personal service, (2) abode service, (3) publication, or (4) if on an agent, if a

corporation. If made at the defendant's abode, such service is sufficient if it is left at the defendant's usual place of abode and with someone of suitable age and discretion who resides therein. Abode is determined by domicile which is where the individual resides with the intent for the person to be their permanent residence. With respect to someone of suitable age and discretion, the individual does not need to be over 18 years old, just enough to be able to satisfy the policy that service is on someone who will give the notice to the defendant who resides therein. In this instance, service was on Donna through abode service. The sheriff's deputy is a permissible person to effectuate service and Donna's 15-year-old daughter received the service. A 15-year-old is likely to be of capable of conveying such information to her mother when she returns home. Further, even though Katie's parents are divorced, they have shared physical custody meaning that Katie resides in Donna's house as part of her domicile. Thus, service was proper on Donna.

(2) Georgia would have personal jurisdiction over Dodge City Ranch under the Georgia Nonresident Motorist Act and because Dodge City through its owner purposefully availed itself of Georgia roadways such to provide constitutional personal jurisdiction.

Personal jurisdiction is the power that a court has over a person (i.e., whether the court has power over the defendant to render a binding judgment). Personal jurisdiction is established if a Georgia statute provides jurisdiction and if the jurisdiction is also constitutional; however, it can be waived preemptively by contract, or by failing to raise the defense in the respondent's answer or first motion (whichever comes first). Statutorily, personal jurisdiction in Georgia is established through either: (1) consent (i.e., the parties agreeing to the jurisdiction either expressly or impliedly), (2) personal service, (3) domicile, (4) long-arm statute (grants a state jurisdiction over a nonresident), (5) under the Georgia Nonresident Motorist Act (i.e., an individual is deemed to have subjected himself/herself to the jurisdiction of a court if he/she avails herself of the roadways in the jurisdiction), or (6) tag jurisdiction. Under the Georgia Long-Arm Statute, personal jurisdiction can be obtained on a nonresident if the nonresident either: (1) transacts business in the state from which the lawsuit derives, (2) commits a tortious act in the state of Georgia from which the lawsuit derives, (3) commits a tortious act outside of the state of Georgia but the plaintiff is harmed

in Georgia and such act is from which the lawsuit derives, if the tortfeasor either regularly does or solicits business in Georgia, engages in other persistent course of conduct in Georgia, or derives substantial revenue from goods used or consumed or services rendered in Georgia. Further, under the GNMRA, a state may have personal jurisdiction over a defendant if the accident involved occurred in the state, even if that individual is a nonresident of the state (at the time the accident occurred or at the time service) and the long-arm statute is unavailable. Finally, if there is statutory personal jurisdiction, the court must also have constitutional personal jurisdiction over the defendant, which means that the defendant has such minimum contacts with the forum that the defendant has purposefully availed himself/herself of the rights and benefits of the forum (i.e., purposefully availed himself of the privilege of doing some act or consummating some transaction within the forum), it is foreseeable that such contacts would indicate that the defendant could be haled into court in the forum (i.e., a nexus between defendant and the forum), and the exercise of personal jurisdiction over the defendant is reasonable under the theory of fair play and substantial justice (factors include: burden on the defendant, the forum state's interest in the dispute, the plaintiff's interest in obtaining convenient and effective relief, and the interstate judicial system's interest in obtaining convenience and effective resolution of the controversy). Of note, the Superior Courts in Georgia are the main trial courts of the state and have jurisdiction over all cases unless jurisdiction is given expressly to another court.

In this case, Tim, the owner of Dodge City Ranch, availed himself of the jurisdiction of the court by driving on the roadways of Georgia, thus providing Georgia with statutory personal jurisdiction over Dodge City. Tim was the owner of Dodge City and had just dropped off a purebred horse to a customer in Georgia. An employer can be responsible for the tortious acts of its employee if the employee was acting with the scope of his/her employment. In this case, Tim had just dropped off the horse, it seems that he was returning to his home and was not on a frolic such that it would remove him from being within the scope of his employment. Therefore, under the theory of respondeat superior, Tim's actions would be imputed to Dodge City and since the accident occurred on a Georgia highway, the GNRMA would give statutory personal jurisdiction. In addition, it seems that Tim and Dodge City had availed themselves of the right to do business in Georgia since Tim had just dropped off a

purebred horse to a 'customer.' Further, it is foreseeable when driving on the highway might result in an accident and it is reasonable for Tim and Dodge City to think that they might be haled into court if an accident does occur. Thus, Georgia also seems to have personal jurisdiction over Dodge City constitutionally as well.

(3) It seems that Plaintiff may bring in Rowdy Rotors as a party defendant.

In Georgia, joinder is permissible if it the case has not proceeded to far into the litigation and joinder would not substantially burden the parties involved. Here, the case was filed on October 10, 2019 and in June of the following year, information regarding a potential additional defendant is discovered through interrogatories. It seems that the parties are currently in discovery and it seems that the parties would not be prejudiced by adding Rowdy Rotors since Rowdy Rotors may be partially liable for the damage caused that would have initially been from Donna. Further, in Georgia a pleader may amend once as of right up to the entry of a pretrial order, or up to trial if there is no pretrial order, unless the amendment is to come after the statute of limitations. Here, Plaintiff turned 18 on 07/25/19, which is when she can bring her claim. Personal injuries and property damage claims have a 2 year statute of limitations in Georgia so Plaintiff would have until 07/25/21 to bring the claim. She brought the claim here on 10/10/19 so, within the statute of limitations period due to tolling because of minority. Thus there is no issue with plaintiff amending her complaint to add Rowdy Rotors as long as it is done before pretrial conference, which it appears is most likely here. Thus, plaintiff should amend her complaint to bring in Rowdy Rotors.

## ESSAY 2 – SAMPLE ANSWER 2

MEMORANDUM

To: Managing Partner

From: Examinee

Re: Donna and Dodge City Ranch

1. Was the service of process on Donna sufficient under the law? Please explain your answer fully.

The Georgia Civil Practice sets out the standard for service of process in Georgia. Process may be served by the sheriff or deputy for the county where the action is brought or where the defendant is found, by a civilian who is an American citizen and who is specially appointed by the court, or by a certified process server. Additionally, service must be effected within a reasonable time after filing the complaint. By statute, an in-state process server must serve the summons and complaint within five days of their receipt. Even if this requirement is not complied with, service may be upheld if the plaintiff shows due diligence to effect service within a reasonable time.

In Georgia, service of process is proper by personal service, abode service, or service upon an authorized agent. Additionally, a request for a waiver of formal service of process by mail. Abode service is conducted by leaving the process at the defendant's usual place of abode with one of suitable age and discretion who resides there. Teenagers are considered to have suitable age and discretion.

Here, the firm filed a complaint against Donna and Dodge City Ranch in the Superior Court of Cobb County, Georgia on October 10, 2019. The facts indicate that subsequently the Cobb County Sheriff’s deputy made a service attempt on Donna within five days, if not the same day. Because Donna was not home, the sheriff’s deputy served Donna’s 15 year- old daughter, Katie. Process was served by the correct individual under Georgia law and within the correct timeframe. The deputy made service by abode service by leaving the process at Donna's usual place of abode with someone of suitable age and discretion. As a 15-year-old, Katie has suitable age and discretion for abode service. Katie’s parents are divorced and have shared legal and physical custody of her. Although Katie may not reside at the home full time, she is a legal resident of the home. Thus, service of process on Donna was proper under Georgia law.

2. Does the Superior Court of Cobb County, Georgia have personal jurisdiction over Dodge City Ranch? Please explain your answer fully.

For a court to have jurisdiction over a defendant, the state must authorize jurisdiction by statute and the exercise of jurisdiction must be constitutional. Additionally, service of process must be proper to give the defendant notice.

**Statutory Basis:**

Georgia has established statutory bases for jurisdiction for presence, consent, domicile, corporations and entities, and through its long-arm statute. Georgia's long arm statute provides in personam jurisdiction over nonresidents for claims arising from certain acts or omissions in Georgia. A nonresident is subject to personal jurisdiction under the long-arm statute for claims when he transacts any business in Georgia or commits a tortious act in Georgia. The cause of action must arise out of the defendant's contacts with Georgia. Importantly, the nonresident motorist act provides jurisdiction over nonresidents who operate a motor vehicle in Georgia for claims arising from their ownership or operation of the vehicle.

Here, Dodge City Ranch is vicariously liable for the actions of its owner, Tim. Because Dodge City Ranch is a Delaware corporation with its principal place of business in Kansas it is not subject to general jurisdiction in Georgia. However, it can be subject to personal jurisdiction based on Tim's presence within the state of Georgia. Tim is subject to in personam jurisdiction under Georgia's long-arm statute under the nonresident motorist act, because the claim arises from his operation of a vehicle in Georgia.

**Constitutional Basis:**

For jurisdiction to be constitutional, there must be sufficient minimum contacts so that the exercise of in personal jurisdiction over the defendant is fair. The defendant's contacts with

the forum must show that the defendant personally availed herself of the forum state's laws and knew or reasonably should have anticipated that her activities in the forum made it foreseeable that he may be haled into court there. If the claim is related to the defendant's contact with the forum, a court is more likely to find that jurisdiction as to that claim is fair and reasonable. The court will also consider whether the forum is so gravely difficult and inconvenient that the defendant is put at a severe disadvantage, the forum state's interest in providing redress for its resident, the plaintiff's interest in obtaining effective relief, the judicial system's interests in efficiency, and other social policies.

Here, Dodge City Ranch had contacts with the forum related to its business. Tim, the owner of Dodge City Ranch was in Georgia to deliver a purebred horse to a customer. The accident occurred during the scope of his employment. As a motor vehicle operator, Tim availed himself of the Georgia traffic laws and should have reasonably anticipated that his activities could subject him to litigation. It was foreseeable that he could be haled into court. Most motorists are aware of the possibility that they could be haled into court for torts committed in their vehicle operation. Additionally, the state of Georgia has a strong interest in providing redress for its residents injured by nonresident motorists. There is an argument for judicial efficiency because the accident and evidence occurred in Georgia. Thus, personal jurisdiction meets the requirements to be constitutional.

In conclusion, the Superior Court of Cobb County, Georgia has personal jurisdiction over Dodge City Ranch.

3. Having received supplemental interrogatory responses from Donna in June 2020, can Plaintiff add Rowdy Rotors as a party defendant? If your answer is yes, please explain why it can be added as a party defendant and by what procedure. If your answer is no, please explain why it cannot be added as a party defendant.

Under the CPA, a party may amend his pleading any time before entry of a pretrial conference order. An amendment naming a new defendant relates back to the date of the

original pleading if the plaintiff can show that the party to be brought in had notice of the action and knew or should have known that she will not be harmed in presenting a defense.

Here, because there has not been a pretrial conference yet, the plaintiff can amend his pleading to add Rowdy Rotors. The statute of limitations for a personal injury claim is typically 2 years. However, for a minor the tolling does not begin until the individual reaches the age of 18. Here, the tolling for the personal injury claim for Plaintiff did not begin until he turned 18 on July 25, 2019. Thus, he can amend his complaint in June 2020 to add Rowdy Rotors. Even if it doesn't meet the requirements to relate back, he is within the statute of limitations. Thus, plaintiff can add Rowdy Rotors as a defendant.

## ESSAY 2 – SAMPLE ANSWER 3

1. Service of Process

Yes, process was properly served.

At issue is the sufficiency of service on Donna's teenage daughter, Katie. In Georgia, service of process may be made by the sherriff for the county where the action is brought. Here, the action was brought in Cobb County Superior Court, and service was made by the Cobb County Sherriff's office. Georgia permits several methods of service, including abode service, which means service at the defendant's usual place of abode on a personal of suitable age and discretion residing therein. The service here was clearly an attempt at abode service, raising two questions: 1) Is Katie, a fifteen year old, a person of suitable age and discretion? 2) Does Katie "reside" at Donna's home?

First, despite being fifteen, Katie is a person of suitable age and discretion. Georgia law classifies teenagers as persons of suitable age and discretion for purposes of abode service. Even though Katie is a minor, she is not a small child, and she is old enough to

accept service of process on her mother Donna's behalf. Next, Katie likely "resides" at Donna's place of abode. Although the facts state that Donna and her ex-husband share legal and physical custody, Katie spends at least part of her time living at Donna's house, and so will be considered a resident for purposes of abode service. Moreover, if Katie was present at Donna's house when the sherriff arrived, it appears that she was staying at Donna's house at the time service was made and thus was "living there" at the time of service.

In sum, since service was made by the sherriff of the county where the action was brought upon a person of suitable age and discretion residing therein, service of process was proper under Georgia law.

2. Personal Jurisdiction

Yes, there is likely personal jurisdiction over Dodge City.

For a Georgia court to have personal jurisdiction, both statutory and constitutional requirements must be met. First, jurisdiction must be authorized by Georgia law. Georgia law authorizes jurisdiction if the defendant is present in Georgia when served with process, consents to jurisdiction (either expressly or impliedly by failing to object), or is domiciled in Georgia. None of these requirements appear to be met for Dodge City Ranch. Georgia's long arms statute also authorizes personal jurisdiction over out of state defendants who commit a tort that injures a plaintiff in Georgia. Here, Dodge City Ranch was involved in a car wreck in Georgia, hitting Plaintiff's and Donna's cars from behind. This allegedly tortious action would be sufficient to meet the long arm statute's authorization.

Next, personal jurisdiction must meet constitutional requirements of due process. The key inquiry is whether the defendant has such minimum contacts with the forum state such that the exercise of jurisdiction would be fair and reasonable (wouldn't offend traditional notions of fair play and substantial justice). Factors include minimum contacts with the state

via purposeful availment, the foreseeability of being sued in the state, convenience, and the interests of the plaintiff and forum state. Moreover, the defendant must receive sufficient notice to apprise him of the action and allow him an opportunity to be heard. Any of the traditional methods of personal service will satisfy the notice requirement.

A potential problem arises with regards to Dodge City's Ranch's minimum contacts with Georgia. From the facts, it does not appear that Dodge City does much business in the state- it is not a Georgia corporation, and it has its office and agent in Kansas. We do know, however, that Dodge City was in Georgia on business at the time of the collision—it had just delivered a horse to a customer in Georgia. Although we don't know for sure whether Dodge City regularly delivers horses to customers in Georgia, the act here might be sufficient to confer personal jurisdiction, because Dodge City has purposely availed itself of the privilege of doing business in Georgia by contracting with a Georgia horse buyer. Moreover, the claim against Dodge City arises out of its contacts with Georgia- the accident occurred shortly after Dodge City delivered the horse. Thus, although there is no general jurisdiction over Dodge City because the company is not at home in the state, there is specific jurisdiction because the claim arises out of the contacts. Moreover, it is foreseeable that if Dodge City could be sued in Georgia if it drove negligently while transporting horses. While it might be inconvenient for Dodge City to defend suit in Georgia, having to defend does not place Dodge City at a substantial disadvantage in the litigation. Moreover, the plaintiff has an interest in seeking relief in his home state, and Georgia has an interest in providing a forum for its injured citizens to bring tort suits.

3.

Yes, the plaintiff may add Rowdy Rotors as a party defendant. At issue is whether the plaintiff will be permitted to amend his complaint to add Rowdy.

Georgia sets permissive rules for amending the complaint. A plaintiff may amend once as a matter of right any time before the entry of a pretrial conference order, or, if there is none, until commencement of trial. Here, the case is still in the discovery phase, and there

is no indication that the court has entered a pretrial conference order, so the plaintiff may still amend.

Next, there are no problems with the statute of limitations. The statute of limitations is 2 years for personal injury actions; moreover, since the Plaintiff was under a legal disability (infancy) at the time of the suit, the two years did not begin to run until his 18th birthday. This means that the statute was tolled until July 25, 2019, and the plaintiff has until July 25, 2021 to bring his claim. As such, there is no need to analyze whether the amendment will relate back.

## ESSAY 3 – SAMPLE ANSWER 1

1. The communications that will likely be considered as part of the agreement depends on the law used.

For common law purposes, in determining whether there was an offer and acceptance, the mirror image rule governs transactions. According to the mirror image rule, the offer and acceptance must be exactly alike. Any additions or changes made to a contract are essentially treated as a rejection and counteroffer under the mirror image rule. Thus, Smith's purchase order for the software as well as the SOW would be the agreement that governs, because that was the last agreement that was stated before performance began.

Under the UCC approach, the "battle of the forms" approach is used. Under this doctrine, the proposal of additional or different terms by the offerree in an acceptance does not constitute a rejection and a counteroffer, and is instead effective as an acceptance. In contracts involving a nonmerchant, the additional term is considered to be mere proposals that do not become a part of the contract. In contracts involving merchants, the terms are incorporated into the agreement unless 1) they materially alter the agreement; 2) the offer

expressly limits acceptance to the terms of the offer; or 3) the offeror has already objected to the terms or objects reasonably soon.

Here the two entities would likely be considered merchants, and the SOW would be incorporated because it is not a material change to the agreement.

2. The sale of software would likely not be governed under the UCC because it is not a tangible good. Under the UCC, "goods" are all things moveable at the time they are identified. The UCC does not apply to the services or intangibles such as patents. The software at issue here was not a tangible, moveable good. This can be seen by the way it was delivered (through email). Thus, Article 2 would not apply to this transaction.

3. ISC can argue that these types of "clickwrap" agreements are not sufficient to disclaim liabilities. Additionally, ISC can argue that the merger and integration clauses present in license did not apply because they were not signed by the person who had made the agreement-- Smith. Collier did not have the authority to make agreements on behalf of ISC, and therefore could not sign onto these new provisions. It can also be argued that if the Battle of the Forms doctrine applies, the new terms within the License constituted material changes to the contract that should not be considered a part of the agreement. These material alterations were too great to be incorporated into the agreement.

4. ISC could argue that Solutions breached its contract because the SOW governed the agreement under common law principles. As described above, under the common law, Smith's attachment of the SOW implicitly formed a counteroffer, which Solutions accepted by beginning performance. Under the terms of the SOW, ISC would require technical support in implementing the new software, and also included various parameters for the use of the software. These should all be considered a part of the contract, and since Solutions violated these terms, it should be found in breach of the contract.

## ESSAY 3 – SAMPLE ANSWER 2

### 1. Pre-agreement communications.

The parol evidence rule governs the admissibility of oral and documentary evidence of negotiations and other communications between the parties that took place prior to or during the execution of the contract. Parol evidence is admissible to explain and interpret terms of the contract. It is admissible to supplement the contract unless the contract is completely integrated. The UCC additionally allows for trade usage, course of dealings, and course of performance evidence to be used to supplement even if the contract is completely integrated. Parol evidence is admissible to contradict the written contract as long as the term is not fully integrated.

Here, the contract was likely formed when Smith sent the purchase order back to Long. The parol evidence rule would apply to all subsequent and contemporaneous communications. This would include the information contained in the SOW, Long's statement about the software being able to handle the business, the payment schedule, and the means of delivery to the IT technician. The merger clause did not come until later when Collier downloaded the software and was not a part of the original contract, so it likely will not impact this analysis. This means the contract would likely not be deemed completely or fully integrated with would allow many types of parol evidence in (regardless of whether the analysis was under the UCC or Georgia common law).

Therefore, because the contract was not fully or completely integrated, parol evidence of the pre-agreement communications may be introduced to explain, supplement, and contradict the written contract.

### 2. Sale of Goods

The UCC governs the sale of goods. A sale is any transaction in which the seller transfers title of goods to the buyer. A good is any moveable item. For hybrid cases that involve goods

and services, the applicable law is governed by the predominate purpose of the transaction, looking to the contract language, the nature of the business, and the values involved.

Here, the software is likely a good as it is a moveable item that can be moved on and off of a computer system. The fact is does not have a physical quality like most goods is probably not enough to not make it a good. Software can be easily moved, so it is likely a good. There was a sale of the software between ISC and Solutions. The value of the software was $550,000 while the technical support service with the software was only $60,000.

Therefore, the predominate purpose of the contract was likely for the sale of goods which means that UCC Article 2 would apply.

**3. Additional Terms**

Under the UCC Article 2, additional terms in a contract are generally made a part of a contract unless the offer expressly limits acceptance to the terms of the offer, the offeror objects to the additional terms within a reasonable time, or the additional terms would materially alter the contract. A contract would be materially altered if it would result in surprise or hardship if incorporated without the express awareness of the other party.

Here, the disclaimer of warranties, the merger clause, and the damages limitations were included in a click-wrap link with the download link for the software that was sent to the IT specialist. Even though the IT specialist clicked on this accepted and accepted the terms without reading it, allowing these terms would still materially alter the contract and create hardship if incorporated. ISC would likely not be expressly aware of the terms because the one making the contract was not involved in this part, only the IT specialists. Therefore, ISC would try to argue that these additional terms not be included in the contract.

**4. Breach and Damages arguments.**

A breach of an implied condition to a contract will be sufficient if it is a material breach to the contract. This occurs when the breach is serious enough that it can be treated like a failure of an express condition.

Here, there was an implied condition present that the software would be able to handle 2500 users without crashing. However, this was not the case here. The software was not able to handle the amount of users and the system crashed. This breach is likely material as it caused large amounts of damages to ISC in lost business and profits.

ISC will be able to recover expectation damages for the breach of this contract which entitles the aggrieved party to the amount that will restore them to the position they would have been in had the contract been fully performed. One caveat of this is that the damages sought, especially consequential damages, must be foreseeable.

Here, it is likely that ISC would be able to recover the lost profits from cancelled sales and from the lost orders. It is reasonably foreseeable that a crashed sales system would cause damages like this. The expenses to fix the system are also foreseeable as it is likely a company would try to fix a broken system. The advertising costs are a little more shaky but a court may allow them as most business have to spend advertising money to fix reputation hits from system crashes.

Therefore, the damages would likely be recoverable because of the material breach by Solutions.

## ESSAY 3 – SAMPLE ANSWER 3

ISC employs Smith, VP, and Collier an IT tech.

Solutions employs Long an IT engineer.

1. The answer might be different if this was considered a contract for goods versus services, but as discussed in number two this is a contract for sale of goods, so UCC article 2 governs. The parties should be bound by Smith's purchase order sent to Long. It was a negotiated agreement that had a meeting of the minds. The parties should probably also be bound by the SOW. Long was shown the SOW prior to the contract, and received it when he received the purchase order. Solutions had an opportunity to object to the SOW and did not, and instead delivered the goods. If this was not an article 2 matter there would be no meeting of the minds and the merchant counter offer rules with additional terms would not save the agreement.

If the SOW is not part of the agreement it may still be incorporated by an express warranty when Long a Solutions engineer ensured Smith of ISC that Solution's standard software could handle "any function listed in the SOW with virtually no need to customize it and would easily work with the other software ISC used." This is an express warranty that Smith likely relied upon. Although the SOW is likely not included as a binding document, a court should look at the SOW and the express warranty to see what was expected of Solutions.

The license agreement likely does not govern. It was accepted by Collier, who might not have had authority to accept it. The license was not part of the initial fully integrated agreement. The license has many dramatically different terms that ISC would not have signed if they were brought to its attention. Further, licenses in that form are a contract of adhesion which the court might disregard as unfair under the circumstances. This is not a fair counter offer because of the nature of the changes. That being said, a court could say it was agreed to and it was a unilateral mistake due to poor due diligence.

2. Solutions provided both a sale of goods and services. When both goods and services are provided, a court looks to the primary purpose of the contract to determine whether the UCC Article 2 should control. In the initial document Solution sent ISC discussing price and sales, $550,000.00 of the total sale price of $610,000.00 was allocated for the purchase and access to the software which is a good. A much smaller amount of $60,000 was allocated for three hundred hours of technical support for the implementation, testing, and training needed to deploy the software. Additionally, there is no indication that there was to be continued long term support after the product went live. A court would likely consider this interaction as a sale of goods.

3. As discussed in number 1, these terms were such a change from the original contract and never agreed upon that the merchant counteroffer rules likely would not allow them in. Also, since they already were silent on many of the added terms, these new terms were a major modification. The person who accepted the terms may not have been able to bind the company. ISC higher ups were never warned of the license until after it was accepted.

That being said, merchant rules give ten days to object to changes, and ISC did actually accept them. Still, in fairness they should not be allowed.

4. Solutions breached both the implied warranty of merchant-ability and the express warranty made by Long discussed above. All of ISC's following damages were foreseeable from the breach so ISC should be able to get the consequential damages as well as the damages to fix the problem. Those damages, would include $5.7mil in lost profits on sales that were canceled and orders not places for 30 days after the malfunction. $250,000 in advertising costs to bring sales back to normal, $250,000 of expenses for ISC's IT overtime. ISC might not receive the lost profits and sales from the full 30 days after the malfunction because it was able to turn back the software after 10 days. ISC received non-conforming goods.

**MPT – SAMPLE ANSWER 1**

**To:** George Bunke

**From:** Examinee

**Re:** Janet Klein matter

**Date:** October 5, 2020

A. Whether the State of Franklin is protected from liability by sovereign immunity

No. The State of Franklin is not protected from liability by sovereign immunity under the Franklin Tort Claims Act. Under the Franklin Tort Claims Act (FTCA) Section 41-6 waiver of government immunity is found where a government employee acting within the scope of duty is negligent giving rise to unsafe, dangerous, or defective conditions on property owned by the state of Franklin. Farrington v. Valley County, Fr. Sup. Ct. (2015).

Here, Mr. Randall Small is an employee of the state and may impute liability to the state of Franklin as a state employee as a result of negligence on the premises or grounds surrounding buildings owned by the state of Franklin under the FTCA. FTCA section 41-6. On the night of the rodeo Mr. Small was the on-site parking supervisor and had the ability to create a safe condition by moving the barriers to allow for multiple exits from the parking lot. See Investigation Email. However, Mr. Small did not allow for the removal of the barricades blocking the Central Avenue exit of the parking lot as Ms. Moore reported in the preliminary investigation. As required under the FTCA section 41-6 a government employee who is negligent within the scope of his employment and gives rise to unsafe, dangerous, or defective conditions on property owned by the state of Franklin may give rise to a waiver of sovereign immunity. FTCA section 41-6.

The state may argue that mere sloppy supervision is not actionable under the FTCA. See Rodriguez v. Town of Cottonwood, Fr. Ct. App. (2018) (noting that lack of supervision is not a dangerous condition where an employee acts within the scope of employment on government property or surrounding grounds). Alternatively, the state may argue that there is no waiver of sovereign immunity where state employee negligence did not create the risk of harm on or around government property. See Arthur v. Custer, Fr. Ct. App. (2008). Waiver is not found where negligence did not result in creating the risk of harm in a public park. Rodriguez, (2018)(citing Arthur v. Custer, Fr. Ct. App (2008)).

However in Mrs. Klein's action, Mr. Small did not merely act with sloppy supervision he actively did not allow for the removal of the barriers that blocked the Central Avenue exit during an event where the parking lot is excessively crowded. Thus, Mrs. Klein may argue that the refusal to unblock the central avenue exit to mitigate the risk of causing an unsafe, dangerous condition within the parking lot at a time where the lot would be at capacity created the risk of an unsafe or dangerous condition.

Therefore, it is arguable that Mr. Small's omission to remove the barricades blocking the Central Avenue exit during the rodeo event, an event that is known to create dangerous conditions, may have given rise to a dangerous and unsafe condition under the FTCA and that sovereign immunity was waived for the purposes of the FTCA.

B. Whether Mrs. Klein met FTCA notice requirements

An agency that causes alleged harm must have actual notice before written notice is not required. Beck v. City of Poplar, Fr. Ct. App (2013)(citing Ferguson v. State of Franklin, Fr. Sup. Ct. (2010)). Here, Mrs. Klein was injured on May 23, 2020 and screamed the state would pay for her damages at Mr. Small the on-site parking supervisor for the rodeo. However, this would be insufficient notice that the state should expect a claim against it under the FTCA section 41-16(b). Section 41-16(b) requires actual notice that the state agency may expect a claim against it and not mere injury, date, time, location. See Beck, Fr. Sup. Ct. (2012). Mrs. Klein was cited in a police report the same day, and the report also

noted that she screamed that the state would pay for her damages. See Police Report. However, this too would likely be considered ample notice under the FTCA.

Furthermore, under the FTCA section 41-16(a) a claim must be noticed in writing within 90 days of the cause of action. Solomon v. State of Franklin, Fr. Ct. App. (2012). Mrs. Klein did not give "official" notice of the claim against the state until 97 days after the incident giving rise to the cause of action. Thus, this would likely not put the state on notice as required under the FTCA.

However, some exceptions apply to the notice requirement under the FTCA. Under FTCA section 41-16(b) an agency is notified where notice reasonably apprises the agency it may be subject to litigation. FTCA 41-16(b). It could be argued that Mrs. Klein's statement in the police report was sufficient, but as mentioned above this alone would likely be insufficient under the FTCA. But the inference from a three car pile up at a crowded event on state property may coupled with that statement in a police report may be sufficient because it would then place the state on notice that the agency should have been reasonably alerted of necessary investigation of the facts surrounding the three car collision on its property to include what Mr. Small (a state employee charged with parking supervision during the event) did or did not do to mitigate the risks of creating a dangerous or unsafe condition during the rodeo event. See FTCA section 41-16(b).

Furthermore, Mrs. Klein cc'd Mr. Small on her official notice and he remembered that Mrs. Klein wanted to sue the state agency on the night of the accident, which should have placed the state agency on alert that a claim was imminent as a result of the accident on the night of May 23, 2020.

Therefore, if it could be successfully argued that the statement in the police report and the inference that a three car pile up should have put the state agency on reasonable alert notice that it should have investigated the facts surrounding the accident at the rodeo, Mrs. Klein may be successful in asserting timely and proper notice under the FTCA.

C. Conclusion

It is assumed that if Mr. Small was negligent and acted within the scope of employment and it is found the state waived immunity under the FTCA that the state is vicariously liable for Mr. Small's negligence. Therefore, if Mrs. Klein can successfully argue that she gave notice within 90 days of the incident and that notice was sufficient to reasonably alert the Risk Management Division of the State of Franklin Mrs. Klein may be successful in recovering her injuries, personal and property damages, as well as lost wages.

## MPT – SAMPLE ANSWER 2

***Is the State of Franklin protected from liability in this case by sovereign immunity?***

The State of Franklin is typically immune from suit under the doctrine of sovereign immunity. However, in certain cases, the state may waive its protection of sovereign immunity and open itself to liability from suit. This is exactly what the State of Franklin has done. In §41-1 of the Franklin Tort Claims Act, the state legislated that it is public policy for Franklin to be liable only while within the limitations of the Tort Claims Act. The act further states, in §41-4 and §41-6, that immunity "is waived when bodily injury, wrongful death, or property damage is caused by the negligence of public employees while acting within the scope of their duties."

In the present case, Janet Klein was involved in a car accident and injured on May 23, 2020, while leaving the Rodeo. The Rodeo was operated on the Franklin State Fairgrounds, which would classify as a state building or public park for purposes of the Tort Claims Act (*see* §41-6). Furthermore, it is stipulated in the library that Randy Small was the Director of Parking Facilities at the state park. The act requires personal or property injury, of which Janet Klein had both. Ms. Klein's car was damaged, as per the official report, and Ms. Klein has provided evidence of physical injuries which have caused her much trouble and

financial consequence. Further, the accident occurred at the state fairground's parking facility, which is a public park for purposes of the Tort Claims Act. Finally, the facts stipulated that Mr. Small was negligent in his operation of the parking facilities because he only allowed one exit to be operational, despite the facility having two exists and much of Mr. Small's staff expressing concern that the second exit remained barricaded.

Under *Rodriguez v. Town of Cottonwood*, the Franklin Court of Appeals held that the language in §41-6 of the Act has been interpreted to refer only to "operation" or "maintenance," and not supervision, of state facilities. It is stated that Mr. Small was negligent in his operation of the parking facility, thus falling within the limitations of the Act. While Mr. Small undoubtedly was negligent in his supervision of the parking facilities on the day of the incident, his negligent supervision alone isn't what waives immunity for the state. Mr. Small's negligent operation of the facilities is what imputes liability to the state. The Library indicates multiple studies, observations, and statements from employees of the parking facility that leaving barricades in place to block the second exit was negligent, and would ultimately lead to an accident. Ms. Klein alleges that had both exists been open, the accident would not have occurred. The allegations of negligence stem from Mr. Small's operational decision (negligence) to utilize only one exit.

A final defense that may be raised by the State of Franklin is that the parking facility, although adjacent to the State Fairgrounds, was not part of the fairgrounds and thus does not qualify as a state building or park under the meaning of §41-6. The court, in *Farrington v. Valley County*, held that a plain reading of the Act "discern[ed] no intent to exclude [...] liability for injuries arising from defective or dangerous conditions on the property surrounding a public building" or park. In *Farrington*, the court was considering the County Housing Authority's responsibility to keep the common areas around public housing safe from roaming dogs. It is certain that the court would find the state-managed parking lot attached to the state fairgrounds to be within the meaning of "state buildings and parks" for the purposes of waiver just as it found common areas of county housing to be within the definition. Further, the court ruled that the Housing Authority's (the state actor in *Farrington*) liability would rest on if it knew, or should have known, of the issue of roaming dogs in the

housing complex. That isn't an issue in the instant case as it was clear that Mr. Small had been warned on multiple occasions of the dangers of allowing only a single exit from the facility and yet refused to open the second exit. Mr. Small's knowledge, as an employee of the state, will be imputed to the state.

The State of Franklin will be liable to Janet Klein under the Franklin Tort Claims Act so long as she met the notice requirement's laid out in said statute.

***Did the State of Franklin receive sufficient notice as required by the Franklin Tort Claims Act?***

Under the Franklin Tort Claims Act, "[e]very person who claims damages from the State [...] shall present [...] claims against such local governmental body, within 90 calendar days after an occurrence" that would be a claim against the State of Franklin and would require Franklin to waive sovereign immunity of the Tort Claims Act. The written notice must also state "the time, place, and circumstances of the loss or injury."

Under the Act, claims may be addressed to the Risk Management Division if the claim is against the State. Here, Ms. Klein has a claim against the state and she provided written notice to the Risk Management Division of said claim on August 30, 2020 for the injuries she suffered on May 23, 2020. There is a question as to whether or not the Risk Management Division of the state is the appropriate division to be notified. The Act states a number of agencies that may receive notice or provides for notice to "the head administrative head of any other local governmental body for claims against such local governmental body." Thus, if there was a governmental body for "State Parks and Fairgrounds," Ms. Klein should have sent her notice there.

Additionally, the Act requires that written notice must be provided to the required state agency within 90 days, and because Ms. Klein's letter was dated August 30, 2020 (more than 3 months after the occurrence on May 23, 2020), she failed to provide timely notice.

The State of Franklin would thus be immune from suit. However, §41-16(b) of the Act states that any suit which immunity has been waived for shall not be heard unless notice has been given, or unless the governmental entity had actual notice of the occurrence. The question is therefore whether or not the state had actual notice of the occurrence.

In *Beck v. City of Poplar,* the court interpreted the "actual notice" portion of the Act, as seen in §41-16(b). The court held that actual notice "means that 'the *particular agency that caused the alleged harm must have actual notice*.'" The state further held in Beck that a police or other report may serve as actual notice as required by §41-16(b). However, the court clarified that the report itself must indicate that there may be a claim against the governmental entity.

In the instant case, there are a few opportunities when the governmental agency managing the fairgrounds and parking facility may have been put on notice. First, there was a state agent there, Mr. Small, who arrived at the scene just moments after the accident and witnessed Ms. Klein swearing and threatening suit against the state. As an employee of the state, Mr. Small's knowledge will be imputed to the state. Ms. Klein's statements were also rather explicit regarding her intentions to sue, therefore putting Mr. Small (and the state) on notice.

There was also a Traffic Collision Report created on the date of the accident. The collision report itself would not have been enough to impute actual knowledge on behalf of the appropriate governmental entity. However, located within the report, was a recorded statement from Ms. Klein where she stated, "The State will pay for this!" The language "the state will pay" is clearly enough to alert the state that there may be impending litigation. However, it is important that the state still received actual notice within the 90 days, as set out by the Act and the holding in *Beck*. Fortunately for Ms. Klein, Mr. Small's email to Mr. Thomas on September 27 stated that he received the Traffic Collision Report the week after the accident. A week after the accident is within the 90 day timeline, and, as stated above, the report included a notice that the state may be sued. This is different than the accident

report Beck, where the report only stated the date, time, and location without providing any indication that the City would be held liable.

For the above reasons, the State of Franklin did not receive written notice as required under §41-16(a) of the Act, but was put on actual notice (as required under §41-16(b)), in the form of the Traffic Collision Report, within 90 days of the occurrence. Therefore, the State of Franklin will be deemed to have been put on notice of the occurrence and will have waived sovereign immunity under the Tort Claims Act.

## MPT – SAMPLE ANSWER 3

**MEMORANDUM**

**October 5, 2020**

**To:** **George Bunke**

**From:** **Examinee**

**Re:** **Janet Klein Matter**

**Issue 1: Is the State of Franklin protected from liability in this case by sovereign immunity?**

No, the State of Franklin is not protected from liability in this case by sovereign immunity. The Courts will likely waive immunity in this case in favor of Ms. Janet Klein.

The issue here is whether the State of Franklin would be vicariously liable for their employee's, Mr. Small's, negligent supervision and operation of the fairground parking lot

(Lot B specifically) on the night of May 23, 2020 during the Hopps Rodeo at the annual State Fair. Ms. Klein is arguing that because Mr. Small was negligent in operating, maintaining, and supervising the parking lot B that his negligence caused the parking lot B to be unsafe and resulted in Ms. Klein's three-car vehicle accident.

First, we need to examine the law in the jurisdiction that is applicable here. The Franklin Tort Claims Act (hereinafter "Act") applies here, specifically Sections 41-1, 41-4, 41-6, and 41-16. As to this first issue, we will cover Sections 41-1, 41-4, and 41-6. Section 41-16 will be covered in Issue 2 below. Section 41-4 states the Legislative public policy of Franklin that they have this Act is to protect the state and local governmental entities and public employees from being liable within the limitations of this Act. The Act goes on to say that any state and local governmental entity and any public employee acting within the scope of employment are granted immunity from liability for any tort except those waived in Sections 41-5 through 41-15. This is where Section 41-6 comes in to our facts. Section 41-6 states that the immunity granted in the Act is waived when "bodily injury, wrongful death, or property damage is caused by the negligence of public employees while acting within the scope of their duties in the **operation or maintenance** of any building or public park."

Now that we have the rule, let's apply the cases to these rules. The Supreme Court in Farrington (2015) held that the Plaintiff won. The Defendant in this case is the Valley County Housing Authority (hereinafter "Defendant"). Defendant argued that the Tort Claims Act does not apply to grounds and only applies to buildings and parks. Section 41-6 states that the Franklin legislature intended to ensure the safety of the general public by imposing on public employees a duty to exercise reasonable care in maintaining premises owned and operated by governmental entities. There is no intent to exclude from that waiver liability for injuries arising from defective or dangerous conditions on the property surrounding a public building. The Tort Claims Act waives immunity for unsafe conditions in buildings or on the grounds surrounding the buildings. The Court held that loose dogs running around could represent an unsafe condition upon the land and therefore, the Court held for the Plaintiff here and waived immunity, allowing the Valley County Housing Authority to be sued. This case here is related to this case because the grounds of the parking lot are involved here.

There was no building or park involved in this case. Rather, it was a parking lot. The Court will establish that Franklin legislature intends to ensure the safety of the general public by imposing on public employees a duty to exercise reasonable care in maintaining premises owned and operated by governmental entities. Here, Mr. Small had the duty to exercise reasonable care in maintaining premises of the parking lot. IF he removed the barricades and allowed for a more open parking lot and easier access to the exits, reasonable care may have been established. But he did not. Instead, he kept the barricades there for over two years.

Here, the facts state that due to this car wreck, Ms. Klein suffered severe injuries, serious back injury and a broken wrist. She also suffered car damage and had to pay a $500 deductible for her insurance to cover the cost of repair. She has missed 3 weeks of work due to these injuries. She is a physical therapist, so she obviously needs her back and wrist and her body to be in great shape or at least good shape in order to conduct her activities on the client and to help restore her clients' physical abilities. Ms. Klein also cannot engage in usual activities and she has suffered $57,500 in expenses as a result of lost income, medical expenses, and her auto insurance deductible. She wants to recover those expenses and for the pain that she has suffered. These facts definitely go to Ms. Klein's favor in winning this suit because it is clear that according to section 41-6 of the Act that she has suffered not only bodily injury but also property damage as a result of Mr. Small's negligence while acting within the scope of his duties in the operation of the parking lot B on May 23, 2020. The Collision Report also states these injuries and property damage.

The next issue that we need to discuss focuses on the case of Rodriguez. In this case, the Franklin Court of Appeals held that the Town of Cottonwood is not liable and would grant them sovereign immunity. Here, a child was injured on playground as a result of negligent supervision of the Camper employees. The Court states that language in Section 41-6 refers only to the "operation" or "maintenance" that results in a condition creating a risk of harm and that no waiver of immunity is available for negligent performance of an employee's duties **unless the negligent performance of those duties resulted in a dangerous or defective condition in a public building or public park**. The Court held that the liability

cannot be based solely on negligent supervision. The Court explained that negligent supervision is a tort at common law, but it is not one of the torts for which immunity is waived by Section 41-6 of the Tort Claims Act. Here, the facts make it clear that Mr. Small's operation and maintenance of Lot B resulted in the dangerous and defective condition in the public parking lot. The facts state that there is only one exit was available. The road is a single dirt road funneled into one exit. Already, we can tell this is dangerous because the rodeo is the "most well-attended event at the annual State Fair" and in fact was sold out this year. Also, according to the investigator's report, the stadium holds 6,000 seats and the parking lot holds 5,000 cars so there is definitely a need for more than one exit since there are so many cars. Thus, it would make sense to have more than one exit open. The facts state that the parties were driving at a reasonable speed so we know it is not the drivers' fault here or Ms. Klein's fault given their attentive driving (stated in Collision report).

In addition, in the investigator's report, he refers to two employees he spoke to regarding this accident. By his observations, he could tell there were two exits - Central Ave and Lomas Blvd (one used here). They are both paved exists; however, only Lomas is used and Central was barricaded by galvanized steel barriers that were not affixed to the ground and could be moved if desired. In addition, there is only one gravel roadway through the center of Lot B that leads to both exits. ON the night he attended the concert, the investigator also saw that only the Lomas Blvd exit was open and that Central Av exit was again barricaded. The investor spoke to Ed Cranston, who also worked during the night of the wreck. He was nearby, saw it, and remembers Janet yelling. Ed said that he told Randy Small, his supervisor, that the barricades to Central Av exit should be moved so that the Central Av can be used. He states that the Central Av exit has been barricaded since he started working for the parking bureau 2 years ago. The investigator also spoke to Emma Moore and she said that the barricades have been in place for "years." She states that she thinks the accident was the result of Randy Small's, her supervisor, negligent supervision of her team and the parking lot operations. She and other staff members warned Randy about it causing an accident one day. She states that Randy is a terrible supervisor and is super lazy, but that she is not allowed to move barricades without Randy (her supervisor's) permission. These facts clearly state that not only is the parking lot clearly tight and jammed-pack, but

by Randy not opening the Central Av exit that is negligently supervising the parking lot and causing it to be negligent operated and maintained. Thus, the immunity would be waived here and the State of Franklin would be liable due to Randy Small's negligence of maintaining and operating Parking Lot B.

**Issue 2: Did the State of Franklin receive sufficient notice as required by the Franklin Tort Claims Act?**

Yes, the State did receive sufficient notice as required by the Act. The issue here is whether Ms. Klein provided sufficient notice to the State of Franklin as required by the Franklin Tort Claims Act.

The Act provides that every person shall present to the Risk management Division for claims against the State within 90 calendar days after an occurrence giving rise to a claim for which immunity has been waived under the Act. The notice must state the time, place and circumstances of the loss or injury.

The Supreme Court of Franklin held in Beck in 2013 that the City was granted the motion for summary judgment because the accident report was not sufficient written notice to notify the City that a lawsuit could be coming their way. The court held that 41-16(a) requires the governmental entity to be given *written notice* of the alleged tort. The Supreme Court continues to say that section 41-16(b) provides an exception to this requirement in (a) where the governmental entity allegedly fault had actual notice of the tort. The Court says that the purpose of 41-16(a) and (b) is "to ensure that the agency allegedly at fault is notified that it may be subject to a lawsuit." The Court states that a police report or other accident collision report could serve as actual notice under 41-16(b) but only where the report contains information that puts the governmental entity allegedly at fault on notice that *there is a claim against it.* The basic purpose that Ms. Klein would need to meet based off of this case is to provide written notice to the applicable parties under the Tort Claims Act in order to reasonably alert the State to the necessity of investigating the merits of a potential claim

against it and to give the State and applicable governmental entity notice of a likelihood that litigation may ensue.

Here, Ms. Klein wrote to the Risk Management Division on August 30, 2020, so just under 45 days from the date of the occurrence, May 23, 2020. The time is sufficient. She notified the proper entity as well. In the notice, she provides she is suing the State for injuries she suffered and clearly describes the accident as well as all of her injuries and losses due to the accident. She goes on to state that the Hopps Rodeo is the most well-attended event and that the parking is crazy because there is only exit available and there should be two available or more or a wider roadway to exit. She also states Mr. Small's name and says that because of his negligent supervising of the parking lot and not opening the other exit after the rodeo (especially because the barricades can be removed, as proven and stated by the two employees that the Investigator spoke to and also the Investigator's own perception and when he actually saw that the barricades could be removed.

To clearly state again, Ms. Klein must present to the Risk management Division for claims against the State within 90 calendar days after an occurrence giving rise to a claim for which immunity has been waived under the Act. She did so here by writing to the Risk Management Division on August 30, 2020, so just under 45 days from the date of the occurrence, May 23, 2020. The notice must state the time, place and circumstances of the loss or injury. The notice stated that the wreck occurred on Memorial Day weekend at the Hopps Rodeo, and she also clearly states the circumstances of the loss and injury she recovered. Thus, Ms. Klein has provided sufficient and proper notice to the State of Franklin.