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Peek et al. v. Doris Stern and Allied Behavioral Health Services

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Peek et al. v. Doris Stern and Allied Behavioral Health Services

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ROBINSON & HOUSE LLC
Attorneys at Law
44 Court Drive
Fairview Heights, Franklin 33705

MEMORANDUM

TO: Examinee
FROM: Jean Robinson
DATE: July 25, 2017
RE: Peek et al. v. Doris Stern and Allied Behavioral Health Services

We represent a class of Union County women probationers in a lawsuit filed in federal court under 42 U.S.C. § 1983 of the Civil Rights Act. All probationers convicted of misdemeanors in Union County receive probation services through Allied Behavioral Health Services. Our complaint alleges that the defendants Allied and Doris Stern, in her capacity as executive director of Allied, are discriminating against women probationers based on gender.

The named plaintiff in our class action, Rita Peek, was sentenced to 18 months' probation by the Union County court in May 2016. (See attached sentencing order.) A condition of her probation was that she receive mental health counseling. To date, Peek has met all the requirements of her probation except for mental health counseling because Allied has failed to provide that counseling.

We filed suit in the U.S. District Court for the District of Franklin against Allied and Doris Stern alleging that they have developed a plan of services that disproportionately denies probation services to female probationers. Thus far, we have deposed Allied's Probation Services Unit director. During a recent case-management conference, the U.S. District Court judge raised the issue of whether the defendants are state actors and, therefore, subject to 42 U.S.C. § 1983. The judge ordered the parties to file simultaneous briefs on that issue alone.

Please prepare the argument section of our brief in support of our position that Stern and Allied are acting under color of state law and are subject to suit under 42 U.S.C. § 1983, relying on all available tests employed by the courts to determine whether parties are state actors. Follow our office guidelines in drafting your argument. Because the court ordered simultaneous briefs, you should anticipate the defendants' arguments and respond to them. Do not draft a separate statement of facts, but incorporate all relevant facts into your argument.

ROBINSON & HOUSE LLC

OFFICE MEMORANDUM

TO: All lawyers
FROM: Litigation supervisor
DATE: April 14, 2011
RE: Simultaneously filed persuasive briefs

All simultaneously filed persuasive briefs shall conform to the following guidelines:

Statement of the Case [omitted]

Statement of Facts [omitted]

Body of the Argument

The body of each argument should analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Be sure to cite both the law and the evidence. Emphasize supporting authority but address contrary authority as well; explain or distinguish contrary authority in the argument. Because the court ordered simultaneous briefing, anticipate the other party's arguments and respond to them; do not reserve arguments for reply or supplemental briefing. Be mindful that courts are not persuaded by exaggerated, unsupported arguments.

Organize the argument into its major components. Present all the arguments for each component separately.

With regard to each separate component, write carefully crafted subject headings that illustrate the arguments they address. The argument headings should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example: Improper: Plaintiff has satisfied the exhaustion of administrative remedies requirement. Proper: Where Plaintiff requested an administrative hearing by timely completing Form 3B, but the prison has refused to schedule a hearing, Plaintiff has satisfied the exhaustion of remedies requirement.

STATE OF FRANKLIN
UNION COUNTY DISTRICT COURT

State of Franklin	)	
	)	
v.	)	**Case No. 2016-3098**
	)	
Rita Peek, Defendant	)	

SENTENCING ORDER

Rita Peek, the above-named Defendant, having been found guilty of misdemeanor battery, a violation of § 35-87 of the Franklin Criminal Code, is hereby sentenced to 10 months in jail, but that jail sentence is stayed on the condition that the Defendant successfully complete a probation term of 18 months beginning on this date and subject to the conditions listed below.

During the term of probation, the Defendant must successfully satisfy the following conditions:

1. Immediately report to the Union County Probation Officer to register as a probationer, and follow any rules or regulations established by the County Probation Officer.
2. When ordered by the County Probation Officer, report to Allied Behavioral Health Services, 806 W. Main St., Fairview Heights, Franklin, for those services ordered by this Court and any services ordered by the County Probation Officer.
3. Meet monthly with a counselor assigned by Allied Behavioral Health Services to review compliance with this Order; Allied Behavioral Health Services to inform Court of any violations of this Order.
4. Be evaluated for and undergo mental health counseling by Allied Behavioral Health Services.
5. Not consume any drugs or alcohol and submit samples of blood, urine, or both for tests to determine the presence of any prohibited substances.
6. Not violate any criminal statute of any jurisdiction.
7. Not leave the State of Franklin without the consent of this Court.
8. Pay to Allied Behavioral Health Services a fee of $50 per month.

In the event that the Defendant fails to satisfy these conditions during the probationary term, probation may be revoked and the Defendant be subject to one or more of the following: (1) reinstatement of the original 10-month jail sentence, (2) extension of probation for a term of up

to three years on any conditions the Court deems appropriate, or (3) other relief that the Court deems just and proper.

Entered: May 31, 2016.

James Finch

Honorable James Finch
Union County District Court

ROBINSON & HOUSE LLC

MEMORANDUM TO FILE

FROM: Jean Robinson
DATE: June 4, 2017
RE: Peek et al. v. Doris Stern and Allied Behavioral Health Services

Ever since 2014, when Union County began contracting with Allied Behavioral Health Services to provide misdemeanor probation services in the County, Allied has in effect given male probationers priority in receiving mental health counseling. As a result, Allied typically fails to provide female probationers with counseling. It is typical that when a woman's probation term ends without her completing counseling, Allied informs the sentencing court of the failure to complete counseling. The court then usually extends the term of probation, although the court does have the power to revoke probation and impose the original jail sentence.

Rita Peek, our named plaintiff, has experienced such a delay in undergoing counseling. She was sentenced to 18 months' probation on May 31, 2016, and ordered to undergo mental health counseling. Allied has failed to initiate that counseling. Peek is now over a year into her 18-month probation term. If Allied does not provide counseling services very soon, Peek will face an extension of her probation (with additional costs assessed to her). The sentencing court also has the power to reinstate her 10-month jail sentence if she does not complete the counseling within the probationary period.

Peek's criminal defense attorney filed a motion with the Union County court in March of this year, asking it to order Allied to immediately offer counseling to Peek. The court denied that motion. Peek's criminal defense attorney then contacted us.

In April, we filed a class action lawsuit (the class has been certified) in federal court alleging that Allied and Doris Stern, in her capacity as executive director of Allied, have violated female probationers' civil rights by disproportionately denying services to women, in violation of 42 U.S.C. § 1983, which entitles them to a civil remedy for the deprivation of their constitutional rights.

Later this month we are scheduled to depose James Simmons, the director of Allied's Probation Services Unit.

Excerpts from Deposition of James Simmons
June 26, 2017

Examination by Plaintiff's Attorney Jean Robinson

Q: Please state your name and position.

A: James Simmons, director of the Probation Services Unit of Allied Behavioral Health Services.

Q: Explain the organization of Allied Behavioral Health Services.

A: Allied is a nonprofit organization formed in 1975 to provide mental health counseling and other services to residents of Union and neighboring counties. We have a board of directors that hires the executive director, who is currently Doris Stern. The board determines what services we offer, approves our entering into contracts, and sets policies, including personnel policies. Each year, Ms. Stern presents a plan detailing our program goals and means of accomplishing those goals, and the board approves it. Allied is a private entity, like any nonprofit.

Q: Who is on the board of directors of Allied Behavioral Health Services?

A: We have 11 board members. One of the county judges and the county director of public health services became members when we started offering probation services and expanded the board. Before that we had just nine board members, and those nine have always included community and business leaders, religious leaders, and active citizens.

Q: What influence do the two public officials have over the board?

A: They are simply 2 of 11 board members. The board requires a majority vote to act.

Q: How is Allied organized regarding the services it provides?

A: We have two units—the Family Services Unit and the Probation Services Unit, which I direct.

Q: To whom do you report?

A: To Doris Stern and through her to Allied's board of directors.

Q: Who pays you?

A: Allied.

Q: Who evaluates you?

A: Ms. Stern.

Q: Who evaluates the counselors who provide probation services?

A: I do, and Ms. Stern reviews those evaluations.

Q: Explain the relationship between Allied and Union County's Probation Office.

A: In 2013, the State of Franklin decided that counties could contract with private entities for probation services for those defendants convicted of misdemeanors. A year later, the Union County Probation Office asked us to contract with them for probation services. Most of what Union County wanted for those on probation for misdemeanors were counseling-related services that we already provided. So we prepared all the documents the county wanted and began providing probation services. The Probation Services Unit is the part of our agency that I direct. We carry out sentencing orders of the court. How we do so is up to us, as long as we follow court orders. We submit an annual plan and quarterly and annual reports to the county. Day to day, we do not deal with the county.

Q: How is Allied funded?

A: We are funded from several sources. The county pays for most of the probation services, with the probationers' fees making up the rest. And we get grants and funds from the community—fund-raisers, corporate donors, that sort of thing. Much of the funding for our counseling for persons not on probation comes from insurance; some comes from individual clients who pay for their own services. Altogether, Allied gets 40% of its funding from public sources and 60% from private sources.

Q: I need to clarify. Consider only the funding for the Union County probation program. How much of that is funded by a combination of funds from the county itself and fees paid by the probationers?

A: One hundred percent.

Q: Union County is a unit of local government, subject to the laws of Franklin, isn't that correct?

A: I am not a lawyer, but I believe that is correct.

Q: When operating probation services for the county, Allied must meet the requirements set by state law, isn't that true?

A: Yes.

Q: State law sets out minimum qualifications for the employees of entities like Allied which provide probation services, correct?

A: Yes.

Q: Isn't it true that Allied must set out an annual plan for providing probation services and have it approved by the County Probation Officer?

A: Yes.

Q: Each probationer served by Allied has been convicted of a misdemeanor crime in a Union County District Court in the State of Franklin, isn't that right?

A: Yes, each probationer served by us has been referred to us by the courts, but our other departments offer services that are not court-referred.

Q: Isn't it true that in each case when a person is convicted of a misdemeanor and placed on probation, the judge determines the conditions of probation?

A: Yes.

Q: Allied cannot deviate from those conditions, can it—that is, you cannot add or remove conditions?

A: We carry out whatever the judge orders.

Q: Who determines what kind of counseling services you provide to probationers?

A: Again, the sentencing court. We typically evaluate probationers to determine the extent of mental health counseling needed and decide when and how they receive those services.

Q: Are you familiar with my client, Rita Peek, the named plaintiff in this case?

A: Yes, ma'am. She is a Union County probationer and under our supervision.

Q: Isn't it true that the court ordered that Ms. Peek receive mental health counseling?

A: Yes. Among other things, the court ordered mental health counseling for her. We evaluated her during her second meeting with us, back in June 2016. The result was that she needed what we call "Level Two Counseling"—both group and individual therapy sessions. We put her on our list for mental health counseling.

Q: Have you provided such counseling to her?

A: Not yet.

Q: Ms. Peek is still on a waiting list for that counseling, 13 months after she was sentenced to probation, correct?

A: Correct.

[Testimony regarding Allied's approach to providing counseling to women probationers is omitted.]

***

Q: Each quarter you report to the County Probation Officer on those probationers being served and what services were provided, correct?

A: Yes.

Q: As part of that report, the counseling waiting list is reported to, and approved by, the County Probation Officer each calendar quarter, correct?

A: Correct.

Q: During the last three quarters, at least, you have included Ms. Peek on the waiting list as needing mental health counseling and not yet served, correct?

A: I don't have the reports in front of me, but that is probably true.

Q: And the County Probation Officer has approved those quarterly reports, right?

A: Yes.

Q: I refer you to the reports Allied filed with the County Probation Officer. These show that 90% of the female probationers you serve do not even start, let alone complete, counseling within the probation term, isn't that correct?

A: If that is what the reports say, it must be true.

Q: In fact, 70% of the female probationers are given an extension of their probation term in order to complete counseling, isn't that true?

A: I believe that is true.

Q: These same reports show that, by contrast, 75% of male probationers receive and complete counseling within the period of their probation, isn't that correct?

A: If that is what the report says, then that is correct.

Q: In addition to providing mental health counseling to Ms. Peek, Allied is supposed to oversee her as a probationer, isn't that true?

A: Yes.

Q: Overseeing her means, among other things, ensuring that she reports to Allied monthly and complies with any required drug and alcohol testing, right?

A: Yes.

Q: Has Ms. Peek met all the conditions of probation imposed on her, other than receiving mental health counseling?

A: Yes, she has been a model probationer.

Q: If a probationer were to violate a condition of probation, you would report that to the court, wouldn't you?

A: Yes.

Q: If a probationer, such as Ms. Peek, failed to complete the conditions of probation, her probation could be revoked and she could be sent to jail, correct?

A: Yes.

Q: Or her probation could be extended, correct?

A: Yes.

Q: Probation is a restriction on a person's liberty, isn't it?

A: Yes.

Q: In that regard, being on probation is a restriction sort of like being in jail?

A: Well, it's a lot better than being in jail, but it is a restriction. Probationers have to comply with conditions of probation, they must meet with us in person each month, they cannot leave the state, and so on.

Q: And isn't it true that only the State of Franklin has the power to sentence someone to probation, set conditions of probation, revoke probation, and send someone to jail?

A: I am not a lawyer, but I believe that is so.

Robinson: No further questions.

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EXCERPTS FROM FRANKLIN CRIMINAL CODE

§ 35-210 Misdemeanor Sentencing; Probation

For a person convicted of a misdemeanor, the court may impose a jail sentence not to exceed 12 months. The court may suspend the jail sentence and place the person on probation for a term not to exceed three years. When placing a person on probation, the court shall determine the conditions of probation.

§ 35-211 Probation Services

(a) Each county shall appoint a County Probation Officer who shall be an employee of the county and shall provide probation services to the county as required by the Criminal Code, either directly or through other entities as provided by law.

(b) Any county may elect to provide probation services for those convicted of misdemeanors by contracting with a private entity, provided that the private entity:

1. Shall be a nonprofit entity.
2. Shall receive approval from the County Probation Officer of an annual Plan of Services which must include
   (i) oversight of those on probation;
   (ii) monthly meetings with those on probation unless otherwise ordered;
   (iii) drug and alcohol testing; and
   (iv) drug and alcohol counseling, anger management counseling, vocational and mental health counseling, and referral to educational programs.
3. Shall require that each individual providing such services possess at least a bachelor's degree in the relevant professional field or its equivalent as determined by the County Probation Officer.
4. Shall submit to the County Probation Officer quarterly reports listing the names of probationers served during that quarter, the services provided to those probationers, and any other information required by the County Probation Officer, and shall receive approval of those reports from the County Probation Officer.
5. Shall submit to the County Probation Office an annual report of services provided and all expenses incurred and receive approval of that report from the County.

Lake v. Mega Lottery Group
United States Court of Appeals (15th Cir. 2009)

Olivia Lake sued the Mega Lottery Group pursuant to 42 U.S.C. § 1983, claiming that it fired her without due process. Mega moved to dismiss the complaint, arguing that as a private actor, it cannot be sued under 42 U.S.C. § 1983. The district court dismissed the complaint. Lake appealed. The sole issue on appeal is whether Mega acted as a state actor when it fired Lake. We affirm.

42 U.S.C. § 1983 provides for a cause of action against persons acting under color of state law who have violated rights guaranteed by the United States Constitution. *Buckley v. City of Redding*, 66 F.3d 190 (9th Cir. 1995). The Constitution's due process clause applies to states but not to private actors. However, private actors are not always free from suit for violating the Constitution. Constitutional standards protect those harmed by private actors when it is fair to say that the state is responsible for the offending conduct. To succeed on a § 1983 civil rights claim against a private actor, a claimant must prove that the private actor was a state actor.

To determine if an apparently private actor may still be a state actor, no one set of circumstances or criteria is sufficient. Rather, courts typically consider the range of circumstances when characterizing a private actor as a state actor for § 1983 purposes. Each set of factual circumstances must be examined in light of the critical question: whether "the State is responsible for the specific conduct of which the plaintiff complains." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n,* 531 U.S. 288 (2001).

There are two tests of those circumstances creating state action that are pertinent to Lake's claims. First, state action exists where the private actor was engaged in a public function delegated by the state. If the private actor exercises a function that has traditionally been a public or sovereign function, the private actor is not free from constitutional limits when performing that function. Second, a private actor engages in state action when the state exercises its coercive or influential power over the private actor or when there are pervasive entanglements between the private actor and the state. Under this test, "a state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the state." *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

Under either of these two tests, there is a further requirement to find state action: there must be such a "close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the state itself." *Brentwood.*

Public function

Lake claims that Mega is engaged in a public function, relying on *West v. Atkins,* 487 U.S. 42 (1988), and on *Camp v. Airport Festival* (15th Cir. 2001). In *West*, a privately employed doctor was a state actor when he was employed to provide medical care to inmates in a state prison. The state is required to provide medical care to those it imprisons, and when the doctor contracted with the state to provide that care, he became a state actor.

In *Camp*, the plaintiff sued Airport Festival, a private nonprofit entity created to organize an aviation festival, for violating his First Amendment rights when he was arrested for leafleting during the festival. The city's police department had been directed to follow the instructions of festival organizers regarding security and arrests. Only the state has the power to deprive persons of their freedom by arresting them. When festival organizers accepted the authority to instruct the police regarding arrests, festival organizers became state actors.

Other examples of activities found to be public functions constituting state action include operating a local primary election, operating a post office, and providing for public safety through fire protection and animal control. Courts have narrowly construed the public function test to require that the action be one that is exclusively within the state's powers. Thus, courts have rejected claims that those who operate hospitals, privately owned public utilities, or schools, or provide foster care are performing public functions. While the state sometimes performs these functions, they are not traditionally the *exclusive* prerogative of the state. Over the years, private organizations have often initiated and performed these functions.

Here, the State of Franklin established a state-operated lottery in 1985. In 2005, due to the financial costs of operating a lottery, Franklin entered into a contract with Mega to operate the lottery, with the profits reverting to the state. Operating a lottery is not a traditional function of state government. Many private entities operate similar activities through racetracks, casinos, sweepstakes, and other activities. Thus, Mega is not engaged in a public function.

State coercion or influence, or pervasive entanglement

Lake next argues that there is state action because the state has coerced or influenced Mega to act. Lake argues that because Franklin contracts with Mega to operate the lottery, with the profits from the lottery becoming state proceeds, its influence over Mega is significant, if not coercive. She also argues that Franklin coerces Mega through its extensive regulation of the lottery, making Mega an agent of the state.

Lake's argument fails in light of the U.S. Supreme Court's ruling in *Rendell-Baker*. That case involved employees who claimed that their First Amendment rights were violated when they were discharged by a private school. The plaintiffs argued that the state's extensive regulation of education made the school a state actor. The Court rejected this argument because the state did not regulate, encourage, or compel the private board of trustees to fire the employees. Any government regulation was directed to education of the children, and did not compel the board to follow any particular personnel policies.

The state's exercise of its coercive power or influence must be such that the private choice can be said to be that of the state. Lake has failed to show any evidence that the State of Franklin required, recommended, or even knew about this, or any, personnel action. What the state regulates is the operation of the lottery, not the hiring and firing of Mega's employees.

Lake also argues that even if the state did not coerce Mega, there are additional pervasive state-private entanglements. She relies on *Brentwood,* 531 U.S. at 288. There, the U.S. Supreme Court ruled that the "nominally private character of the Association" could not overcome the pervasive entanglement with public institutions. Lake maintains that Franklin and Mega are entangled because of Franklin's heavy regulation of the lottery.

In *Brentwood*, the defendant Association regulated interscholastic athletic competition among public and private high schools in Tennessee. The Association's board found that Brentwood, one of the Association's member schools, had violated a rule prohibiting "undue influence" in recruiting athletes and, among other things, declared Brentwood's teams ineligible to compete in playoffs for two years. Brentwood sued the Association, alleging violation of its First and Fourteenth Amendment rights when the school was penalized for violating Association rules. The Association argued that it was not a state actor. The Court found that the Association's board of directors was composed primarily of representatives of public schools. The board effectively operated the sports program for the state's public high schools. The State Department

of Education formally adopted the Association's rules as the rules for public school sports programs. Based on these findings, the Court rejected the Association's claim, concluding that the relationship of the public schools and the Association constituted a pervasive entanglement that made the Association a state actor.

Lake also points to the pervasive entanglements in *Camp* as analogous to the State's control here over the lottery. In *Camp*, although the festival was organized by a nonprofit entity, the city permitted the festival to use the airport grounds at no cost; the city's personnel were extensively involved in planning for the festival while on city time and at city expense; the city promoted the festival through its tourism bureau; and the city's airport personnel controlled access of airplanes during the festival's air show. As noted *supra*, the city's police and first responders were effectively turned over to the festival organizers for the duration of the festival. These entanglements were extensive.

In contrast, the primary relationship between the State of Franklin and Mega is a contract, no different from that between the state and any other contractor. The State of Franklin contracts with private entities to build its buildings, deliver food for its prisoners, and furnish office supplies to state legislators, to name but a few contracts. These contracts do not constitute the sort of pervasive entanglement necessary to constitute state action. When the state enters into a contract to build a state building, the contract demands compliance with many regulations, yet it is left to the contractor to execute the contract. Franklin does not involve itself in the governance of Mega. It does not endorse Mega's personnel policies as the state had in *Brentwood* when the state Department of Education approved the Association's rules. Nor does Franklin involve itself directly in the operation of Mega as the city did in running the airport festival at issue in *Camp*.

Connection to offending conduct: nexus

Even if Lake had met one or both of the tests discussed above, Lake has failed to meet the further requirement of *Rendell-Baker* that there be a nexus, meaning a connection, between the state and the challenged action. That is, Lake has not shown that the offending conduct—her being discharged without due process—was somehow connected to the state's influence over Mega. Lake was discharged by Mega in the same way that any private corporation fires any employee. The state played no role in the discharge, so Lake cannot show the required nexus. Lake offers no facts that rise to the level of the circumstances where the state and private parties

have acted in concert to engage in denial of a party's civil rights. Mega's only participation with the state is to contract with the state to operate the lottery. Mega did not involve the state in any way in its decision to fire Lake.

Affirmed.

NOTES

NOTES

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

1) MPT1 - Please type your answer to MPT 1 below

Â

When finished with this question, click Â to advance to the next question.

(Essay)

======== Start of Answer #1 (2563 words) ========

Brief Supporting Argument that Doris Stern and Allied Behavioral Health Services are State Actors for Purposes of 42 U.S.C. § 1983

Argument

A. Governing Law

Section 1983 of Title 42 of the United States Code provides a cause of action against persons acting under color of state law who have violated rights guaranteed by the United States Constitution. *See* Lake v. Mega Lottery Group (citing Buckle v. City of Redding). Of pivotal importance to the outcome of this action is whether Allied Behavioral Health Services ("Allied") can be said to be a

state actor because the Constitution and Section 1983 normally only apply to state actors. Lake v. Mega. Allied, on the other hand, is a private, nonprofit entity. Constitutional standards protect those harmed by private actors only when it is fair to say that the state is responsible for their offending conduct. Lake v. Mega. In Lake, the Fiftheenth Circuit stated that, in determining whether a private actor can be a state actor for purposes of Section 1983, there is no set circumstances or criteria that are determinative, rather courts will consider a range of circumstances in categorizing a private actors' conduct as state action. A private actors conduct must be analyzied in light of a critical question, which is whether "the State is repsonsible for the specific conduct of which the plaintiff complains." Lake (quoting Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n).

There are two tests for determining whether the circmstances of a private actor's conduct constitute state action. Lake. The first states that state action exists where a private actor has engaged in a public function (i.e. one that has traditionally been a public or sovereign function) delegated by the state. Under the second test, a private actor engages in state conduct when the state exercises its coercive or influential power over the private actor, or when there are pervasive entaglements between the private actor and the state. Lake. In other words, under the latter test, a private actor's conduct will not be state action unless the state "has exercised

coercive power or has provided such significant encouragement . . . that the choice [ ] in law [must] be deemed to be that of the state." Lake (citing Rendell-Baker v. Kohn).

Finally, under either the first or second test just mentioned, a third requirment must exists before a private actor's conduct, which violates the constitution, will entitle a plaintiff to remedial action under Section 1983. There must be a nexus, or connection, between the alleged offending conduct and the challenged actioon. Rendell-Baker.

B.1. Allied is Administrating a Public Function when it Provides Probation Services to Misdemeanor Offenders in Union County because Probation Resembles in Many Ways Incarceration; Allied's Services are Required by the State's Criminal Code and Judicial Orders; and Finally, Because Probation Restircts a Person's Freedom, which Only the State Retains the Authority to Do.

In Camp v. Airport Festival, the Fifteenth Circuit heard a Section 1983 claim by a plaintiff who had attended a airport festival and claimed that his being arrested at the festival, administerd by a nonprofit entity, for leafletting violated his first

amendment rights. In that case, the court found that the nonprofit entity who organized the festival was a state actor because it accepted authority delegated to it to instruct the city's police offers in watching over the festival and exercising such authority was in reality performing a public function and thus state action. It was a public fucntion and the exercise of state action because the power to depvire persons of their freedom by arrest is only vested in the state. In a different case, West v. Atkins, the Fifteenth Circuit found that a private doctor who had contracted with a state to provide medical care to inmates at the state prison was a state actor. It determined that provided that the doctor's performance under the contract was state action because the state is required to provide medicla care to those it imprisons.

Under either Camp or West it is clear that Allied is performing a public function. For instance, in his deposition testimony, James Simmons, the director of Probation Services for Allied, conceeded that to the best of his knowledge only the State of Franklin has the power to sentece someone to probation, set conditions of probation, revoke probation, and send someone to jail. However, Allied, constructively, peforms the latter two duties regularly. When most of the women misdeanor offender probationers do not complete the mental health counselling prescribed by court order, becauase Allied has placed them on a waiting list,

Allied notifies the court which will either extend a probationary sentece or could revoke probation as send a probationer back to jail. The ability to revoke probation and send someone back to jail for failure to complete all probation conditions is evidenced in named plaintiff, Peek's, sentencing order, and also was acknowledged by Simmons. Furthermore, Simmons conceeded that in many ways probation is sort of like jail, and directly agreed athat probation is a restirction on freedom. Given the court's conclusion under Camp, it a similar conclusion should thus be reached that providing probation services, and inderectly restriction a probationer's freedom, a power reserved to the state, is a public fucntion and thus state action.

Additionally, West supports reaching the conclusion that Allied is engaged in a public function, because the services Allied provides are required to be provided by statutes and court order. Franklin's Criminal Code outlines the proceedures for ordering probation versus a jail sentence for misdemeanor offenses. Under Section 35-210 of the Criminal Code a court may suspend a jail sentence for a misdemeanor, and instead place a person on probation, the conditions of which are to be set by a judge. Furthermore, Section 35-211 permits a County Probation Officer to delegate the provision of probation services to misdemeanor convictions, however the Probation Officer under section 35-210(a) is required to

provide the serivces in compliance with the requirements of the criminal code (and logically private entities to whom probation services are delegated under 35-210 (b) must also comply). Mr. Simmons in his deposition talked about how he and other Allied professionals are required to comply with probation conditions set by a judge in sentencing orders. Because the administration of mental health counselling is required by law, such as by court order (*See* Sentencing Order entered against Rita Peet May 31, 2016), Allied's provision of services is state action just like the private medical services in West were.

On the other hand, in Lake v. Mega Lottery Group, the Fifteenth Circuit Court of Appeals, held that when a state contracted with a lottery group to administer it's state lottery, the running of a lottery was not a public function and thus state action. In Lake, the lottery fired one of it's employees and that employee sued under Section 1983 claiming a denail of constitutional due process. The court noted that running a lottery is not a traditional public function, because other similar endeavors, such as operating race tracks and casinos, have been operated by many private entities. Note, however, that the operation of a lottery, and the adminstration of probation services are very different. Unlike gambling, the adminstration of the criminal justice system, such as the running of jails for incarceration, has been a function peformed by our government since it's founding

and is tied with paramount consitutional rights such as the right to liberty.

It should also be noted that the defendants will likely raise two arguments suggesting they are not performing a public function. These arguments will fail. They may first argue that today, jails and prisons are also operated by private parties in some places, and thus are not traditional public funcitons. However, unlike a lottery as mentioned, that invention in relatively new. Rather, for most of history, such facilities were ran by the government. They might also argue that probation is not necessarily required (since requirement was a critical element in West). However, while probation is not required, it or some sentence, a maximum of 10 months, is required for a misdemeanor under Franklin law. Just because it is an alterante punishment does not mean punishment is general is not required.

B.2. The State has exerted Coercion and Influence over Allied, and Become Excessivly Entangled with It's Provision of Services, Such that Its Actions Are State Actions, by Excessivly Regulating What Probation Services Must be Provided and Requiring Quarterly and Annual Approval of Its Actions.

In Rendell-Baker, a group of private school employees argued that their discharge violated the First Amendment, and their employer's actions were state action,

becauase of extensive regulation of education (private or public) by the state. The Supreme Court rejected this argument, noting that the state regulation in that case was in regard to actual educationg, and not matters such as personell. In Lake, the Circuit Court cited Rendell-Baker, discussing again how the state's exercise of it's coercive power or influence must be such that a prvate choice can be said to be that of the state. The court denied the plaintiff's claim because the state regulation of the Mega Lottery's conducting the lottery did not relate to personell matters, but instead others. On the other hand, this case, and Allied's conduct and the state regulation applicable to it, is easily distinguishable.

Section 35-201 of the Franklin Criminal Code provides a number of requirements that must be met when provision of probation services to misdemeanor offenders is delegated to a private entity. Requirements include: the entity be a nonprofit entity; the entity submit an annual plan for approval; personell providing services have certain qualificaitons, that an quarterly report be submitted to the County Probation Officer for Approval listing the names of probationers served; and an annual report be approved that contains other information. Other particulars are also required including: oversight of probationers; monthly meetings with them, testing them for drugs and alcohol, providing them with drug and alcholo coulnseling, mental health counseling, and other programs.

Mr. Simmons, in his deposition, spoke of how Allied is obligated to provide such services, and comply with them, as they are outlined and called for in sentencing orders. He actuall said, "We carry out whatever the judge orders." Unlike the facts of Rendell-Baker and Lake, the regulation in this case is directly on point and applicable to the conduct which Ms. Peek and other plaintiffs are challenging. Furthermore, it is worth noting that like the statute requires, Mr. Simmons confirmed the not for profit status of Allied

The discussion immediately above demonstrates how the state exercts coercion and influence over Allied, but there is also excessive entanglement. In Brentwood, the Supreme Court decided that an association reuglating interscholastic athetics among public and private highschools in Tennessee, although techincially a private entity, was a state actor for a number of reasons. One such reason was the fact that the associatoins's rules for public shcool sports programs had been adotped and approved by the state's Department of Education. This, according to the Court, constituted state action. Similarly, here, the criminal code of Franklin calls for approval of reports and actions by those entities providing probation services to misdemeanor offenders. In Mr. Simmon's testimony, he noted how the exact conduct complained of, placing disproportionately more women on waiting

lists for mental health counseling then men, thus resulting in the extention of their probations, was approved by the County Probation Officer because the waiting lists were within required quarterly reports. It is true that in Brentwood the Court also found state action because most of the board members of the Association were public officials. As Mr. Simmons noted, that is not the case here, rather only 2 of 11 board members are public employees. However this factor is not dispositive and circumstances, as noted above, are wieghed on a case by case basis when determining whether private action is really state action. The direct applicability of state requlation, and the required oversight and approval supports subjecting Allied to the Constitution and Section 1983's requirements.

It should also be noted that in Lake the court in part decided that the Mega Lottery was not a state action because it's primary relationship with the state was one of contract. That is also true in the case at hand. Allied contracts with the State of Franklin to provide it's probationary services. On the other hand, in the situation in Lake, the State was paid by some proceeds of the lottery. In converse, the state in our case pays almost 100% of the probationary expenses of Allied (40% of it's net income). Additionally, the court in Lake noted how the result might have been different had the state been required to approve the Mega Lottery's actions. As already demonstrated, approval of Allied's actions is required through the

submission of regular reports. For all of the above reasons, the state coerces and influences Allied's provision of services, and is execissivley entangled in the provision of services, such that it's conduct is state action.

It should also be noted that as a counterargument the defendants may suggest that their conduct was not directly regulated because state regulation does not provide the specific time frame within which mental health counselling is required. This argument is not persuasive because it is required nonetheless.

C. There is a Sufficient Nexus Between Allied's Complained of Conduct and the State's Influence Over Allied Because the State is Actually Informed of the Complained of Conduct and Approves It in Quarterly Reports.

As already discussed, Mr. Simmons in his deposition stated that the names of all of the women who are place on waiting lists is provided to the County Probation Officer in the quartlerly reports required by the Criminal Code. Furthermore, Mr. Simmons talked about his legal obligation to comply with sentencing orders which issued by judges, such as the order entered against Ms. Peek. Note that Ms. Peek's sentencing order states, "Allied [must] inform Court of any violations of this Order." Mr. Simmons confirmed that when probationers do not complete or satisfy

all of the conditions provided in an order, Allied promptly informs the court, which may ultimately result in futher probation or incarceration. Clearly, there is a strong nexus between the complained of conduct, disproportionately not providing mental health counseling to women which ultimately results in the continued restriction of their constitutionally guaranteed freedom, and the state's influence over Allied. The state approves lists which demonstrate the existence of this discriminatory and disparate treatment, and the state further sanctions women when they fail to satisfy the conditions of their probation through no fault of their own.

Conclusion

In sum, Allied should be subjected to liabilty under Section 1983, because it disproptionately provides probations services to women, to their detriment, in volation of the Fourteenth Amendment, and it's actions are state action thus making them subject to the protections of the constitution. It's actions are state action under any of the two tests used to make such a determination. It's actions are a public function because they are required by state law, and they are actions (criminal justice) traditionally performed by the state. Futhermore, it's actions are state action because of the influence the state exercts on it and the degree to which

it is entanagled with Allied through regulation. Finally, there is a sufficient nexus to justify liability.

======== End of Answer #1 ========

Applicant Number

MPT-2
717

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MULTISTATE PERFORMANCE TEST

In re Zimmer Farm

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In re Zimmer Farm

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State of Franklin
County of Hartford
Office of the County Attorney
92 Oak Street
Glenview, Franklin 33705

MEMORANDUM

TO: Examinee
FROM: Carl S. Burns, County Attorney
DATE: July 25, 2017
RE: Complaints about Zimmer Farm

The county board president, Nina Ortiz, is concerned about activities at the John and Edward Zimmer farm on Prairie Road, and specifically about the bird rescue operation and bird festivals they operate on their farm. Ms. Ortiz has received numerous complaints from local residents about the activities at the farm. While she supports the concept of a bird rescue operation, Ms. Ortiz would like the bird operation moved to a location far away from any residential subdivisions. She also wants the festivals stopped. She has asked me to research whether the county's zoning ordinance can limit the Zimmers' operations. Further, she wants to know whether the Franklin Right to Farm Act (FRFA), which protects certain farms and farming activities, applies here.

In addition to the bird rescue operation and the festivals, the Zimmer farm produces apples and strawberries for local sale. The Zimmers' apple and strawberry cultivation and sales are permitted under the applicable county zoning ordinance. I want you to focus on the bird rescue operation and the festivals—the activities the neighbors are complaining about. Please prepare an objective memorandum for me analyzing these questions:

1. Is the Zimmers' bird rescue operation permitted under the county zoning ordinance?
2. Are the Zimmers' festivals permitted under the county zoning ordinance?
3. How, if at all, does the FRFA affect the county's ability to enforce its zoning ordinance with respect to the bird rescue operation and the festivals?

In your analysis, address any counter arguments the Zimmers may make in support of the bird rescue operation and the festivals. Address only the questions I have raised above. Do not draft a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis.

Email to County Board President

TO: Nina Ortiz, County Board President (ctybdpres@Hartford.gov)
FROM: Sally Wendell (swendell@cmail.com)
DATE: May 8, 2017
SUBJECT: Zimmer farm complaints

I am writing on behalf of homeowners living in Country Manors and Orchard Estates, near the Zimmer farm. For the past two years, the Zimmers have run a bird rescue operation. The birds create noise and offensive smells and attract flies, all of which bother us. We cannot sit or eat outside or use our outdoor grills because of the bird noise, odors, and bugs. We did not have this problem before the Zimmers began their bird rescue operation. Just come out some evening and see for yourself how bad it is!

Last year, the Zimmers also hosted several bird festivals with music and food. People who came to these festivals parked on the streets in our subdivisions and walked to and from the farm, littering our streets and yards. Plus the music got pretty loud and we could hear it whether we wanted to or not. The Zimmers are planning more festivals, maybe even every month.

We paid good money for our homes because we wanted some quiet country living—that's why we moved here. Now our neighborhood is becoming like a downtown entertainment center. We taxpayers and homeowners want you to shut down the Zimmers' bird rescue operation and stop these festivals.

A taxpaying citizen,
Sally Wendell

MEMORANDUM

TO: Carl S. Burns, County Attorney
FROM: Judy Abernathy, Investigator
DATE: June 19, 2017
RE: Zimmer farm complaints

On June 14, 2017, I interviewed John Zimmer and his son Edward regarding neighbors' complaints about the Zimmers' farming activities.

As soon as I arrived at the Zimmer farm, Edward Zimmer said, "I know why you are here—just tell those neighbors 'Right to Farm.' They knew they were moving to a farm area—what did they expect?"

John Zimmer provided some background. When his parents, Gus and Ann Zimmer, purchased the property in 1951, it consisted of an apple orchard and a strawberry field. Gus and Ann continued that operation and began growing vegetables after purchasing additional land in 1960. They sold the fruit and vegetables to local grocery stores. In 1985, John and his wife, Darlene, took over the operation and expanded their produce sales to three farmers' markets.

In 1988, the Zimmers began a tradition of holding a one-day annual apple festival for their children's school. School families arrived by bus with their children and picked apples, which were for sale. The families played games and listened to music. There were approximately 100 persons in attendance.

In 2007, the Zimmers suffered several losses—a late spring freeze that ruined the strawberry crop, tough financial times, and some serious health setbacks for Darlene. In 2009, their son Edward moved to the farm to help. Darlene died in 2010. John and Edward continue to produce apples and strawberries for sale locally, but they discontinued the vegetable operation.

In 2015, Edward, who is trained as a veterinary assistant, began taking in wounded ducks, geese, owls, quail, pheasants, hawks—pretty much any fowl or bird that had been hurt. People from miles around bring him wounded birds. Edward made improvements in some of the outbuildings and now cares for as many as 100 birds at a time. I inspected the buildings where the birds are kept and did not observe any obvious threats to public health.

Edward's goal is to care for the birds until they can be released back to the wild, but those that cannot be rehabilitated stay on the farm. Edward does not sell the birds, does not make any profit from the operation, and does not intend to do so. He loves to rescue birds.

Last year, Edward and John said they took a clue from agritourism, a development in the last 20 years that uses entertainment and public educational activities to market and sell agricultural products. The Zimmers held four weekend festivals at their farm in 2016. They showed me a flyer used to advertise the fall festivals. It was titled "Fall Bird Festival" and said "Support injured birds, listen to music, have a good time. Buy apples and discover the best recipes for baking with fruit." The flyer listed details such as hours of the festival, directions, etc.

As many as 200 people attended the festivals each day. To attract people to the festivals, the Zimmers had vendors provide food and drinks, and local musicians offered musical entertainment. A local chef offered two sessions on cooking and baking with fruit; the Zimmers also sold apples or strawberries, depending on the season, and cookbooks.

Each day of the festival, Edward gave a one-hour program about birds. To raise funds for his bird rescue operation, Edward sold bird-related souvenirs, including T-shirts, caps, and books. Guests were encouraged to "adopt" a wounded bird by donating to its care and upkeep. Profits from the bird-related souvenirs, along with the donations, were used to underwrite the bird rescue operation. The Zimmers plan more bird festivals this year.

I also visited the two adjoining subdivisions, both of which were developed in the 1990s. Before that residential development, the land on both sides of the 30-acre Zimmer property was farmland for over 100 years. Presently, all lots in both subdivisions have been sold and developed. Country Manors, which lies to the east of the Zimmer farm, consists of upscale homes. Orchard Estates, which lies to the west of the farm, consists of moderately priced homes very attractive to families due to a number of playgrounds and park areas within the subdivision. About 20 of the homes in Country Manors border the Zimmer Farm, and about 30 of the Orchard Estates properties border the farm. Both subdivisions are zoned R-1, single-family residential.

On June 15, I reviewed public records and confirmed that Zimmer Farms Inc. has owned the property in question since 1951. The Zimmer farm is zoned Agricultural A-1. As you know, Hartford County has countywide zoning. Most property is either single- or multi-family residential, light industrial, or agricultural. The permitted uses for A-1 zoned areas are specified in the zoning ordinance. Growing apples and strawberries for commercial sale, as the Zimmers have done, is permitted in an A-1 zone.

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EXCERPTS FROM HARTFORD COUNTY ZONING CODE

Title 15. ZONING

§ 22. Agricultural A-1 District Permitted Uses

(a) Within an A-1 district, the following uses are permitted:

(1) any agricultural use;

(2) incidental processing, packaging, storage, transportation, distribution, sale, or agricultural accessory use intended to add value to agricultural products produced on the premises or to ready such products for market;

. . .

(b) Definitions

. . .

(2) "Agricultural use" means any activities conducted for the purpose of producing an income or livelihood from one or more of the following agricultural products:

(a) crops or forage (such as corn, soybeans, fruits, vegetables, wheat, hay, alfalfa)

(b) livestock (such as cattle, swine, sheep, and goats)

(c) beehives

(d) poultry (such as chickens, geese, ducks, and turkeys)

(e) nursery plants, sod, or Christmas trees

. . .

An agricultural use does not lose its character as such because it involves noise, dust, odors, heavy equipment, spraying of chemicals, or long hours of operation.

(3) "Agricultural accessory use" means one of the following activities:

(a) a seasonal farm stand, provided that it is operated for less than six months per year and is used for the sale of one or more agricultural products produced on the premises;

(b) special events, provided that they are three or fewer per year and are directly related to the sale or marketing of one or more agricultural products produced on the premises.

EXCERPTS FROM FRANKLIN AGRICULTURE CODE
Ch. 75 Franklin Right to Farm Act

§ 2. Definitions

(a) "Farm" means the land, plants, animals, buildings, structures (including ponds used for agricultural or aquacultural activities), machinery, equipment, and other appurtenances used in the commercial production of farm products.

(b) "Farm operation" means the operation and management of a farm or an activity that occurs on a farm in connection with the commercial production, harvesting, and storage of farm products.

§ 3. Farm not nuisance

(a) A farm or farm operation shall not be found to be a public or private nuisance and shall be protected under section 4 of this Act if the farm or farm operation existed before a change in the land use or occupancy of land that borders the farmland, and if, before that change in land use or occupancy of land, the farm or farm operation would not have been a nuisance.

(b) A farm or farm operation that is protected under subsection (a) shall not be found to be a public or private nuisance as a result of any of the following:

(i) a change in ownership;

(ii) temporary cessation or interruption of farming;

(iii) enrollment in a governmental program; or

(iv) adoption of new technology.

§ 4. Local units of government

Except as otherwise provided in this section, a local unit of government shall not enact, maintain, or enforce an ordinance, regulation, or resolution that conflicts with this Act and undermines the purpose of this Act.

Effective July 1, 1983.

REPORT FROM FRANKLIN SENATE COMMITTEE ON AGRICULTURE
Pertaining to S.B. 1198, May 3, 1983

S.B. 1198 will be known as the Franklin Right to Farm Act and will protect Franklin farmland. During each of the past several years, two to three million acres of U.S. farmland have been converted to nonagricultural uses. Franklin's agricultural resources play an important role in feeding the population of Franklin, the United States, and the world. Loss of farmland imperils 2.2 million agriculture-related U.S. jobs, the habitats of 75% of our wildlife, and open spaces necessary for a healthy environment. Loss of farmland creates urban sprawl with the attendant stresses on the infrastructures of Franklin's formerly rural counties and small towns.

When land that was formerly agricultural is converted to residential land, new home dwellers, not familiar with rural life, complain of odors, noise, dust, and insects caused by animals, crops, and farm machinery. Too often these new residents file nuisance suits against their farming neighbors. Additionally, local ordinances enacted in response to residents' concerns threaten farmers with fines and/or closure if they are in noncompliance with the restrictions imposed by the ordinances. These restraints and costly lawsuits by nonfarming neighbors discourage farmers from investing in their farms and remaining on them.

S.B. 1198 protects those who farm for a living. A farming operation that was not previously a nuisance does not become one when residential development moves in next to the farmland. To qualify for this protection, farmers must show that the farm operation would not have been a nuisance at the time of the changes in the area. This protection applies to those who make their living farming, whether in an agricultural area or in a residential area, not to those with gardens for personal use. Under the common law, "coming to a nuisance," such as building a home next to a cattle operation, was ordinarily a defense for the farmer. However, courts have been reluctant to afford this defense wide applicability. This reluctance adds to the uncertainty facing farmers. S.B. 1198 codifies this common law defense and protects those who farm for a living.

Accordingly, this Committee declares that it is this state's policy to conserve, protect, and encourage the development and improvement of its agricultural land for the commercial production of food and other agricultural products, by limiting the circumstances under which a farming operation may be deemed to be a nuisance.

Shelby Township v. Beck
Franklin Court of Appeal (2005)

The issue on appeal is whether the Franklin Right to Farm Act (FRFA or "the Act") preempts a local zoning ordinance.

In 1995, the Becks purchased 1.75 acres of property in Shelby Township. The property had been used for raising chickens, and there were chicken coops on the property when the Becks purchased it. In 1995, the land use plan for the township allowed farming on this land. In 1996, the Becks began raising chickens for sale at local butcher shops. In 1998, Shelby Township passed Zoning Ordinance 7.0, which requires farms to have a minimum size of three acres. In 2000, several real estate developers began to build homes near the Becks' property. Neighbors began complaining to the Township Board about the smells and noise from the Becks' chickens. The neighbors filed a petition with the Township Board, asking it to close down the Becks' operation because it was a nuisance. In 2004, the Township Board decided that the best way to close down the Becks' farm was to enforce its ordinance regarding minimum farm size. The Township sued to enforce its ordinance, and the Becks moved to dismiss, claiming that FRFA preempts the ordinance. The trial court granted the motion, and the Township appealed.

State law can preempt a municipal ordinance in two ways. First, preemption occurs when a statute completely occupies the field that the ordinance attempts to regulate. FRFA does not "occupy the field," because the legislature has also authorized local governments to enact zoning laws concerning agricultural properties. Second, preemption occurs when an ordinance conflicts with a state statute and undermines its purpose. A conflict exists when the ordinance permits what the statute prohibits or vice versa. Determining whether there is a conflict requires a careful reading of the statute and the ordinance in light of the policy and purposes behind the statute and measuring the degree to which the ordinance frustrates the achievement of the state's objectives.

If Shelby Ordinance 7.0 is in effect, the Becks cannot raise chickens on their property because it is under the minimum size required for a farm. However, Section 4 of FRFA provides that a local ordinance is preempted when it conflicts with FRFA. The question then is whether there is a conflict. Section 2 of FRFA defines a "farm" as "land, plants, animals, buildings, structures . . . and other appurtenances used in the commercial production of farm products." The Act does not set a minimum acreage for farms. Here, the Becks' operation—raising chickens for sale—is protected by FRFA because it is the commercial production of farm products, even

though the operation takes place on only 1.75 acres. Thus, there is a conflict between the size requirement of the ordinance, which prohibits the Becks from raising chickens, and FRFA, which does not. Thus the ordinance and FRFA are in direct conflict, as the ordinance prohibits what is permitted by the Act. The ordinance undermines the very purpose of the Act by prohibiting this farm operation.

The Township's effort to use its size ordinance to prevent what the neighbors believe is a nuisance is the very sort of enforcement action that FRFA is designed to prevent. FRFA states that a farm shall not be found to be a nuisance if it existed before the change in land use and if, before that change, it would not have been found to be a nuisance. The Becks' operation began in 1995, before the residential development neighboring it was created. In 1995, the Becks' farm operation was a permitted use and would not have been a nuisance. Accordingly, the Becks' operation is protected by FRFA.

Our conclusion that the state law preempts the local ordinance also serves the purpose of the Act, which is to conserve land for agricultural operations and protect it from the threat of extinction by regulation from local governmental units. *See* Sen. Rpt. Comm. Agric. 1983.

Affirmed.

Wilson v. Monaco Farms
Franklin Court of Appeal (2008)

Defendant Monaco Farms (Monaco) has operated a dairy farm on its property from 1940 to the present, with changes in the ownership passing from father to son in 1970, and to granddaughter in 2000. Monaco increased the number of dairy cows on the farm from 40 to 60 in 2005, and from 60 to 200 in 2007.

Plaintiff Bill Wilson has lived in the subdivision immediately to the east of Monaco since 1990. In 2007 he filed a private nuisance action against Monaco, alleging that the flies, dust, and odors from the dairy cows interfered with his enjoyment of his property. Monaco moved to dismiss, relying on the Franklin Right to Farm Act (FRFA), which it claims continues to protect a farm operation when it expands or changes its operation. In response, Wilson argued that FRFA does not protect a farm whose expansion created a nuisance not present at the time he purchased his property. The trial court granted the motion to dismiss, and Wilson appealed. We affirm.

The present situation is the very sort of farm operation the legislature intended to protect when it enacted FRFA. Monaco has existed since 1940, and it would not have been a nuisance at that time. In 1984, the land bordering Monaco was subdivided and developed into a residential area and was zoned residential.

There were no complaints about the operation of Monaco until 2007, when it expanded from 60 to 200 cows. The question is whether FRFA continues to protect Monaco after the expansion. When it enacted FRFA, the legislature understood that circumstances could change and provided that certain changes would not affect the protections of FRFA. Section 3(b)(i) of FRFA addresses the issue of change in ownership but does not address changes in size or nature of the operation.

Wilson argues that because the legislature listed four, and only four, contemplated interruptions or changes in farm operations, those are exclusive and exhaustive. If Wilson is correct, the only changes the legislature intended to protect are the four items specified in the statute, and those four do not include expansion of farm operations.

Monaco, on the other hand, argues that where the legislature provides a list, the court must determine what is common among the items on the list and then consider whether the matter at issue is sufficiently similar to the items listed as to be included. Monaco argues that the

change in size of the operation is similar to a change in technology, which does not destroy the protections of FRFA. Both changes have as their purpose the opportunity to increase farm production and thus profitability.

Both parties assume that the court must look to § 3(b) of FRFA. A better approach is to examine § 3(a), which provides that a farm "shall not be found to be a public or private nuisance . . . if the farm or farm operation existed before a change in the land use or occupancy of land that borders the farmland . . . ." Thus, the statute provides a date for measuring whether a nuisance exists, namely the date when the use of the neighboring land changed. In this case, that date is 1984, the year that the neighboring land was subdivided and developed into a residential area. The legislature may have assumed that farms might expand. Indeed, it noted in § 3(b) the possibility of change in technology. Nevertheless, the legislature established only one date for measuring whether a nuisance exists.

The purpose of FRFA is "to conserve, protect, and encourage the development and improvement of [Franklin's] agricultural land for the commercial production of food and other agricultural products, by limiting the circumstances under which a farming operation may be deemed to be a nuisance." Sen. Rpt. Comm. Agric. 1983. Relying solely on the legislature's date for determining whether a nuisance exists serves the statutory purpose.

When he bought his home in 1990, Wilson knew that he was moving next to a dairy farm. It remains a dairy farm, albeit a larger one. Nothing in FRFA prohibits expansion of farm operations. Despite the expansion of Monaco's dairy operation, it is protected by the Act, and the trial court properly dismissed Wilson's nuisance action.

Affirmed.

Koster v. Presley's Fruit
Columbia Court of Appeal (2010)

In this case, the court is asked to determine the applicability of the Columbia Right to Farm Act (CRFA). The precise issue on appeal is whether the production of wooden pallets for use in harvesting peaches is an agricultural activity protected by the Act.

Defendant Presley's Fruit (Presley's) has grown and sold peaches at its location since 1960. In 2006, Presley's added a new building and began manufacturing wooden pallets for use in harvesting and transporting peaches.

In 1997, plaintiffs Matt and Kathleen Koster purchased residential property that abuts Presley's. They had no complaints about Presley's until 2006, when they began experiencing noise and dust associated with the manufacturing of the wooden pallets. The Kosters filed a nuisance suit against Presley's, claiming that the noise and dust is a nuisance that substantially and unreasonably interferes with their enjoyment of their property.

Presley's moved to dismiss, claiming the protections of CRFA. CRFA states that a farm operation which existed one year before the change in the area is not a nuisance if it would not have been a nuisance at the time of the change in the property. The trial court granted the motion.

On appeal, the Kosters argue that CRFA protects only farm activities and not manufacturing. Presley's claims that the pallets are needed to harvest and transport the peaches (a farm product) to market and that therefore the manufacturing of the pallets is protected by CRFA.

Resolving this question requires the court to interpret and apply the provisions of CRFA. Our role in construing a statute is to "ascertain and give effect to the legislative intent." *Brady v. Roberts Electrical Mfg., Inc.* (Columbia Sup. Ct. 1999).

We must examine the Columbia statute's text and give the words their natural and ordinary meaning in light of their statutory context. If the statutory language is clear and unambiguous, the court must apply the statute's plain language and not venture beyond the text to add words not there. However, when the statutory language is unclear, the court may refer to the purpose of the legislation and the legislative history of the statute, such as legislative committee reports, to aid us in interpreting the text.

In this case, an examination of the statutory language provides the answer. CRFA defines a farm product as "those plants and animals useful to human beings produced by agriculture and includes, but is not limited to, forages and sod crops; grains and feed crops; dairy and dairy products; poultry and poultry products; livestock, including breeding and grazing animals; fruits; vegetables; or any other product which incorporates the use of food, feed, or fiber." Although that is a broad definition of farm product, there is no mention of products produced from wood.

The pallets are constructed of wood and nails or staples. The wood used for the pallets originates from outside the defendant's property. The products, therefore, are not grown, raised, or bred on the farm premises, but are only assembled there from materials purchased elsewhere. The pallets do not match any of the definitions of farm products set forth in the Act, nor are they like any of those farm products defined by the statute. The manufacturing of these wooden pallets is not an activity protected by CRFA.

We reverse the trial court's order dismissing this case. If, on remand, the Kosters are successful in their nuisance action and convince the court to order Presley's to cease producing the pallets at the farm, there will be no loss of farmland. If the Kosters succeed, Presley's land will continue to be used for the production of peaches. The land will remain agricultural. Presley's would manufacture the pallets off the farm premises rather than on the premises, or purchase the pallets from some outside source. Purchasing pallets should be no more a threat to Presley's than purchasing a truck for hauling the peaches to market.

Reversed and remanded.

NOTES

NOTES

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

2) MPT2 - Please type your answer to MPT 2 below *(Essay)*

======== Start of Answer #2 (1717 words) ========

MEMORANDUM

TO: CARL S. BURNS

FROM: EXAMINEE

DATE: JULY 25, 2017

RE: Complaints about the Zimmer Farm

This memorandum will discuss issues surrounding the Zimmer Farm and its bird rescue and bird festivals. It will address the follwing issues:

1. Is the Zimmers' bird rescue operation permitted under the county zoning ordinance?

2. Are the Zimmers' festivals permitted under the county zoning ordiance?

3. How, if at all, does the FRFA affect the county's ability to enforce its zoning ordinance with respect to the bird rescue operation and the festivals?

1. Is the Zimmers' bird rescue operation permitted under the county zoning ordinance?

It is unlikely that the Zimmer's bird rescue operation is permitted under the county zoning ordinance. Under § 22(a) of the Hartfrd county Zoning Code, districts with A-1 zoning are permitted to have the following uses: 1) any agricultural use; and 2) and incidental .. or agricultural accessory use to add value to agricultrual products produced of the premises or to ready such products for the market. An agricultural use means any activity conducted for the purposes of producing an income or livelihood from one or more of the following agricultural products: (d) poultry (such as "chickens, geese, ducks, and turkeys.")

When interpreting a statute, persuasive authority from the Columbia Court of Appeal suggests that the purpose is to ascertain and give effect to the legislative intent. *Koster; Roberts*. This means that words must have their natural and ordinary meaning in light of their statutory context. When the statutory language is clear, one applies the plain language of the statute and does not venture beyond the text to add words not there. However, when staturoy language is unclear, the court may refer to the purpose of the legislation and the legislative history of the statute such as legislative committee reports.

Accordingly, the issues are whether a) the Zimmer's birds can be considered poultry and b) whether or not the rescue operation can be considered "for the purposes of producing an income or livelihood."

A) The Zimmer birds may be considered poultry.

The Zimmer's birds may be considered poultry. In *Koster*, the Columbia Court of appeal found an broad definition of a farm product to be complete. In *Koster*, farmers had expanded their use of the land to include the production of wood pallets. Because the statute did not mention any products produced by wood as a "farm product," and the the wood was not grown, raised, or bred on farm premises but only assempbed there, the court held the definition of farm product did not include wooden pallets.

Here, Edward Zimmer takes in wounded ducks, geese, owls, quail, pheasants, and hawks, as well as pretty uch any fowl or bird that has been hurt. The A-1 Agricultural use permits using agricultural land for the production of poultry (such as "chickens, geese, ducks, and turkeys."). While Edward does take in array of birds, he also does take in all fowl, including ducks and geese that are

injured. Ducks and geese are specifically included in the statutory list of animals that may be produced and considered an agricultural use. Accordingly, the Zimmer's birds may be considered poultry.

On the other hand, because the majority of Edward's birds are not named in the enumerated list of "poulty" birds in the statute, they are not included in the broad definition of an agricultural use and one likely has a strong arugment against their classification as poultry. Still, common usage of the word poultry (as in bird meat often sold and consumed by humans) could add pheasants and quail to the list as well. Accordingly, Edwards bird may be considered poultry.

B) Even assuming the Zimmer birds may be considered poultym it is unlikely, the rescue operation can be considered "for the purposes of producing an income or livelihood."

Despite the fact that Edwards birds may be considered poultry, it is unlikely the bird rescue will be considered an agricultural use as it is not used for the purposes of producing an income or livelihood. Here, Edward does not use the bird rescue to produce and income or livelihood. Edward does not sell the birds, does not make any profit from the operation, and does not intend to do so.

Moreover, all of the funds raised at the festivals from the purchase of bird-related souiveners and donations were put directly back into the bird rescue operation to underwrite it. Accordinly, Edward does not keep birds to produce a livelihood and the operation is not agricultural use.

2. Are the Zimmers' festivals permitted under the county zoning ordiance?

It is likely that three of the Zimmer's festivals per year will be permitted under the county zoning ordinance because they serve to promote agricultural prodcuts produced on the premises, namely strawberries and apples. As stated above, under § 22(a) of the Hartfrd county Zoning Code, districts with A-1 zoning are permitted to have the following uses: 1) any agricultural use; and 2) and incidental .. or agricultural accessory use to add value to agricultrual products produced of the premises or to ready such products for the market. An agricultural accessory uses include "special events, provided that they are three or fewer per year and are directly related to the sale or marketing of one or more agricultural products produced on the premises."

Here, the Zimmers held four weekend festivals at their farm in 2016. The purpose of the festival was to "support injured birds, listen to music and have a

good time." In addition the Zimmers encouraged visitors to "buy apples and discover the best recipes for baking with fruit." A local chef offered two session on cooking at the festival, and the Zimmers also sold apples or strawberries, depending on the season and cookbooks. Accordingly, The Zimmers could argue that their festivals were a special events authorized by the Hartford County Zoning Ordinance because while they were called bird festivals, they were also related to the production and sale of agricultural products, namely the apples and strawberries the Zimmers grow on site. Moreover, Edward only gave a one hour program about birds at each fesitval, and sold bird gear to raise money. Accordingly, one could argue that the majority of the time was spent on the agricultural use related to the strawberries and apples. Because of this it is unlikley that the Board will able to completely prohibit the Zimmer festivals. However, they will be able to limit the number of festibals to three per year.

3. How, if at all, does the FRFA affect the county's ability to enforce its zoning ordinance with respect to the bird rescue operation and the festivals?

The FRFA is unlikely to affect the county's ability to enforce its zoning ordiance with regard to the bird recue operation or the bird festivals.

State law can pre-empt a municipal ordinance in two ways. *Shelby.* First it can occur when a statute completely occupies the field that the ordinance attempts to regulate. *Shelby.* The FRFA does not "occupy the filed" because the legislation authorizes local regulations that do not conflict with the FRFA or undermine its purposes. *Shelby.* Accordingly, the issue at hand is whether the FRFA conflicts with the zoning ordiance and thereby pre-empts its application.

A conflict exists when the ordinance permits was the statute prohibits or vise versa. *Shelby.* Determining whether there is a conflict requires a careful reading of the statute and the ordinance in light of the policy and purposes behind the statute and measuring the degree to which the ordinance frustrates the achievement of the state's objectives.

The FRFA states that a farm or farm operation shall not be found to be a public or private nuisance if it existed before a change in land that borders the farmland, and if, before that change in land or use or occupancy of land, the farm would not have been a nuisance. Ch. 75 § 3. The date for measuring whether a nuisance exists, is the date when the use of the neighnoring land changed. *Wilson.* A "farm" means the land, plants, animals, buildings, structures, machinery,

equipment, and other appurtances used in the commercial production of farm products. § 2 FRFA.

The purpose of the FRFA is "to conserve, protect, and encourage the development and improvement of Franklin's agricultural land for the commercial production of food and other agri products, by limiting the circumstances under which a farming operation may be deemed a nuisance." Sen. rpt. Comm. Agric. 1983. However, the FRFA only protects those who "farm for a living ... not to those with gardens for personal use." *Id.*

In *Shelby,* the court held that a zoning requirement that required all farms to be at least three acres directly conflicted with the FRFA. This is because FRFA did not prohibt farms smaller than three acres. Essentially, the ordinance prohibted what was permitted by the act, and undermined the very purpose of the Act by prohibiting farm operation.

Here, it is unlikely the Zoning Code's restriction on the bird rescue would be pre-empted. This is because the bird rescue is prohibited, not because of the types of animal housed, but because of the use. The FRFA as stated above only protects those who "farm for a living ... not to those with gardens for personal use." This is

directly in line with the Hartford zoning code that defines agricultural use as one that is engaged in for the purpose of producing an income or livlihood.

In addition, the restriction limiting the number of festivals to three per year is not pre-empted. The FRFA only protects against nuisances related to the commercial production, harvesting and storage of farm products, not the sale of farm products. Accordinlgy, the zoning regulation is not prohibiting anything the FRFA is permitting.

Finally, like the prohibition of producing wood pallets in *Koster*, the prohibition of the bird rescue does not limit the amount of farmland that the Zimmers can farm. The Zimmers may continue farming all of the land previously used for strawberry and apple farms. The FRFA would prevent any restrictions on the Zimmer's use for that puroser.

Accordingly, the FRFA is unlikely to affect the county's ability to enforce its zoning ordiance with regard to the bird recue operation or the bird festivals.

======== End of Answer #2 ========

END OF EXAM