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PENNSYLVANIA BAR EXAMINATION

**Essay Questions and Examiners Analyses
and
Performance Test**



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Question No. 1: Facts and Interrogatories

Frank, who operated a nursery, was in need of a will. He had a friend, Larry, a trial lawyer, whom he approached on the subject. Larry was somewhat knowledgeable but not an expert on wills. He therefore referred Frank to attorney Abel who did wills. Larry and Abel, each sole practitioners in Pennsylvania, often referred clients to each other for a 20 percent referral fee. They were not otherwise associated.

Frank and Abel agreed in writing that Frank would give Abel ten oak trees in return for the will and related legal services. The agreement did not represent an excessive legal fee. Upon completing the will, Abel took the ten trees, transferred two to Larry, and planted the remaining eight in a row in front of his home, which he thereupon named "Oakacre." Frank knew and approved of Larry's participation in the fee. Larry happily accepted the trees in part because he did none of the work on nor assumed any responsibility for Frank's will. Abel, who was terminally ill, regarded the oaks as a form of immortality.

After planting the trees, Abel prepared and executed a will making several specific gifts and leaving the very substantial remainder of his estate in equal shares to his wife, Wilma, and his daughter, Darla. Because Wilma and Darla did not like Oakacre, Abel specifically devised it to his brother's son, Stan.

Darla and Dan had been married for five years and resided in Pennsylvania. They had no children, and their only asset was their home (Blackacre) valued at \$60,000, which they both had worked for throughout their marriage. Knowing about her father's condition and her impending inheritance, Darla tried to persuade Dan to withdraw a divorce action, which he had commenced against her. Instead, Dan asked the divorce court to award him their home in an equitable distribution proceeding, arguing that Darla would probably receive a substantial inheritance upon Abel's death.

Some time after Darla and Dan's divorce and equitable distribution were finalized, Abel died, survived by Wilma and Darla, but Stan had tragically predeceased Abel, leaving a wife and adult son, Brian. Abel's will was silent about what happened to Oakacre should Stan predecease Abel. Abel had not updated his will after Stan's death.

1. How should the judge handling Dan's divorce have ruled on Dan's argument to award him all of Blackacre?
2. Assuming Abel and Larry must file federal income tax returns in their law businesses, how, if at all, should the value of the oak trees received and/or transferred by and between them be reported on their returns?
3. Did the fee arrangement between Larry and Abel on Frank's fee violate the Pa. Rules of Professional Conduct (Pa. R.P.C.)?
4. Who is entitled to Oakacre under Abel's will? Assume for your answer that in Abel's state his will was valid and that the following statutory will interpretation provisions are in force:

Rules of Interpretation. In the absence of a contrary intent appearing therein, wills shall be construed as to real and personal estate in accordance with the following rules:

(9) Lapsed ... Devises and Legacies; Substitution of Issue. A devise or bequest to a child or other issue of the testator or to his brother or sister or a child of his brother or sister ... shall not lapse if the beneficiary shall fail to survive the testator and shall leave issue surviving the testator but shall pass to such surviving issue who shall take per stirpes the share which their deceased ancestor would have taken had he survived the testator; Provided, That such a devise or bequest to a brother or sister or to the child of a brother or sister shall lapse to the extent to which it will pass to the testator's spouse or issue as a part of the residuary estate ...

(10) Lapsed ... Devises and Legacies; Shares Not in Residue. A devise or bequest not being part of the residuary estate which shall fail or be void because the beneficiary fails to survive the testator ..., if it shall not pass to the issue of the beneficiary under the provisions of clause (9) hereof, ... shall be included in the residuary devise or bequest, if any, contained in the will.

(11) Lapsed ... Devises and Legacies; Shares in Residue. When a devise or bequest as described in clause (10) hereof shall be included in a residuary clause of the will and shall not be available to the issue of the devisee or legatee under the provisions of clause (9) hereof, ... it shall pass to the other residuary devisees or legatees, if any there be, in proportion to their respective shares or interests in the residue.

Question No. 1: Examiner's Analysis

1. The court handling Dan's divorce should not consider the possibility of a future inheritance for Darla when equitably dividing marital property in a divorce proceeding between Dan and Darla.

In deciding equitable distribution, courts are to be guided by "all relevant factors" including the eleven factors enumerated in 23 Pa. C.S.A. §3502(a). These include the "station" of each party (subsection 3) and any opportunity to acquire assets in the future (subsection 5). Although there are these many factors to be considered by a court in the distribution of the marital estate, including specifically the opportunity of each party for future acquisitions of capital assets and income and their "station" in life, Pennsylvania courts have consistently expressed concern about the tenuous nature of the possibility of a future inheritance. See Gruver v. Gruver, 372 Pa. Super. 194, 197, 539 A.2d 395, 397 (1988).

The possibility of such an inheritance should not be considered in making equitable distribution. Fielding v. Fielding, 454 Pa. Super. 261, 685 A.2d, 178 (1996). Even the possibility of surviving a living parent who established a joint account with a divorcing child is not to be considered. Hutnik v. Hutnik, 369 Pa. Super. 263, 535 A.2d 151 (1987). Abel obviously could change his will prior to his death, or his wealth could be dissipated prior to that time. If he had joint accounts with Darla he could terminate them or survive Darla. Furthermore, ascertaining potential sources of inheritance and the likelihood thereof is impractical and unreliable. Thus, Dan's request that the court award him Blackacre based on the anticipation that Darla's father is terminally ill and may be providing her a substantial inheritance should be denied by the court handling their divorce consistent with the above cases.

2. The ten oak trees are taxable to Abel and Larry for federal income tax purposes at their full value.

Under Section 61 of the Internal Revenue Code of 1986, as amended (IRC), all income from whatever source derived is taxable income unless specifically excluded. Barter income is not excluded and is therefore subject to federal income tax. See IRC Reg. Section 1.61-2(d)(I). Barter income, with respect to Abel, includes generally the value of goods received from someone like Frank for Abel's services provided to Frank. Likewise, barter income, with respect to Larry, includes generally the value of goods received from Abel for referring Frank to Abel. Under the above-cited Reg., the goods are taxable to Abel and Larry at their fair market value which would be the value at which Frank was selling them at the time.

As between Abel and Larry, Abel should report as income the receipt of ten (10) trees at their fair value since Frank, by agreement with Abel, delivered the trees to Abel for legal services. Abel, in turn, would then deduct the value of the two trees which he paid to Larry as a referral fee. Larry would then report the value of the two trees as his barter income.

The payment by Abel to Larry of the two trees is deductible by Abel as an "ordinary and necessary business expense" under Section 162(a) of the IRC where such expenses as sales commissions and referral fees are deductible. Generally, expenses are considered "ordinary" if they are customary and usual as well as reasonably related to the business by which they are deducted. Expenses are considered "necessary" if they are appropriate and helpful in developing and maintaining the business. Referral fees among lawyers are "customary" (witness the specific Pennsylvania Rule of Professional Conduct thereon to be discussed in the next question). Such fees are also "appropriate and helpful" in retaining business. Thus the referral fee from Abel to Larry of two trees is an "ordinary and necessary" Sec. 162(a) deduction for Abel. See RIA Federal Tax Coordinator, 2nd Vol. 16, Paragraph L-1200 et seq.

3. The fee split arrangement between Abel and Larry did not violate Pa. R.P.C. provided that Rule 1.5(e) on Fees is complied with.

Referral fees and fee splits between lawyers are commonplace and specifically covered by Pa. R.P.C. 1.5(e). This rule provides:

A lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm unless:

- (1) the client is advised of and does not object to the participation of all the lawyers involved; and
- (2) the total fee of the lawyers is not illegal or clearly excessive for all legal services they rendered the client.

Looking at the above requirements, a fee split is allowed if the client is aware, does not object, and the total fees being split are not excessive or illegal. Our facts indicate that Frank was aware of and approved the fee split and obviously the referral since he first went to Larry and was referred by Larry to Abel. Thus Abel and Larry were in compliance with subsection (1) of the rule.

The requirement that the total fees not be excessive is covered in the facts which state that the fees were not excessive. Also, nothing in the facts suggest that the fees were illegal. Therefore, subsection (2) of the rule is met and the fee split in general complies with the Pa. R.P.C.

Note that the fact that Larry neither did any of the work for nor assumed any responsibility to Frank is not a violation of Pennsylvania modern rule on fee splitting between attorneys from different firms. However, some jurisdictions and Model Rule of Professional Conduct 1.5(e) would require that the division of a fee between two lawyers be proportional to their respective share of the services or that each lawyer at least accept responsibility for the services. In such jurisdictions Able and Larry's fee arrangement would under the facts not be compliant.

4. Under Abel's will as interpreted by the anti-lapse statute quoted in the facts, Oakacre will pass with the residue of Abel's estate to his wife, Wilma, and daughter, Darla in equal shares.

Although Abel's will leaves Oakacre to his nephew, Stan, it does not – according to the facts – state where Oakacre will pass if Stan does not survive Abel. If this devise to Stan fails, it is said to lapse. The subject matter of the statute quoted in the facts is whether or not a given bequest or devise will lapse if the beneficiary fails to survive the Testator (as Stan so failed) and the will does not otherwise provide alternate beneficiaries.

Specifically, the statute first provides that the terms of the will control. However, our facts specifically indicate that Abel's will was silent about the scenario at hand (i.e., Stan's predeceasing Abel). Often and preferably wills will be clear on the issue of whether a bequest or devise to a beneficiary who predeceases the Testator shall pass to an alternate beneficiary or flow into the residue of the estate.

The statute under which Abel's will must be interpreted states that (in the absence of express language to the contrary) the devise of Oakacre which is possibly lapsing due to Stan's predeceasing Abel would pass to Stan's issue (Brian) except to the extent it would otherwise pass to Abel's spouse or child under the residuary clause of Abel's will. Here, since Abel's spouse (Wilma) and child (Darla) are taking all of his residue under his residuary clause, Brian does not take any of Oakacre. His father's devise lapses. This is covered under subsection (9), Lapsed ... Devises and Legacies; Substitution of Issue quoted above.

Who then takes Oakacre? Subsection (10), Lapsed ... Devises and Legacies; Shares Not in Residue, controls since the lapsed devise was not a residuary gift but instead a specific devise not part of the residue. Subsection (10) provides that the devise passes with the residue of Abel's estate.

In sequence, Subsection (11), Lapsed and Void Devises and Legacies; Shares in Residue, then controls. Under Subsection (11), the lapsed specific devise of Oakacre passes to Wilma and Darla in equal shares because under Subsection (11), it is added to their residuary shares in proportion (i.e., half each) to their respective shares of the residue. See 20 Pa. C.S.A. 2514 (9), (10) and (11), which is the statute above reproduced in relevant part.

Question No. 2: Facts and Interrogatories

One evening Carl was walking home through an alley in a business area of Smallville, Pennsylvania, when he was tackled from behind, without warning, and thrown to the ground by Fred, who was upset with Carl for breaking off a relationship with Fred's sister. Carl was dazed but not knocked unconscious by the tackle. Fred tied Carl's hands behind his back, blindfolded him and dragged him approximately two hundred fifty feet down the alley, to the back door of Fred's business, Fred's Hardware Store. Fred then violently kicked in the back door to make it appear that there was a break in. Fred called the police and claimed he caught Carl in the act of breaking into his store and had to physically subdue Carl until the police arrived. At Fred's insistence, Carl was arrested at the scene by the police.

Tim, who just left the Smallville Tavern after eight hours of heavy alcohol consumption, staggered into the alley, looking for his "favorite spot" to sleep off the alcohol when he saw all of Fred's actions relative to Carl. Tim is well known in the Smallville area as the "town drunk" and only the week before the incident completed two years of probation for a conviction for car theft and public intoxication. After the police took Carl into custody, Tim who despised Carl supported Fred's version of the incident although Tim knew it was not true. Tim and Fred did not know each other at the time of the incident. The criminal case for the break in, which was filed at Fred's insistence, resulted in Carl's acquittal of the criminal charge, even though both Fred and Tim testified against him.

Carl has retained the law firm where you are employed to represent him in a claim for civil damages against Fred. Carl is still suffering from the physical injuries caused by Fred's tackle including residual problems from a broken leg. Additionally, Carl missed six weeks of work due to his arrest and trial and incurred substantial legal fees in connection with the defense of his criminal case.

A preliminary investigation into the facts of this matter indicates Tim was at a local tavern the day after the incident and told the bartender and various patrons that Fred "worked Carl over pretty good" and "set him up" with the police. Finally, you have determined that over the eight- hour period that Tim was at the Smallville Tavern on the day of the incident, he consumed fifteen twelve- ounce beers and that immediately before he left the bar, Tim was refused further alcoholic drinks by the bartender, who stated that Tim was visibly intoxicated.

1. What steps, if any, can be taken under the Pennsylvania Rules of Civil Procedure on behalf of Carl to determine the extent of Fred's liability insurance and his financial status and with what likely result?
2. Other than torts related to the infliction of emotional distress and defamation, what torts should be asserted in a civil action by Carl against Fred?
3. Assume for the purpose of this question only, that a civil action is filed against Fred by Carl, and that Tim, who is called as a witness for Fred, testifies consistent with his earlier testimony in the criminal case. What evidence should Carl's attorney attempt to introduce to cast doubt on Tim's testimony?

Question No. 2: Examiner's Analysis

- 1. If a civil lawsuit is instituted against Fred, he can be compelled pursuant to the Pennsylvania Rules of Civil Procedure governing discovery to disclose liability insurance information and, subject to a proper court order, other financial information since punitive damages are applicable.**

The law firm would be concerned about proceeding against Fred if there is no potential of financial recovery against him. The attorneys for Carl would like to know of the existence or extent of the insurance together with other financial information showing Fred's solvency.

Carl would not be entitled to any information regarding liability insurance and/or financial status unless and until a proper lawsuit is filed in the Court of Common Pleas of the appropriate county. Once a civil lawsuit is filed, the Pennsylvania Rules of Civil Procedure governing discovery are applicable. The discovery portion of the rules beginning at Rule 4001, et seq. would compel the disclosure of certain information.

Pa.R.C.P. 4003.2 is applicable to whether Fred will be compelled to disclose liability insurance information. This rule states as follows:

“A party may obtain discovery of the existence and terms of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of such disclosure admissible in evidence at trial. For the purposes of this paragraph, an application for insurance shall not be treated as part of the insurance agreement.”

This rule is similar to Federal Rule of Civil Procedure 26(b) and codifies the decision of the Pennsylvania Supreme Court in Szarmack v. Welch, 456 Pa. 293, 318 A.2d 707 (1974), which permits discovery of insurance information. Therefore, once a lawsuit has been filed against Fred, Carl can have his attorneys submit interrogatories to counsel for Fred requesting information relating to available insurance or pursue other available means of discovery such as depositions and motions for production.

Additionally, the request for information relating to assets or the financial status of Fred would not be obtainable prior to the institution of a lawsuit. Once a proper lawsuit is filed, the information relating to financial status would still ordinarily not be discoverable prior to a verdict and then only in aid of execution. The scope of discovery is generally limited to trial preparation material. Pa.R.C.P. 4000.3 supports the premise that the financial condition of Fred is not relevant to a determination of liability.

Here, the civil action to be filed against Fred would include theories of recovery based upon intentional torts such as battery, false imprisonment and malicious prosecution. One may seek punitive damages in addition to compensatory damages when intentional torts are pled. The financial situation of a Defendant is thus relevant after a lawsuit is filed and can be secured by discovery prior to verdict. The financial information gained from a Defendant would be admissible at trial to assess appropriate punitive damages.

Pennsylvania Rule of Civil Procedure 4003.7 states as follows:

Rule 4003.7 - Punitive Damages - A party may obtain information concerning the wealth of a defendant in a claim for punitive damages only upon order of court setting forth appropriate restrictions as to the time of the discovery, the scope of the discovery, and the dissemination of the material discovered.

Based upon the above Rule of Civil Procedure it would appear that upon proper application to the Court, financial information relating to a Defendant's financial wealth may be obtained since punitive damages are sought. Proper application to the Court to secure financial information would generally require the Plaintiff to make some showing to support a punitive damage award before financial information is released in discovery.

It should also be noted that although liability insurance information is discoverable it would not be admissible at the trial of the matter since it is irrelevant to liability and highly prejudicial. The material obtainable in discovery is to a large part wider than that which may be admissible at trial. The purpose of allowing insurance information in discovery is to promote the prompt settlement of cases.

Thus, the law firm could obtain the liability insurance information from Fred after suit is filed. Also, information concerning Fred's general financial situation can be obtained by use of discovery for use at trial since the intentional torts pled do carry the potential of an award of punitive damages.

2. The torts of false imprisonment, battery and malicious prosecution should be filed in a civil suit brought on behalf of Carl against Fred.

The tort of false imprisonment occurs when a person acts intending to confine another within boundaries fixed by the actor, the act results in the confinement of the other person and the other person is conscious of the confinement or is harmed by it. RESTATEMENT (Second) OF TORTS Section 35; Gagliardi v. Lynn, 446 Pa. 144, 285 A.2d 109 (1971) The tort of false imprisonment has been generally characterized, especially in areas involving police conduct, as the unlawful detention of another. Renk v. City of Pittsburgh, 537 Pa. 68, 641 A.2d 289 (1994)

The actor or Defendant, in order to be responsible for the tort of false imprisonment in Pennsylvania must act with the intent to confine a party such as Carl. Here, Fred, after tackling Carl, tied his hands, blindfolded him and carried him to a different location in the alley.

Since Carl was not unconscious, but only dazed, he was likely aware of his confinement by virtue of his hands being tied. Fred's tying of Carl's hands and the other actions clearly were without legal right and thus the restraint was unlawful. No right existed to restrain Carl by tying his hands, blindfolding him and moving him down the alley, since Carl did nothing improper or illegal.

Fred intentionally tied Carl's hands, blindfolded and moved him to a spot behind Fred's Hardware Store. These acts clearly restrained Carl and prohibited his free movement. Additionally, Fred did these things on purpose since it was his conscious object and purpose to frame Carl for a criminal offense that Carl did not commit. False imprisonment, an intentional tort, should be included in the civil complaint brought by Carl against Fred.

Secondly, the civil complaint filed against Fred should include a battery. Battery also is an intentional tort that requires a person such as Fred to purposely and intentionally cause a harmful and/or offensive touching or contact with a party such as Carl. See Levenson v. Souser, 384 Pa. Super. 132, 557 A.2d 1081 (1989) Here there was an actual touching by virtue of the tackle from behind.

The tort of battery requires a harmful or offensive contact or touching by Fred to Carl. Levenson, supra. It would be hard to argue that the touching in this case was not harmful and/or offensive since Carl was violently thrown to the ground and dazed by the unexpected tackle. Here there can be little doubt that Fred intended to tackle Carl which resulted in the touching. The complaint should include the tort of battery as a viable claim against Fred.

Lastly, the tort of malicious prosecution should be included in the complaint filed against Fred. The underlying claim addressed by this tort is the criminal prosecution initiated by Fred against Carl based upon clearly false information. Fred made the criminal complaint to the authorities falsely and with the intent to implicate Carl in a criminal offense for which he was not responsible. The law does encourage complaints regarding alleged criminal activity to be turned over to the authorities, but certainly frowns upon manufactured and false allegations brought to the authorities. The law wants to encourage wrongdoers being brought to justice, however, this tort provides a remedy for those who have been wrongfully prosecuted by virtue of manufactured evidence. Here this is not a mistake of judgment by Fred, rather a manufactured case where he created the fact scenario and then wrongfully turned this matter over to the police.

The tort of malicious prosecution generally has three elements:

- a) That the criminal proceedings that were instituted were without probable cause;
- b) With malice; and
- c) That the Plaintiff in the tort action must have prevailed in the criminal case.

Kelley v. General Teamsters, Chauffeurs and Helpers, Local Union 249, 581 Pa. 517, 544 A.2d 940 (1988)

A private person can be charged with responsibility for institution of proceedings by a public official where it appears that the desire to have the proceedings initiated, expressed by direction, request or pressure was the determining factor in the official's decision to commence prosecution or that the information furnished on which the official acted was known to be false. Bradley v. General Accident Insurance Co, 778 A.2d 707 (Superior Ct. 2001)

The Pennsylvania Supreme Court also requires that the Plaintiff suffer some damages. Byers v. Ward, supra. Here Carl has missed work for a significant period of time and has incurred economic loss including lost wages and attorney fees. See Lynch v. Johnston, 76 Pa. Cmwlth 8, 463 A.2d 87 (1983).

This would seem like a case where malicious prosecution should be added to the civil complaint as a third intentional tort to be brought. In summary, three intentional torts, false imprisonment, battery and malicious prosecution should be brought in a civil action by Carl against Fred.

3. Tim's credibility as a witness should be attacked by Carl's attorneys based upon his past conviction, his alcohol usage on the day in question, his inconsistent statements regarding what he actually observed on the day in question and his possible bias against Carl.

Rule 609 of the Pennsylvania Rules of Evidence permits impeachment by virtue of evidence of a conviction of certain crimes. This rule states as follows:

Rule 609. Impeachment By Evidence of Conviction of Crime

(a) General Rule

For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or nolo contendere, shall be admitted if it involved dishonesty or false statement.

The rule further provides that the conviction must be within the last ten years (Rule 609(b)). This rule is consistent with prior Pennsylvania practice which permitted impeachment of witnesses by proof of any conviction if it were in the nature of a crimen falsi. Commonwealth v. Randall, 515 Pa. 410, 528 A.2d 1326 (1987). It has been determined that theft is a crime involving dishonesty or crimen falsi. Commonwealth v. Brown, 449 Pa. Super. 346, 673 A.2d 975 (1996), Commonwealth v. Kyle, 367 Pa. Super. 484, 533 A.2d 120 (1987) appeal denied 518 Pa. 617, 541 A.2d 744 (1988).

Here, the facts state that Tim recently completed a two-year probation for the theft of an automobile. It would appear that Tim's conviction for theft would be admissible in the event he testified, to impeach his credibility.

Impeachment would be important since it is Fred's and Tim's word against evidence presented by Carl as to what really happened in the alley. Tim's credibility or believability can be severely tarnished by his past conviction. Logically, one who has a past criminal conviction such as auto theft would be less likely to tell the truth since it has been judicially established that they are a dishonest person. Here Tim has recently finished a two-year probation, thus meeting the ten-year relation back requirement of Rule 609 for convictions.

Carl's attorneys should be aware that Tim's conviction for theft will be admissible to impeach his credibility. On the other hand, the fact that Tim was on probation for public intoxication, not an offense involving a crimen falsi or one involving dishonesty, would not be admissible for impeachment purposes. There simply would be no correlation between someone who is publicly intoxicated on an unrelated day or event and the ability to testify truthfully as to a separate and distinct occurrence.

Second, Tim's use of alcohol on the night of the event should be used by the Plaintiff's attorney to impeach his credibility. Rule 607 of the Pennsylvania Rules of Evidence states as follows:

Rule 607. Impeachment of Witnesses

(a) Who May Impeach

The credibility of any witness may be attacked by any party, including the party calling the witness.

(b) Evidence To Impeach

The credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these Rules.

It has generally been held that evidence that a witness such as Tim was intoxicated at the time of the events about which he is testifying would be relevant and thus admissible to impeach. Commonwealth v. Drew, 500 Pa. 585, 459 A.2d 318 (1983), Hannon v. City of Philadelphia, 120 Pa. Commw. 383, 548 A.2d 693 (1988), The facts developed in the investigation indicate that Tim was refused further alcoholic drinks by one of the Smallville taverns the night of the incident because he was visibly intoxicated.

The effects of alcohol on Tim's perception to recall what he did or did not do is highly important. Obviously alcohol would cloud Tim's ability to adequately relate what happened on the day in question thus bringing his testimony into question.

One would believe it is highly relevant that Tim engaged in a course of drinking during the day he allegedly witnessed the incident between Carl and Fred. Further, it is highly relevant that Tim was refused further alcoholic drinks by at least one bar due to his visibly intoxicated condition. One would question whether Tim has the ability to relate clearly and honestly what occurred in the alley between Fred and Carl.

In Commonwealth v. Drew, *supra*, the Supreme Court used the following language pertaining to the admissibility of evidence of potential defects in perception or memory that may be offered to impeach:

“Any deficiency of the senses, such as deafness, color blindness or defect of other senses which would substantially lessen the ability to perceive the facts which the witness purports to have observed, should of course be provable to attack the credibility of the witness, either upon cross examination or by producing other witnesses to prove the defect.” Also see McCormick, Evidence section 44(4th edition 1992).

The Courts in Pennsylvania have universally found that in order to introduce alcohol consumption evidence for impeachment purposes, there must be evidence of intoxication. The mere fact that a person drinks or consumes alcohol, frankly has no probative value, lacks credibility and may ultimately unfairly taint the witness's testimony. Rule 403 of the Pennsylvania Rules of Evidence may serve to bar testimony regarding alcohol consumption unless intoxication can be shown. Here, the testimony of the bartender who refused to further serve Tim alcoholic drinks due to visible intoxication would be admissible to impeach Tim's credibility. This testimony would cast doubt on Tim's ability to properly recall and relate events.

Third, Tim's credibility should further be attacked on cross-examination by Carl's counsel based upon the inconsistent statements Tim made regarding what he saw in the alley. Tim told a bartender the day after the incident that Fred set up Carl. Tim gave a different statement at the trial of the criminal case and at the trial of the civil case than he did to the bartender. Pennsylvania Rule of Evidence 613 permits the impeachment of witnesses by cross-examination by using prior inconsistent statements.

The clear purpose of confronting a witness about inconsistent statements is to raise doubt as to the various versions of a witness. McCormick, Evidence, Sec. 34, PP 126-128, (5th ed. 1999). Which of Tim's various statements is to be believed? The attack on Tim's credibility based upon his inconsistent statements can be anticipated. Tim's statements are unquestionably inconsistent and therefore it is fair to expect an inquiry regarding the inconsistent versions under Pa.R.E. 613.

The facts state that Tim is called at trial as a witness. We know that Tim's version, consistent with his testimony at the criminal trial, implicates Carl in criminal wrongdoing. When Tim testifies at the civil trial to the version previously given at the criminal case, he may be confronted by his inconsistent statement to the bartender which indicates that Fred "set up" Carl. The statement to the bartender is inconsistent with Tim's testimony at the civil case and his earlier testimony at the criminal case. Tim has given an inconsistent out of court statement to his in court testimony at the civil trial. If Tim fails to admit on cross-examination that he made the statement to the bartender, Carl's attorneys may call the bartender as a witness to impeach Tim's credibility. Tim should successfully be impeached in the civil case by his earlier inconsistent statement to the bartender.

The facts state that Tim "despised" Carl. Therefore, Carl's attorney may also inquire into Tim's potential bias during cross-examination. Pennsylvania law permits impeachment of a witness by showing bias. Carl's attorney may inquire into the facts surrounding why Tim despises Carl to explore the issue of potential bias. Fisher v. North Hills Passavant Hospital, 781 A.2d 1232 (Pa. Super. 2001)

Question No. 3: Facts and Interrogatories

John is an illegal drug dealer in X County, Pennsylvania. On December 10, 2002, he paid a visit to Bob, one of his sub-dealers in X County, to remind Bob that he had to be on time to pick up his drugs to sell. When John arrived at Bob's apartment, Bob invited John inside. After some small talk, John told Bob that he was concerned that Bob was habitually late in picking up his share of the drugs to be sold. Angered by John's comments, Bob said, "You obviously do not pay attention to your business. I'm there on time so get off my back." John immediately picked up a bat from Bob's apartment floor and struck Bob in the head three times while shouting, "Don't talk to me like that. Just be on time or I'll come back and give you another beating." After the third blow, Bob began to bleed profusely from the head wounds, fell to the floor and died. John fled the apartment with the baseball bat in his hand.

Bob's next door neighbor, Sue, a well-respected local minister, heard the three "thumps" and the verbal exchange between Bob and another person whose voice she did not recognize. She then heard someone immediately run from Bob's apartment. Sue opened her apartment door and looked inside Bob's apartment where she saw Bob's apparently lifeless body lying on the floor in a pool of blood. She ran back to her apartment and looked out the front window where she saw a man carrying a baseball bat run towards and get into a white sports utility vehicle (SUV). Sue immediately called the police, identified herself, and relayed what she had observed along with a detailed description of the man and the vehicle, and the license plate number of the vehicle, to the police. Sue also informed the police that the man was carrying a baseball bat which he threw into the back seat of the SUV. An all points bulletin was immediately broadcast on local television to look out for both the person and the vehicle described by Sue.

About a half an hour after the all points bulletin was issued, the police received a call from a person who saw a man who fit the description given by Sue exiting the offices of Dr. Lisa Smith. The police responded to the area of Dr. Smith's office, which was two blocks from Bob's apartment, and canvassed the area. The police, who knew of Sue's solid reputation in the community, saw a man sitting in a vehicle bearing the license plate number given by Sue who fit the description given by Sue. When the police approached the vehicle, they saw a bat, with what appeared to be blood on it, in the back seat. The police immediately placed John under arrest and transported him to the police station. When they arrived at the police station, and in the process of booking and preparing to incarcerate John in accordance with their established procedures, the police told John to empty his pockets. John handed over his wallet, lifesavers and a note from his pocket which said, "Pay a visit to Bob and remind him to be on time. See if he will pick up next Friday's drug shipment." After he was read and waived his Miranda rights, John admitted to hitting Bob three times with the bat to "teach him a lesson for the future" and admitted that he wrote the note which was in his pocket.

After John was apprehended, the police went to interview Dr. Smith to inquire into why John was in her office. Dr. Smith told the police "off the record" that John told her that he had an injury (which was unrelated to the exchange with Bob) which had to be attended to immediately because the "police were after him." The police also learned from the Coroner that Bob's death was caused by multiple blunt force trauma to the head which would be consistent with being struck with a baseball bat.

1. You are an Assistant District Attorney working for X County, Pennsylvania. You are called by the lead investigator into Bob's death and asked to discuss the potential charges of First, Second and Third Degree Murder based upon the above facts. What advice would you give to the investigator as to the merits of each potential charge and which charge is most strongly supported by the facts presented?
2. Assume that criminal charges are filed against John as a result of Bob's death. One of the motions filed by John's attorney before trial seeks to prevent the police from introducing the note which was in John's pocket on the grounds that the police performed an unlawful warrantless arrest and unlawfully seized the note from John's pocket in violation of his rights under the U.S. Constitution. As Prosecutor, what arguments would you make to oppose this motion and how should the Court rule on this motion?
3. The prosecution subpoenas Dr. Smith to testify at trial about John's statement that the "police were after him." Counsel for Dr. Smith and counsel for John assert the physician/patient privilege on behalf of their respective clients and argue that Dr. Smith should not have to testify as to this statement. State all of the arguments that you as the prosecutor should make to the attempts of both counsel to assert this privilege and how should the Court rule on your arguments?

Question No. 3: Examiner's Analysis

1. **The law on First, Second and Third degree murder would be explained to the lead investigator and he would be advised that Third Degree Murder would most likely be the strongest charge on the facts presented.**

A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing. 18 Pa. C.S.A. Section 2502(a). The phrase “intentional killing” is defined in Section 2502(d) as a “willful, deliberate, and premeditated killing.” Pennsylvania courts interpreting Section 2502(d) have held that a willful, deliberate and premeditated killing is one where the actor has a specific intent to bring about the death of the victim. Commonwealth v. Nelson, 514 Pa. 262, 523 A.2d 728 (1987). As stated by the Pennsylvania Supreme Court, a killing is “willful, deliberate, and premeditated if it is committed by one who is conscious of his own purpose and intends to end the life of his victim.” Commonwealth v. Stewart, 461 Pa. 274, 279, 336 A.2d 282, 285 (1975). The period of premeditation necessary to form the specific intent to kill may be very brief. Commonwealth v. Chimenti, 362 Pa. Super. 350, 524 A.2d 913 (1987). For purposes of a first degree murder conviction, an intent to kill can be formed in a fraction of a second and all that is required is a conscious, fully formed intent to bring about the death of another. Commonwealth v. O’Searo, 466 Pa. 224, 352 A.2d 30 (1976).

One of the most commonly recognized circumstances from which a jury can infer a specific intent to kill is the use by the defendant of a deadly weapon on a vital part of the victim’s body. Commonwealth v. Carbone, 524 Pa. 551, 574 A.2d 584 (1990). As the Pennsylvania Supreme Court has emphasized, “if a deadly force is knowingly applied by the actor to the person of another, the intent to take life is as evident as if the actor stated the intent to kill at the time the force was applied.” Commonwealth v. Harvey, 514 Pa. 531, 538, 526 A.2d 330, 334 (1987).

A criminal homicide constitutes murder of the second degree when it is committed while the Defendant was engaged as a principal or an accomplice in the perpetration of a felony. 18 Pa. C.S.A. Section 2502(b). Perpetration of a felony is defined as the act of the Defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping. 18 Pa. C.S.A. Section 2502(d).

Murder of the third degree is murder that is neither intentional nor committed during the perpetration of a felony. Commonwealth v. Reilly, 519 Pa. 550, 549 A.2d 503 (1988). Third degree murder does not require specific intent to kill, but it does require malice. Like specific intent, malice is properly implied when a deadly weapon is directed to a vital part of the body. Commonwealth v. Austin, 394 Pa. Super. 146, 575 A.2d 141 (1990). Like specific intent, malice may be inferred from attending circumstances. Malice can be shown where one expresses an intent to inflict great bodily harm, or shows a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, or a mind regardless of social duty indicating unjustified disregard for the probability of death or great bodily harm. Commonwealth v. Kersten, 333 Pa. Super. 343, 482 A.2d 600 (1984). Evidence that a person repeatedly struck another person in the head with a sledgehammer has been held to support the finding of malice necessary for conviction for third degree murder. Commonwealth v. Marks, 704 A.2d 1095 (Pa. Super. 1997).

As applied here, the investigator should be advised that the facts of this case do not support a charge of second degree murder. Of the six felonies enumerated in 18 Pa. C.S.A. Section 2502(d), rape, deviate sexual intercourse by force or threat of force, arson, robbery and kidnapping clearly do not apply to these facts. The only remaining enumerated felony is burglary. In order for the felony murder statute to apply with regard to the offense of burglary, it would have to be shown that John entered Bob’s residence with the intent to commit a crime and that he was neither licensed nor privileged to enter the residence. See 18 Pa. C.S.A. Section 3502(a). In this case, when John went to Bob’s residence, there is no indication that he intended to commit a crime before he went there. In addition, he was invited into Bob’s apartment and therefore had permission to be there. The facts do not support an argument that

this murder occurred during the commission of a burglary. Since Bob's murder was not committed in the "perpetration of a felony" as defined by statute, a second degree murder charge is not supported on these facts.

With regard to a potential first degree murder charge, it should be explained that the focus should be on whether John had premeditation before Bob was killed. It should be pointed out that John's attorney will likely argue that the note found on John, if admitted into evidence, shows that John only wanted to remind Bob about being on time and that he was contemplating having Bob do work in the future in the nature of a drug pick up. It could be inferred from this note that John clearly was not going to see Bob for the purpose of killing him or he would not have reminded himself to solicit Bob to do further work for him. John's post-arrest statement to the police that he wanted to teach Bob a lesson for the future, if believed by the jury, would support an argument that John did not intend to kill Bob. In addition, the statement overheard by the neighbor that Bob should be on time or John would come back and give Bob another beating further supports an argument that John did not intend to kill Bob despite the fact that he hit Bob three times in a vital part of his body with a deadly weapon. Although the amount of time necessary to premeditate a killing can occur in the spur of a moment, the evidence seems to more strongly support the position that John intended to injure Bob to emphasize his message rather than to kill him.

With regard to third degree murder, the focus is on whether John had malice at the time the events unfolded leading to Bob's death. At a minimum, it appears that John was reckless regarding the consequences of his actions in hitting Bob in the head with the bat and John disregarded his social duty towards Bob which indicated an unjustified disregard for the probability of death or great bodily harm. See Commonwealth v. Kersten, *supra*. In addition, the fact that John repeatedly struck Bob in the head with a bat supports a finding of the malice necessary for a conviction of third degree murder. In the substantially similar case of Commonwealth v. Marks, *supra*, our Pennsylvania Superior Court concluded that evidence of a person repeatedly striking a victim in the head with a sledgehammer supported a finding of the malice necessary for a third degree murder conviction.

In conclusion, it appears that the strongest charge based upon all of the evidence set forth in the facts is that of third degree murder.

2. The Court should deny the motion to suppress this evidence as the police performed a valid warrantless arrest and seized the note pursuant to a valid inventory search.

As a general principle, the Constitution permits an officer to arrest a suspect in any public place without a warrant if there is probable cause to believe that the suspect has committed a felony. United States v. Watson, 423 U.S. 411, 96 S.Ct. 820 (1976). The "totality of the circumstances" approach set forth in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) is applied to warrantless arrests and requires a police officer to make a practical common sense decision whether, given all the circumstances known to him at that time, including hearsay information, there is a fair probability that a crime was committed and that the suspect committed the crime.

The Fourth Amendment to the United States Constitution protects the rights of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and provides that these rights shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation and describing with particularity the place to be searched and the person or thing to be seized. However, in certain circumstances, including inventory searches, a search warrant is not necessary. In Illinois v. Lafayette, 462 U.S. 640, 103 S.Ct. 2605 (1983), the United States

Supreme Court held that inventory searches are a well defined exception to the warrant requirement of the Fourth Amendment and are a recognized part of our law. The Lafayette Court indicated that the inventory search is an incidental administrative step following arrest and preceding incarceration. The Lafayette Court, citing South Dakota v. Opperman, 428 U.S. 364, 49 L.Ed.2d 1000, 96 S.Ct. 3092 (1976), also observed that an inventory search is reasonable because it serves a legitimate government interest that outweighs the persons privacy interest. Namely, the inventory search procedure serves to protect the owner's property while in the custody of the police and protects the police against possible false claims of theft. The Lafayette Court concluded that it is not unreasonable for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures.

In this case, we must first look to see whether John was properly arrested without a warrant. Shortly before the arrest the police were informed by Sue of what she had observed at Bob's apartment and the police were given a detailed description of a man and his vehicle, including his license plate number, and the fact that a baseball bat was carried into the vehicle. This information was relayed by a well-respected local minister. Shortly after receiving this information, and within two blocks of where the crime occurred, the police observed a male, later identified as John, who fit the detailed description of the man given by the witness, and the man was seated in the same vehicle with the same license plate number described by the witness. This information, when considered in it's totality, including the fact that there was a baseball bat on the back seat of John's vehicle which appeared to have blood on it, would appear to provide the police with the probable cause necessary under the U.S. Constitution for the warrantless arrest of John for the apparent murder which was committed.

Once John was lawfully placed under arrest, the police were permitted to conduct a search of his person incident to their established booking and jailing process as discussed in Illinois v. Lafayette, *supra*. Thus, the note which was produced by John from his clothing was lawfully seized pursuant to this valid inventory search and could be used at the subsequent criminal proceeding against John.

Since the note was retrieved in accordance with the inventory search exception to the search warrant requirement under the U.S. Constitution following a valid warrantless arrest, the Court should deny the request of John's counsel to bar the introduction of the note at trial.

3. The Court should overrule both objections because Dr. Smith does not have a right to assert this privilege and since this is a criminal, not a civil proceeding, the privilege would not apply.

The physician/patient privilege in Pennsylvania is codified at 42 Pa. C.S.A. §5929 and provides as follows:

No physician shall be allowed, in any civil matter, to disclose any information which he acquired in attending the patient in a professional capacity, and which was necessary to enable him to act in that capacity, which shall tend to blacken the character of the patient, without consent of said patient, except in civil matters brought by such patient, for damages on account of personal injuries.

The privilege is for the benefit of the patient, not the physician and, therefore, can be claimed only by the patient. Commonwealth v. Frank, 357 Pa. Super. 442, 516 A.2d 64 (1986). It is clear that the privilege only applies in civil cases, Commonwealth v. Ellis, 415 Pa. Super. 220, 226, 608 A.2d 1090, 1092-93 (1992), and does not apply in criminal proceedings, Commonwealth v. Moore, 378 Pa. Super. 379, 548 A.2d 1250 (1988).

As applied here, Dr. Smith would be unsuccessful in asserting the privilege. The privilege is held by the patient, John, and can only be asserted by him. Dr. Smith has no legal right to even assert the privilege. Although John does possess the right to assert the privilege, his attempt to do so here would be unsuccessful because the statute makes clear that it only applies to civil proceedings. Since this is clearly a criminal proceeding, John would not be able to invoke the protections of the privilege. Further, even if the privilege did apply, John's statement to his physician that the "police were after him" would not likely be considered information acquired by Dr. Smith in her professional capacity which was necessary to enable her to act in that capacity which is yet another requirement of the statute.

In conclusion, an attempt by both counsel to preclude Dr. Smith's testimony based upon the privilege will be unsuccessful and Dr. Smith will likely be required to testify to the statement made to her by John.

Question No. 4: Facts and Interrogatories

Holy Inspiration Church ("HIC") is a religious organization which operates a day care center for pre-school age children at its church building in C City, State P. The day care center accepts all children regardless of the religious affiliation of the child's parents, but parents are made aware of the fact that religious instruction suitable for young children is an important part of activities at the day care center and all enrolled children must participate. In accordance with the strict requirements of HIC doctrine, all educational activities, including religious and secular education, are segregated by sex, with only male teachers permitted to provide instruction for boys and only female teachers permitted for girls. Nearly all parents of the 60 children enrolled at the day care center are members of HIC. HIC employs the teaching staff of the day care center, and all of the staff are members of HIC.

In an effort to enhance early childhood education in preparation for public school enrollment, in May 2003 the State P legislature enacted a statute (Act 20) that provides a subsidy payment directly to all licensed day care centers within State P, at the rate of \$500 per enrolled student. The statute allows this subsidy to be used for all types of educational programming and otherwise contains no limitation or requirement as to use of the funds. The HIC day care center is a licensed facility and eligible to receive the subsidy provided by Act 20.

In May, 2003 a female teacher at the day care center resigned from her employment with HIC. Paul, a member of HIC who recently graduated from college as an education major, learned of this resignation through an announcement in the church newsletter and submitted an employment application to HIC to serve as a teacher. HIC quickly denied Paul's application, informing Paul by letter that, although Paul was entirely qualified for the job, the vacant position had to be filled by a female because, in accordance with HIC doctrine, the duties involved only the instruction of girls.

Upset by this response, on June 2, 2003 Paul filed a complaint with the State P Fair Employment Commission ("FEC"), a state administrative agency with jurisdiction to receive and decide claims of employment discrimination. Upon reviewing the complaint, the FEC Hearing Officer responsible for

the case concluded that the circumstances presented an indisputable instance of sex discrimination, and thus on June 4, 2003 issued an emergency order directing the HIC to employ Paul pending final disposition of the case. Such emergency orders by FEC are authorized by State P law in order to protect a complainant's rights while a complaint is pending before the agency. This emergency order was issued without prior notice to HIC and without an opportunity for HIC to provide any information or explanation prior to issuance of the order. Under State P law, the first opportunity for HIC to contest this action would occur when FEC schedules a formal hearing in the case, normally about nine months following filing of the complaint.

Although FEC does not require a complainant such as Paul to use legal counsel in proceedings before the agency, Paul decided to seek legal advice to make sure his rights were protected. On June 20, 2003 he met with attorney Allen, who agreed to represent Paul in any proceedings involving the employment discrimination claim. Allen advised Paul that in addition to filing a complaint with FEC, Paul could also file suit against HIC in federal court asserting an employment discrimination claim. Paul decided not to initiate a federal lawsuit at this time and so advised Allen. Several weeks later, however, Allen signed and filed a complaint in the United States District Court for State P, naming Paul as Plaintiff and HIC as a defendant, and alleging that the refusal to employ Paul was unlawful sex discrimination. Allen had decided that this maneuver would put additional pressure on HIC in connection with the state proceedings, and would also permit Allen to claim counsel fees from HIC if the action was successful.

1. What claim or claims based upon the United States Constitution should an appropriate plaintiff assert in an action challenging the validity of Act 20 and with what likely result?
2. In proceedings challenging the FEC emergency order, what claim or claims should HIC assert based upon the United States Constitution with respect to the manner in which FEC issued the emergency order directing HIC to employ Paul?
3. What defense or defenses based upon the United States Constitution should HIC assert with respect to Paul's claim that HIC discriminated on the basis of sex when his application was denied because he was a male applicant?
4. Assume that upon appropriate motion filed by HIC's counsel, the complaint filed by Allen has been dismissed by order of the District Court on the grounds that it was not authorized by Paul. Based solely upon the Federal Rules of Civil Procedure, advise HIC whether there is a basis to recover its counsel fees incurred in obtaining dismissal of the lawsuit.

Question No. 4: Examiner's Analysis

- 1. A claim that Act 20 violates the Establishment Clause of the First Amendment of the United States Constitution should be asserted and would likely be successful.**

The Establishment Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion," a restriction applicable to the states by virtue of the Fourteenth Amendment to the Constitution. Pursuant to the test enunciated in Lemon v. Kurtzman, 403 U.S. 602, at 612-613, 91 S.Ct. 2105, at 2111 (1971), a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or

primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion. Committee for Public Education v. Regan, 444 U.S. 646, 100 S.Ct. 840 (1980).

Act 20 provides for a direct state subsidy payment to day care centers, including HIC's day care center. The center provides religious education and instruction as part of its programming. Act 20 stipulates that the subsidy may be used for all types of educational purposes, and contains no other limitations or requirements as to use of the funds. Accordingly, it is entirely possible that the state subsidy could be utilized by HIC to support religious education without running afoul of any statutory restriction on the use of the funds.

The parameters of Establishment Clause limitations on state financial support of education continue to be explored by the Supreme Court, most recently in Zelman v. Simmons-Harris, ___ U.S. ___, 122 S.Ct. 2460 (2002), upholding the voucher program established for the City of Cleveland. In Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997 (1997), the Court overturned an earlier holding by concluding that placement of public employees on parochial school grounds to provide remedial education to disadvantaged children did not violate the Establishment Clause. In Bowen v. Kendrick, 487 U.S. 589, 108 S.Ct. 2562 (1988), the Court concluded that a federal statute which provided for direct grants to both public and sectarian institutions for purposes of adolescent sex education did not on its face violate the Establishment Clause, but left open the issue whether, as applied, the program was funding educational programs with religious content.

Zelman, supra, involved a state voucher program which provided scholarships to parents who then could decide which school (including religious schools) their child would attend and thereby receive state funds. This element of the program was essential to the Court's decision sustaining the program against an Establishment Clause objection, as the Court noted that ". . . no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." ___ U.S. ___, 122 S.Ct. 2460, 2468(2002). By contrast it seems clear that where there is a direct appropriation of state funds that could be utilized in furnishing religious instruction, with no explicit legislative controls or restrictions to preclude such a result, that a violation of the Establishment Clause would result. In Levitt v. Committee for Public Education, 413 U.S. 472, 93 S.Ct. 2814 (1973), the Court struck down a statute which reimbursed church-sponsored and secular non-public schools for performing various services mandated by the state, because the state could not demonstrate that such reimbursement would be appropriately restricted so as to assure that only secular services were furnished with the funds. 413 U.S. at 482, 93 S.Ct. at 2820. This same flaw exists with respect to Act 20 and would likely invalidate the statute under the Establishment Clause. Although Act 20 may have a secular legislative purpose (enhancing education of young children), the lack of restrictions on use of the subsidy very likely will have a primary effect of advancing religion and thus fail the second prong of the Lemon test.

2. FEC's emergency order, issued without notice to HIC and an opportunity to be heard, would likely violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

FEC issued its emergency order directing HIC to employ Paul without notice or opportunity to be heard on the part of HIC. Thus, HIC will be required to expend its funds to employ Paul during the pending FEC proceedings, at least through the time for a full hearing which may be as long as nine months.

The “root requirement” of the Due Process Clause of the Fourteenth Amendment is “that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.” Boddie v. Connecticut, 401 U.S. 371, 379, 91 S.Ct. 780, 786 (1971) (emphasis in original). Here, HIC has a property interest at stake, in that its funds would be used to pay salary as a result of FEC’s emergency order. The Due Process Clause also protects against deprivation of a liberty interest, which includes religious freedoms. Board of Regents v. Roth, 408 U. S. 564, 572; 92 S.Ct. 2701, 2707 (1972). Thus, FEC’s order can also be found to infringe upon HIC’s ability to follow the dictates of its religious doctrine.

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487 (1985), makes abundantly clear that some amount of process is due before a property or liberty interest is taken. Applying the balancing analysis enunciated in Matthews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, the Court noted that a pre-termination “hearing” need not be elaborate, and indeed something less than a full evidentiary hearing is sufficient. 470 U.S. at 545, 105 S.Ct. at 1495. Here, HIC’s interest in adhering to its religious beliefs is significant, and outweighs any state interest in an immediate remedy in such cases; likewise, the ability to present HIC’s contentions prior to a decision would be of benefit to FEC in reaching a sound decision (in this instance FEC presumably was unaware of any defenses that HIC may have to the action). At least some opportunity, therefore, for HIC to present its side of the story with respect to Paul’s employment application would be necessary under Loudermill in order for the emergency order to pass constitutional muster. While FEC does provide a full hearing opportunity as part of resolving the complaint, that opportunity in this instance comes long after a determination which has adversely affected a property and liberty interest of HIC.

3. HIC should defend Paul’s discrimination complaint on the basis that FEC’s intrusion into its religious affairs violates the Free Exercise Clause of the First Amendment of the United States Constitution.

There is no question that the employment decision rendered by HIC was predicated upon Paul’s sex, in that only a female applicant was deemed eligible for the position even though Paul was otherwise qualified for the appointment. The basis for this decision, however, was predicated upon HIC doctrine, which mandates that only males teach boys and only females teach girl students. The question, then, is whether FEC’s authority under state law to resolve a claim of employment discrimination in Paul’s favor would result in an impermissible impact on HIC’s rights.

The Free Exercise Clause of the First Amendment provides that “Congress shall make no law . . . prohibiting the free exercise [of religion].” As with the Establishment Clause, it is applicable to the states by virtue of the Fourteenth Amendment. It has long been recognized that the Free Exercise Clause restricts the government’s ability to intrude into ecclesiastical matters or to interfere with a church’s governance of its own affairs. See Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 73 S.Ct. 143 (1952). The Supreme Court has made clear that the constitutional protections rooted in the Free Exercise Clause, as well as the Establishment Clause, preclude intrusion by civil authorities into matters involving church policy and administration. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 96 S.Ct. 2372 (1976). On the other hand government may enforce laws of general applicability against individuals which forbid or require the performance of actions contrary to religious beliefs if the law is not specifically directed to religious practice and is otherwise constitutional. Employment Division, Dept. of Human Resources v. Smith, 494 U.S. 872, 879, 110 S.Ct. 1595, 1600 (1990).

Adjudication of employment discrimination claims has presented courts with the challenge of balancing these general principles. Employment discrimination claims brought by ministers and others with similar spiritual responsibilities against religious organizations have been held to be precluded by the Free Exercise Clause, as well as by the Establishment Clause. See Bryce v. Episcopal Church in Diocese of Colorado, 289 F.3d 648 (10th Cir. 2002), Bollard v. California Province of SOC of Jesus, 196 F.3d 940 (9th Cir. 1999), re-hearing denied, 211 F.3d 1331 (9th Cir. 2000), EEOC v. Catholic University of America, 83 F.3d 455 (D.C. Cir. 1996). By contrast, claims asserted by employees with duties of a more secular nature where religious doctrine is not offended have been allowed. See EEOC v. Mississippi College, 626 F. 2d 477 (5th Cir. 1980), cert. denied, 453 U.S. 912, 101 S.Ct. 3143 (1981) (psychology professor); Shirkey v. Eastwind Community Dev. Corp., 941 F. Supp. 567 (D. Md. 1996) (community developer).

On these facts, the specific duties of the position are of a mostly secular nature (teaching young children). However, the decision to appoint a male teacher is the result of doctrinal requirements of HIC, and religious instruction would be part of the teacher's duties. These factors would support a conclusion that FEC's intrusion into the hiring process violates the Free Exercise Clause. Given the predominately secular nature of a teacher's duties, however, a contrary conclusion can be supported as well.

To the extent Paul could have asserted an Equal Protection claim against HIC, it would fail because of the absence of state action.

4. HIC could attempt to recover counsel fees pursuant to Rule 11 of the Federal Rules of Civil Procedure but would likely be unsuccessful.

Rule 11 of the F.R.Civ.P. requires that every pleading be signed by an attorney of record if the party is represented, and that by signing and filing such a pleading the attorney is certifying (among other things) that to the best of his knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the document is not being presented for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation and that the legal and factual contentions are warranted and supported. F.R.Civ.P. Rule 11(b). A violation of Rule 11 may result in sanctions, which can be initiated by motion or upon the court's initiative. If sanctions are sought by motion, Rule 11(c)(1)(A) requires prior notice to the offending party with a 21-day period for withdrawal or correction before a motion can be filed with the court.

A finding by the Court that the obligations of Rule 11 have been violated allows the imposition of sanctions upon the offending attorney, law firm or party. F.R.Civ.P. 11(c). As to the nature of sanctions which may be applied, Rule 11(c) (2) states:

A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others` similarly situated. ...[T]he sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

Absent unusual circumstances, if a monetary sanction is imposed it should ordinarily be paid into Court, since the purpose is to deter the offending conduct rather than compensate a party. See Advisory Committee Notes to the 1993 Amendments.

In this instance, Attorney Allen filed a complaint in Paul's name despite direct instructions to the contrary by his client. Allen did so in order to influence other pending litigation (the FEC complaint), as well as to provide him with an opportunity to seek counsel fees in the event the federal claim was successful. It seems clear that to proceed with litigation without the consent of, and indeed directly contrary to the instructions of the client would be contrary to the obligations of Rule 11 and would justify imposition of sanctions. See Cimeo v. East Whiteland-Tredyffrian Joint Transportation Authority, 151 F.R.D. 55 (E.D. Pa. 1993). However, unless a motion had previously been filed, once the action was dismissed there would have been no opportunity to provide the requisite 21-day notice to Allen in order to allow him to withdraw the action. Thus, any sanction could only be applied upon the Court's initiative which does not permit an award of fees. Further, even if a motion had been filed, it is likely that any monetary sanction predicated upon HIC's counsel fees in defending the action would be paid into court rather than to HIC, since the deterrent effect would be the same.

Question No. 5: Facts and Interrogatories

Ann owned Blackacre in C County, Pennsylvania. For several years, Ann lived in her home on Blackacre with her son, Sam, and leased a building on another portion of Blackacre to Tom. Tom used the building for his business offices.

On January 2, 2002, Ann entered into a one year written lease with Tom. The lease, prepared by Ann, stated, inter alia: "Lessee does hereby release and discharge said lessor, her heirs and assigns, from liability for damages from water, rain or snow or from pipes and plumbing work whether such damage is caused by or resulting from lessor's negligence or that of her agents." On February 28, 2002, water leaks from broken water fixtures on the second floor caused damage to Tom's office furniture and computers on the first floor.

With Sam's help, Ann later properly subdivided Blackacre into two lots. Ann's home was on Lot I and Lot II contained the office building leased to Tom. After receiving appropriate municipal approval of her subdivision plan, Ann properly conveyed Lot I to Sam and Lot II to Tom on January 2, 2003.

While Ann lived on Blackacre, at least 5 days each week Tom and his employees drove across a twenty foot wide dirt road which crossed that portion of Blackacre on which Ann lived and extended to Tom's offices. The deeds to Sam and Tom did not mention the dirt road, but the subdivision plan showed the dirt road through Lot I. The only other means of ingress and egress available to Tom was a second dirt road adjacent to Lots I and II. Using that road added about 10 minutes to the travel time of Tom and his employees. On March 2, 2003, Sam erected a fence across the dirt road on his property and blocked Tom and his employees' access to the dirt road.

On April 1, 2003, Tom received a flyer addressed to him at his office from ABC, Inc. (ABC) which favorably described the "Mountain Resort" and invited him to visit the resort. The flyer notified him that he had been selected as a "grand finalist" and his award would be either cash in the amount of \$3,000 or a free week's vacation at the Mountain Resort worth \$2,000. The flyer stated that the presentation of the enclosed ticket would entitle Tom to one of the awards if he first attended a video presentation describing time-share units currently offered for sale by ABC. No response card was enclosed.

Tom drove 5 hours to the Mountain Resort, stayed overnight and attended the sales presentation. Afterwards he presented his ticket to obtain his prize. ABC conducted a drawing and Tom did not receive a prize.

1. Tom brings an action against Ann alleging that she had failed to replace defective plumbing on the premises which resulted in the leak that caused damage to Tom's furniture and computers. Ann defends on the basis of the clause in the lease excusing her from liability. Will Ann's defense be successful?
2. What substantive argument could Tom raise in an action in C County Court against Sam seeking to compel Sam to remove the fence he erected across the dirt road and what is Tom's likelihood of success?
3. Tom filed suit against ABC, Inc. for breach of contract. Will Tom be successful in his breach of contract action?
4. Would your answer to question 3 change if ABC asserts, as a defense, that two sentences were accidentally omitted from the flyer by the printer? The omitted sentences stated: "As a grand finalist, you will be eligible to enter a drawing at the conclusion of the presentation. One winner of each prize will be selected from those in attendance."

Question No. 5: Examiner's Analysis

- 1. The exculpatory clause in the lease is probably valid and enforceable and Ann's defense will be successful.**

The clause in the lease whereby Tom waived his rights to bring suit against Ann is an exculpatory clause which may be valid in some circumstances. A commercial lease is interpreted under principles of contract law. Teodori v. Werner, 490 Pa. 58, 415 A.2d 31 (1980).

A provision providing for immunity from liability will be strictly construed against the party seeking its protection. Dilks v. Flohr Cheverole t, Inc., 411 Pa. 425, 430, 192 A.2d 682, 685 (1963). Under Pennsylvania law, three conditions must be satisfied for an exculpatory clause to be valid: (1) the clause must not contravene public policy; (2) the contract must be between persons relating entirely to their own private affairs; and (3) each party must be a free bargaining agent to the agreement so that the contract is not one of adhesion. Topp Copy Products, Inc. v. Singletary, 533 Pa. 468, 471, 626 A.2d 98, 99 (1993).

Once the court determines that the exculpatory clause is valid, it will continue its analysis to determine if the language of the parties is clear that a person is being relieved of liability for his or her own acts of negligence. Id., at 471, 626 A.2d at 99. Such a waiver of responsibility for negligence must be expressed in clear and precise language because, in the ordinary course of contracting, a party does not normally waive the responsibility of the other party for his or her negligence with respect to the property involved in the contract. Hardware Mut. Ins. Co. of Minn. v. C.A. Snyder, Inc., 242 F.2d 64 (3d Cir. 1957). In interpreting exculpatory clauses, Pennsylvania courts look to four guiding standards: (1) the contract language must be construed strictly, since exculpatory language is not favored by the law; (2) the contract must state the intention of the parties with the greatest particularity, beyond doubt by expressed stipulation, and no inference from words of general import can establish the intent of the

parties; (3) the language of the contract must be construed, in cases of ambiguity, against the party seeking immunity from liability; and (4) the burden of establishing the immunity is upon the party invoking protection under the clause. Topp Copy Products, Inc., v. Singletary, *supra*. citing Dilks v. Flohr Cheverolet, 411 Pa. 425, 434, 192 A.2d 682, 687 (1963).

The court would first look to the validity of the exculpatory clause in light of the three conditions set forth in Dilks v. Flohr Cheverolet, *supra*. First, the commercial lease between a business tenant and an individual landlord relates to their private affairs and is not a matter of state or public interest. Courts have held that such clauses do not violate public policy. Jacob Siegel Co. v. Philadelphia Record Co., 348 Pa. 245, 35 A.2d 408 (1944). Moreover, there is no indication in the facts that this was a contract of adhesion or that Tom was not a free bargaining agent to the agreement. The court would most likely find the exculpatory clause valid.

The court would then proceed to determine if the language of the clause is sufficiently clear to render the clause enforceable. The language of the exculpatory clause prepared by Ann could not be more precise or unambiguous. It absolves Ann from liability caused by her “negligence.” No judicial interpretation of the clause is necessary. There is no need to draw inferences from the words used or for the court to rely on canons of construction. Very similar language was present in an exculpatory clause in a commercial lease in Jacob Siegel Co. v. Philadelphia Record Co., *supra*. The Pennsylvania Supreme Court stated that there was no ambiguity and noted: “where the language used is plain and unambiguous, the rights of the parties must be determined by the provisions of the instruments wherein they committed their agreement to writing.” Jacob Siegel Co. v. Philadelphia Record Co., *supra*, 348 Pa. at 248, 35 A.2d at 409, citing Musselman v. Sharswood B. & L. Ass’n, 323 Pa. 550, 556, 187 A.2d 419, 421.

A court would most probably find the exculpatory clause in the lease between Ann and Tom valid and enforceable and Ann’s defense will be successful.

2. Tom should argue that an easement by implication was created and he will probably be successful in his action to compel Sam to remove the fence.

Although the deed from Ann to Sam did not contain an express easement, an easement may be created by implication in certain circumstances. The easement is implied based on the theory that “continuous use of a permanent right of way gives rise to the implication that the parties intended that such use would continue, notwithstanding the absence of necessity for the use.” Burns Manufacturing Company, Inc. v. Boehm, 467 Pa. 307, 314 n.4, 356 A.2d 763, 767 n.4 (1976).

The Court in Burns set forth the circumstances which will give rise to an easement by implication:

Where an owner of land subjects part of it to an open, visible, permanent and continuous servitude or easement in favor of another part and then aliens either, the purchaser takes subject to the burden or the benefit as the case may be, and this irrespective of whether or not the easement constituted a necessary right of way. (Citation omitted). Burns Manufacturing Company v. Boehm, *id.*, 467 Pa. at 314, 356 A.2d at 767.

The Pennsylvania Supreme Court reiterated this test in the more recent case of Bucciarelli v. DeLisa, 547 Pa. 431, 691 A.2d 446 (1997). The Court stated that the purpose of these requirements is to create a test to determine whether an easement was intended at severance and whether the party against

whom the easement is asserted had notice, actual or constructive, that the easement existed. Id., 547 Pa. at 439-440, 691 A.2d at 450.

Here, there was unity of ownership of the two tracts because Ann originally owned both parcels before subdividing and conveying the parcels to Sam and Tom. Tom and his employees used the road in an open and obvious way prior to severance of title. This prior use is crucial because, as the Pennsylvania Supreme Court stated in Bucciarelli:

The effect of the prior use as a circumstance in implying, upon a severance of possession by conveyance, an easement results from an inference as to the intention of the parties. To draw such an inference the prior use must have been known to the parties at the time of the conveyance, or, at least, have been within the possibility of their knowledge at that time. Each party to a conveyance is bound not merely to what he intended, but also to what he might reasonably have foreseen the other party to the conveyance expected. Parties to a conveyance may, therefore, be assumed to intend the continuance of uses known to them which are in considerable degree necessary to the continued usefulness of the land. Also they will be assumed to know and to contemplate the continuance of reasonably necessary uses which have so altered the premises as to make them apparent upon reasonably prudent investigation.... Id., at 436-437, 691 A.2d at 448, citing Restatement of Property §476, comment j.

Ann's intent that the easement continue is shown by her including the easement in the subdivision plan. Sam assisted Ann in preparing the subdivision plan. Sam had also lived on Lot I with Ann and would have seen Tom and his employees use the road both before severance of title and afterwards. The parties' intent and Sam's knowledge could be inferred from these facts.

The easement was used at least 5 days a week for several years thus satisfying the requirement of continuity. "Continuous" in this context means that the use was not occasional, accidental or temporary. "This means that the use shall have been of such a character as to enable the claimant to rely reasonably upon the continuance of such use....It is submitted that...any well-defined route should be held to satisfy the 'permanent or continuous' prerequisite for implication." 4 Powell on Real Property, § 34.08(2)(c)(1996). Id., at 439, 691 A.2d at 450.

The Court in Bucciarelli did not include the often discussed element of necessity in its analysis and relied on Burns Manufacturing Company, Inc. v. Boehm, supra., which held that an implied easement may arise "notwithstanding the absence of necessity for the use." Id., at 314 n.4, 356 A.2d at 767 n.4.

Here, there is no absolute necessity for Tom and his employees to use the dirt road at issue because there is another means of ingress and egress. Absolute necessity, however, is not a necessary element for the creation of an implied easement.

Tom should argue that an easement by implication was created and the court would probably find an easement by implication under these facts and Tom will be successful in his action to compel Sam to remove the fence.

3. Tom will be successful in his breach of contract action against ABC, Inc.

“An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to the bargain is invited and will conclude it.” RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981). It is the manifested intent of the offeror and not his subjective intent which determines the persons having the power to accept the offer. RESTATEMENT (SECOND) OF CONTRACTS § 29 (1981).

It is the presence of a promise in the communication which distinguishes offers from preliminary negotiations. An offer to award a prize will result in an enforceable contract if the offer is properly accepted by the rendition of the requested performance prior to revocation of the offer. Cobaugh v. Klick-Lewis, Inc., 385 Pa. Super. 587, 561 A.2d 1248, 1249 (1989). The only acceptance necessary by the offeree is the performance of the act required to win the prize. Id. See: RESTATEMENT (SECOND) OF CONTRACTS § 54(1) (1981).

The language used in the flyer at issue contained a promise. A person receiving the flyer would reasonably believe that he or she could accept the offer by going to the resort and listening to the sales presentation. ABC’s offer could only be accepted by performance. It is Tom’s performance that manifests his assent to the offer.

Moreover, consideration is not an issue. As an element for contract formation, consideration requires that there be a bargained for exchange. Id., 561 A.2d at 1249. ABC received the benefit of having a listener for its sales presentation as well as the benefits of the publicity generated by the promotional flyer. Tom, in order to accept, was required to go to the Mountain Resort and listen to the presentation. Consideration for the formation of a valid contract exists in these circumstances.

The question of whether a statement is an offer is a question of fact decided by the court. A court would probably determine that ABC had communicated an offer to Tom and Tom accepted the offer by performance. ABC breached the contract when it refused to give Tom a prize. Tom would prevail in his breach of contract action.

4. ABC’s defense of unilateral mistake will not be successful.

ABC is alleging that there was a mistake made by its printer in the information provided in the flyer. As a general rule, a mistake by one party, a unilateral mistake, does not render a contract voidable. Rusiski v. Pribonic, 511 Pa. 383, 515 A.2d 507 (1986). Whether relief should be granted to a party who is adversely affected by a mistake in a written contract depends upon the nature and effect of that mistake. The mistake must relate to the basis of the bargain, must materially affect the parties’ performance and must not be one as to which the injured party bears the risk before the party will be entitled to relief. Lanci v. Metropolitan Insurance Co., 338 Pa. Super 1, 5, 564 A.2d 972, 974 (1989).

RESTATEMENT (SECOND) OF CONTRACTS § 153 provides:

Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performance that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and

- (a) the effect of the mistake is such that enforcement would be unconscionable, or
- (b) the other party had reason to know of the mistake or his fault caused the mistake.

ABC's printer made a mistake and ABC failed to notice the mistake before mailing the flyer to Tom. It was ABC's responsibility to read the contents of its communication before mailing it. ABC's lack of knowledge of the contents of its own mailing is not a defense. Moreover, there is no indication in the facts that Tom knew or had any reason to know of the mistake.

There is nothing to indicate that enforcement of the contract would be unconscionable. The mistaken party bears the substantial burden of establishing unconscionability. RESTATEMENT (SECOND) OF CONTRACTS § 153 cmt. c (1981). Tom's damages for the prize would probably be based on compensating him for the prize of the vacation worth \$2,000 because it is the only prize that Tom could prove with reasonable certainty that he would have won if ABC had not breached its contract.

A court would probably conclude that ABC bore the risk of the mistake and that Tom had no reason to know of the unilateral mistake. ABC's defense of unilateral mistake will not be successful.

Question No. 6: Facts and Interrogatories

Mary is the president of XYZ, Inc. (the "Company"), a Pennsylvania business corporation, which manufactures windows for sale to contractors and retail customers. The Company's board of directors has been considering a plan proposed by Mary to buy land and construct a new manufacturing facility. The plan would also include the acquisition of several pieces of state-of-the-art equipment.

Mary has been speaking with Bill, the owner of Blackacre, about purchasing Blackacre, which is a tract of land that would be perfect for the Company's new site. Mary has also been dealing with Equipco, a manufacturer of digitally controlled glass-cutting equipment.

Bill's father died five years ago. His will devised Blackacre to Bill in fee simple, and contained a clause providing: "neither Bill nor his heirs shall have the power to transfer any interest in Blackacre for fifteen years from the date of my death and any attempt to transfer any interest within said time period shall be null and void."

Mary, without the knowledge of the Company's board of directors, has agreed to purchase five digitally controlled glass-cutting machines from Equipco. Equipco presented Mary with a one-page contract that it had signed. The contract sets forth the price per unit and the time for payment for each unit. The contract is silent regarding the time of delivery for the equipment. The contract does, however, contain a paragraph allowing Equipco to confess judgment against the Company in the event that it is not paid within ten days of submission of its invoice. Mary has signed the contract on behalf of the Company and has mailed it back to Equipco.

The Company's bylaws provide that the Company may not enter into any agreement containing a confession of judgment clause. Equipco has never seen the Company's bylaws.

A member of the Company's board of directors has learned about the contract with Equipco; but is not aware of the specifics of the contract. He has spoken with Mary and advised her that he intends to confront her about the contract at tomorrow's board meeting.

1. Can Bill presently convey fee simple title to Blackacre given the language in his father's will?
2. Under corporate law, would the Company be successful in asserting a defense against Equipco's enforcement of the contract based upon the Company's bylaw provision prohibiting contracts with confession of judgment clauses?
3. Assume for this question that the contract is enforceable. Under Pennsylvania law when must Equipco deliver the ordered equipment?
4. Mary has requested her personal counsel to scan the signed Equipco contract into his computer and then reprint it without the confession of judgment clause and explains to her counsel that her intention is to present it to the board without the confession clause. Assume that such action constitutes forgery under the Pennsylvania Crimes Code. Under the Pennsylvania Rules of Professional Conduct how should Mary's counsel react to her request?

Question No. 6: Examiner's Analysis

1. Bill can presently convey Blackacre to the Company as the language in the will restricting transfer is an invalid disabling restraint on alienation.

One of the incidents of fee simple ownership of real property is the right to convey and encumber the property freely. Generally, the law will not permit the rights of an owner of real property to be hampered by the imposition of restraints by grantors or testators who convey or dispose of their property yet seek to maintain control over the property once transferred. See Grossman v. Hill, 384 Pa. 590, 122 A.2d 69 (1956). When discussing disabling restraints on alienation the Restatement Second of Property states, "A disabling restraint imposed in a donative transfer on an interest in property is invalid if the restraint, if effective, would make it impossible for any period of time from the date of the donative transfer to transfer such an interest." RESTATEMENT (SECOND) OF PROPERTY § 4.1 (1983).

Generally, when dealing with a restraint imposed in a will, a court must look to the intention of the testator, and, unless public policy prohibits enforcement of the testator's stated intention, abide by the terms of the devise. See Pavlikowski v. Ehrhardt, 192 Pa. Super. 373, 161 A.2d 652 (1960). In the instant case, one must determine if the testator's intention was to devise Blackacre in fee simple and whether the fifteen year restriction violates public policy. If one concludes that the intent was to convey in fee simple but impose a condition on this conveyance in the nature of a restraint on the ability of the new owner to sell Blackacre, the court most likely will conclude that the restraint is inconsistent with the intent to convey fee simple title and declare it void. See Pavlikowski, id., Stineman v. Stineman, 382 Pa. 153, 114 A.2d 137 (1955). One must remember that conveyances with restraints are viewed with a bias in favor of free alienability.

Bill's father imposed a disabling restraint on the transfer of Blackacre via the provision in his will. According to the will, Bill cannot convey any portion of Blackacre within fifteen years of his father's death. Yet, Bill is vested with fee simple title to Blackacre. Upon review, a court most certainly would find that the intent of the testator to convey fee simple title in Bill is paramount and therefore would not allow the conveyance to be limited by the restraint imposed by the will. Accordingly, Bill can presently convey Blackacre to the Company. See RESTATEMENT (SECOND) OF PROPERTY §4.1, COMMENT E, ILLUSTRATION 3.

2. Under Pennsylvania corporate law, the Company cannot successfully defend the enforcement of the contract by Equipco based on an argument that the contract is contrary to the provisions of the Company's bylaws.

The president of a corporation is generally known and recognized as an agent of the corporation. Mary, as such, has the ability to enter into contracts on behalf of the corporation and to bind the corporation to those contracts. See 15 Pa. C.S.A. § 1506. In this case, the Company's bylaws contain a provision that prohibits the Company from entering into contracts containing confession of judgment clauses. Mary has entered into such a contract on behalf of the corporation contrary to the provision of the bylaws.

Equipco was unaware of the provision in the Company's bylaws. As such Equipco would have no basis for questioning the authority of Mary to enter into the contract. From Equipco's point of view, Mary clearly had at least implied or apparent authority to enter into the contract.

Given Mary's "authority" to enter into the contract one must look to corporate law to see if any defense is available to the Company. Section 1503 of the Pennsylvania Business Corporation Law (the "BCL") entitled "Defense of ultra vires" addresses the availability of a defense based upon a limitation in the bylaws. The rule set forth in Section 1503, applicable in the instant case, provides "a limitation upon the business, purposes or powers of a business corporation, expressed or implied in its articles or bylaws or implied by law, shall not be asserted in order to defend any action at law or in equity between the corporation and a third person, or between a shareholder and a third person, involving any contract to which the corporation is a party . . ." (emphasis added), 15 PA.C.S.A. §1503(a). Essentially, this section abolishes the defense of "ultra vires" (including a defense based upon a limitation contained in the bylaws) with respect to contracts to which the corporation is a party involving third persons, particularly where the third party had no knowledge of the limitation and has proceeded in good faith in the performance of its duties under the contract. Section 1505 of the BCL further provides, "the bylaws of a business corporation shall operate only as regulations among the shareholders, directors and officers of the corporation and shall not affect contracts or other dealings with other persons unless those persons have actual knowledge of the bylaws." 15 Pa. C.S.A. §1505. As indicated Equipco did not have actual knowledge of the bylaw provision. Accordingly, the Company will be unsuccessful in asserting the bylaw provision as a defense to Equipco's enforcement of the contract.

3. The Uniform Commercial Code will assist the parties in establishing a delivery schedule and will provide that delivery must be made within a reasonable time given the circumstances of the parties.

Article II of the Uniform Commercial Code (the "Code") generally applies to transactions in goods. 13 Pa. C.S.A. 2102. "Goods" means "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . ." 13 Pa. C.S.A. 2105(a). The

equipment being sold by Equipco would fall within the definition of goods and, thus, Article II of the Code would be applicable to the transaction.

Article II of the Code contains various sections that assist parties to a transaction who have failed to provide all necessary terms for the transaction. These so called “gap filler” provisions of the Code are set forth in various sections within Article II. The “gap filler” provisions come into play when the agreement of the parties is silent on the terms in question. See White and Summers, Uniform Commercial Code §3-4 (4th Ed.1995).

In the instant case, the agreement of the parties is silent on when delivery of the goods should be made. Section 2309 of the Code provides “[t]he time for shipment or delivery or any other action under a contract if not provided in this division or agreed upon shall be a reasonable time.” *13 Pa. C.S.A. 2309(a)*. Accordingly, delivery must be made by Equipco within a “reasonable time.” What constitutes a “reasonable time” will be determined considering the duties of good faith and commercial reasonableness as set forth in the Code. See 13 Pa. C.S.A. 1203, 1204 and 2103. A “reasonable time” depends upon “what constitutes acceptable commercial conduct in view of the nature, purpose and circumstances of the action to be taken.” 13 Pa. C.S.A. 2309 comment 1. In the instant case, Equipco will be required to deliver the equipment within a reasonable time given the circumstances of the parties. Considerations such as the nature of the equipment and whether it is being specially manufactured, transportation conditions, the construction of a new facility and when it will be completed would certainly come into play. (For a more thorough discussion of this provision of the Code see White and Summers, Uniform Commercial Code § 3-5 (4th. Ed. 1995).

4. Under the Pennsylvania Rules of Professional Conduct, a lawyer is not to counsel or assist a client in committing a criminal act and should consult with the client regarding the relevant limitations on the lawyer’s conduct and should determine whether or not disclosure by the lawyer is required.

Pennsylvania Rule of Professional Conduct 1.2 addresses the scope of representation between a lawyer and her client. Subpart (d) of Rule 1.2 indicates “a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning or application of the law.” Subparagraph (e) of Rule 1.2 further provides “when a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.” A lawyer is required to give an honest opinion about the consequences of a course of action in which a client intends to engage. The fact that a client uses the advice in a course of action that is criminal or fraudulent does not in and of itself make the lawyer a party to that course of action. A lawyer cannot, however, knowingly assist a client engaging in a criminal or fraudulent act. The comments to Rule 1.2 indicate “there is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending a means by which the crime or fraud might be committed with impunity.”

Section 1.2(d) sets forth the substantive limitation on client-lawyer relationships. The treatise *THE LAW OF LAWYERING* states, “[t]he dividing line is simply this: while a lawyer may discuss, explain, and predict the consequences of proposed conduct that would constitute crime or fraud, a lawyer may not counsel or assist in such conduct.” HAZARD AND HODES, *THE LAW OF LAWYERING* § 5.12 (2002). Accordingly, Mary’s lawyer should refuse her request and advise her not to proceed on the course she has suggested.

One must next ask what duty, if any, the lawyer has to disclose the proposed course of conduct of her client to third parties. Rule 1.6 generally requires a lawyer to maintain strict confidentiality of information except in limited circumstances. One exception allows a lawyer to disclose otherwise confidential information “to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm or substantial injury to the financial interests or property of another.” Pa. R.P.C. 1.6(c). The quoted text at best provides guidance but no absolute rule. It does not clearly draw a line for an attorney to clearly delineate disclosure versus nondisclosure. The facts of each case must be reviewed to determine if the injury will be “substantial.” In this case, the injury most likely does not rise to the level where further disclosure is necessary. The Company is only at risk of having judgment confessed against it if it defaults under the contract terms. Even if judgment is confessed, the Company would have a cause of action against Mary for her failure to abide by terms of the bylaws.

Grading Guidelines

Question No. 1

1. Relevance of possible inheritance in equitable distribution

- The possibility of a future inheritance by a party to a divorce action should not be considered in equitable distribution.
- Possible inheritances are too speculative as to existence, amount and time to be regarded as an asset in equitable distribution.

3 points.

Comments: Applicants are expected to recognize that until an inheritance actually occurs and is distributable, a potential inheritance should not be considered in an equitable distribution. Obviously, inheritances can be foiled by the changing of one's will and the dissipation of the assets to be inherited. Furthermore, despite the condition of a Testator, the timing of a potential inheritance is speculative.

2. Barter Income

- Barter income whereby a professional renders services in return for property is taxable to the professional for federal income tax purposes at the value of the property received.
- To the extent a fee collected by one professional is paid to another professional as a referral fee, it is deductible by the professional paying the referral fee as an ordinary and necessary business expense and income to the professional receiving the referral fee.

5 points.

Comments: Applicants are expected to recognize that the oak trees paid by Frank to Abel in return for legal services are income taxable to Abel at their fair market value as barter income. More specifically, the applicants should recognize that Abel will recognize 10 trees as income from Frank, deduct the 2 trees paid to Larry as a referral fee as an ordinary and necessary business expense; and Larry will recognize 2 trees from Abel as referral income.

3. Fee Splitting between Attorneys

- A lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm unless the client is advised of the arrangement, the client does not object, the total fees are not excessive, and the total fee is not illegal or otherwise in violation of the Rules of Professional Conduct.

5 points.

Comments: Applicants are expected to recognize that the fee arrangement between Abel and Larry is a fee split between lawyers which is governed by the Rules of Professional Conduct. Specifically, the applicants are expected to know and discuss whether, under the facts, the fee arrangement between Abel and Larry complies with Pa. R.P.C. 1.5(e).

4. Will: Lapsed Devise

- In the absence of a contrary intent appearing in a will, a lapsed specific devise to a Testator's nephew will not pass to the nephew's issue if it would pass to the Testator's spouse or issue as part of the Testator's residuary estate.
- If the lapsed specific devise becomes part of the residuary share under the Testator's will, the lapsed devise shall pass to the residuary devisees or legatees (other than the original devisee and his issue) in proportion to their respective shares of the residue.

7 points.

Comments: Applicants are expected to apply the facts to the statute quoted in the facts by recognizing that: (1) there is a potentially lapsed devise at issue; (2) there is no specific resolution of the potential lapse in the will; (3) the anti-lapse statute does not apply to a nephew who predeceases the Testator when there is a wife and daughter who would otherwise take the lapsed devise under the residuary clause of the Testator's will even if the nephew leaves issue; and (4) that the lapsed devise passes in equal shares as part of the residuary estate under the will of the deceased to the deceased's wife and daughter.

Question No. 2

1. Discovery

- Both insurance information and financial information may be obtained by Carl only by using the discovery available to him after a lawsuit is filed in Common Pleas Court.
- Insurance information is discoverable under the Pennsylvania Rules of Civil Procedure, which permits interrogatories or other means of discovery to be filed to gain insurance information.
- Evidence of Fred's financial status would be available, conditioned upon the securing of a Court Order, pursuant to the discovery provisions of the Pennsylvania Rules of Civil Procedure, since punitive damages are sought.

3 Points

Comments: The applicant must recognize that the insurance information and financial information can only be obtained after a civil lawsuit is filed. The Pennsylvania Rules of Civil Procedure provide for the discovery of Fred's insurance information and for discovery which would also permit Carl to get financial information for Fred upon proper application to the Court since Carl is seeking punitive damages.

2. False Imprisonment, Battery, Malicious Prosecution

- Identify each of the three torts: false imprisonment, battery and malicious prosecution.
- Identify the elements of each tort:
 - a) false imprisonment:
 - 1) Intent to confine another within boundaries fixed by the actor;
 - 2) The detention of a person;
 - 3) The person must be conscious of the confinement or is harmed by it.
 - b) battery:
 - 1) Purposely and intentionally;
 - 2) Cause a harmful and/or offensive touching or contact to another.
 - c) malicious prosecution:
 - 1) That the criminal proceedings that were instituted were without probable cause;
 - 2) With malice;
 - 3) That the Plaintiff in the tort action must have prevailed in the criminal case.

9 Points

Comments: The applicant is expected to identify that a civil action against Fred should include the torts of false imprisonment, battery and malicious prosecution. The elements of each tort should be identified and discussed using the facts of the question to show that the essential element of each tort exists.

3. Impeachment Of Tim

State the four ways in which Carl's attorneys can impeach Tim's credibility.

- The past conviction for theft may be used to attack Tim's honesty since it occurred within the last ten years and involved a case of dishonesty.
- The alcohol usage may be used for impeachment since Tim was visibly intoxicated and thus his ability to recall the facts of the incident are brought into question.
- Tim's testimony in Court may be impeached by his earlier statement to the bartender the day after the incident.
- Tim's bias may be inquired into since he despised Carl.

8 Points

Comments: A discussion of four ways in which Tim's testimony may be impeached: his past conviction, his intoxication, his inconsistent statements and his bias, since he despised Carl, must be discussed by the applicant. The candidate must discuss why each method of impeachment is available setting forth the requirements of each together with a discussion of the applicable facts.

Question No. 3

1. First, Second and Third Degree Murder

- criminal homicide constitutes murder of the first degree when it is committed by an intentional killing
- an intentional killing is defined as one that is willful, deliberate and premeditated
- period of premeditation necessary to form specific intent to kill may be very brief
- use of deadly weapon on vital part of victim's body can be used to create inference of intent to kill
- a criminal homicide constitutes murder of the second degree when it is committed while the defendant was engaged as a principal or an accomplice in the perpetration of a felony enumerated in the statute including robbery, rape, deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping
- murder of the third degree is murder that is neither intentional nor committed during the perpetration of a felony
- third degree murder requires malice, which may be inferred from attending circumstances
- malice can be shown where one expresses an intent to inflict great bodily harm, or shows a wickedness of disposition or hardness of heart, cruelty, recklessness of consequences or a mind regardless of social duty indicating unjustified disregard for the probability of death or great bodily harm

10 points

Comments: Applicants should identify and discuss the elements necessary to establish first, second and third degree murder, apply the facts to these elements to address the merits of each charge and reach a well reasoned conclusion that third degree murder is the strongest charge based on the facts presented.

2. Warrantless Arrest/Inventory Search

- Fourth Amendment protects persons against unreasonable searches and seizures
- a warrantless arrest may occur if there is probable cause to believe the person has committed a felony
- probable cause determination is based on totality of circumstances
- inventory search, which is an incidental administrative step following arrest and preceding incarceration is exception to warrant requirement
- inventory search is reasonable because it serves a legitimate government interest that outweighs individuals privacy interest

7 points

Comments: Applicants are expected to recognize the constitutional protection against unreasonable searches and seizures, identify and discuss the exceptions to the warrant requirement for an arrest for a felony and an inventory search and apply the requirements for these exceptions to the facts in reaching a well reasoned conclusion that the note will not be suppressed.

3. Physician/Patient Privilege

- privilege only applies in civil cases and does not apply to criminal proceedings
- privilege is for benefit of patient and cannot be claimed by physician
- statement must be necessary to enable physician to act in professional capacity

3 points

Comments: The applicants should identify the elements of the physician/patient privilege and apply the facts to these elements in reaching a well reasoned conclusion that the privilege is not applicable.

Question No. 4

1. First Amendment – Establishment Clause

- Establishment Clause of First Amendment provides that congress shall make no law respecting an establishment of religion.
- Establishment Clause is applicable to states by virtue of Fourteenth Amendment
- Enactment does not contravene Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion and if it does not foster an excessive government entanglement with religion.
- Direct appropriation of state funds that can be utilized in furnishing religious education with no legislative controls or restrictions to preclude such a result will result in violation of Establishment Clause.

5 points

Comments: Applicants are expected to identify the Establishment Clause, discuss the elements necessary to find a violation and apply these elements to the facts in reaching a well reasoned conclusion that Act 20 violates the Establishment Clause.

2. Procedural Due Process

- Due Process Clause of Fourteenth Amendment requires that some process be afforded before a liberty or property interest is taken.
- Order was issued without notice or opportunity to be heard.
- Property interest is implicated because HIC is required to pay salary of unwanted employee and liberty interest is implicated because religious freedoms are affected.
- Balance interest of HIC in being able to adhere to religious tenets against the need of the government for a speedy decision and the risk of erroneous decision.

5 points

Comments: Applicants are expected to identify the Due Process Clause of the Fourteenth Amendment, and its applicability when property or liberty interests are implicated. Applicants should discuss the level of process provided in light of the balancing test that is required to reach a well reasoned conclusion that the Due Process Clause was violated.

3. First Amendment – Free Exercise Clause

- Free Exercise Clause of First Amendment provides that Congress shall make no law prohibiting the free exercise of religion.
- Government is restricted in its ability to intrude into ecclesiastical matters or of a church's governance of its own affairs involving church policy and administration.
- Employment discrimination claims brought by ministers and others with similar spiritual responsibilities against religious organizations have been held to be precluded by the Free Exercise Clause.
- Decision not to employ Paul because of his sex which was based on religious beliefs of HIC conflicts with state prohibition against discrimination based on sex.

5 points

Comments: Applicants are expected to recognize the applicability of the Free Exercise Clause of the First Amendment, explain its restriction on the government's power and apply the facts in reaching a well reasoned conclusion.

4. Rule 11

- Rule 11 requires that every pleading be signed by attorney of record and that by signing a pleading the attorney is certifying that the document is not being presented for an improper purpose, and that the legal and factual contentions are supportable.
- Complaint was filed on behalf of Paul without his consent and contrary to his instructions.
- Sanctions, including attorney fees, can be awarded under Rule 11 pursuant to a properly filed motion if warranted for effective deterrence.

5 points

Comments: Applicants are expected to recognize and discuss the requirements of Rule 11 of the Federal Rules of Civil Procedure in light of the conduct of attorney Allen and to recognize that sanctions including attorney fees can be awarded, when there is a violation of Rule 11.

Question No. 5

1. Exculpatory clause in commercial lease

- Commercial lease terms are interpreted under principles of contract law.
- Exculpatory clause may be valid if it does not contravene public policy and it is not a contract of adhesion.

- Language of exculpatory clause must be clear and precise.
- Ann may successfully assert the exculpatory clause as a defense in Tom's action.

4 points

Comments: Applicants are expected to recognize the existence of an exculpatory clause, discuss its validity in a commercial lease context and conclude that the clause is valid.

2. Easement by implication

- An easement by implication may arise at the time of severance of title based on the intent of the parties.
- An easement by implication arises where the use has been open, visible, permanent and continuous prior to the severance of title.
- The party against whom the easement is asserted must have actual or constructive notice that the easement existed.
- Tom will be successful in his action to compel Sam to remove the fence because an implied easement was created.

6 points

Comments: Applicants are expected to recognize the existence of an implied easement and discuss how it may arise in reaching the conclusion that an easement by implication, or prior existing use, was created and that Tom will prevail.

3. Contract formation

- An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his or her assent to that bargain is invited and will conclude it.
- ABC's flyer was an offer to Tom which was accepted by his performance of the requested act.
- An enforceable contract requires consideration which is a bargained for exchange by the offeror and offeree.
- ABC's offer to Tom and Tom's performance resulted in an enforceable unilateral contract.
- ABC breached its contract with Tom when it refused to award him a prize.

5 points

Comments: Applicants should recognize the elements of an offer and acceptance in a unilateral contract, the presence of consideration and conclude that a unilateral contract was formed.

4. Unilateral mistake

- The general rule is that a mistake by one party to a contract does not make a contract voidable.
- In order to void a contract on the basis of unilateral mistake, the non-mistaken party must have reason to know of the mistake or enforcement of the contract would be unconscionable.
- A unilateral mistake by a party who bears the risk of mistake does not render a contract voidable.
- Tom probably did not know of the mistake and ABC bore the risk of the mistake by failing to read its own written communication.
- ABC's defense of unilateral mistake will probably not be successful.

5 points

Comments: Applicants are expected to recognize the existence of a unilateral mistake in a contract and discuss the general rule that a unilateral mistake will not void a contract and the exceptions to the general rule in reaching a well-reasoned conclusion.

Question No. 6

1. Restraint on Alienation

- The limitation in the will is a restraint on alienation that prohibits transfer of the property.
- Restraints on alienation are disfavored and are generally void.
- Fee simple title may be conveyed.

5 points

Comments: The applicants should recognize the restraint contained in the will and conclude that it is inconsistent with Bill's fee simple ownership and is thus unenforceable as an unreasonable restraint on alienation.

2. Defense to Contract Based on Limitation in Bylaws

- Mary as president has actual or apparent authority to bind the corporation.
- Equipco had no knowledge of the bylaw provision and thus it cannot be used to defend against its contract.
- The provision in the bylaw, which contains a limitation on the corporation's power, is not a valid defense to a contract with a third party.

5 points

Comments: The applicants should discuss the authority of the company's president to enter into the contract, identify the potential defense of the bylaws and conclude that it will not be successful under Pennsylvania law to defend against a contract with a third party.

3. Gap Filler Provisions

- UCC applies to a sale of goods.
- Delivery term is not provided for but will be provided by the gap-filler provisions of the UCC
- A reasonable time for delivery will be imposed based upon the circumstances.

5 points

Comments: The applicants should conclude that Article II of the Code is applicable and that the gap filler provision on time of delivery would require delivery to be made within a reasonable time.

4. Scope of Representation

- Counsel cannot aid a client in committing a crime.
- Counsel should advise client not to commit the crime and should not assist the client.
- Counsel should consider disclosure of the proposed actions.

5 points

Comments: The applicants should discuss the duties of an attorney not to assist a client in committing a crime or fraud and should discuss what advice should be given and whether disclosure of the proposed conduct is required.

PT



Supreme Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination
July 29 and 30, 2003

PERFORMANCE TEST
July 29, 2003

Use PINK covered book for your answer to the Performance Test.

FILE

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FILE

Law Offices of Apgar & Rale

MEMORANDUM

To: Applicant
From: Barry Apgar, Esquire
Re: **Doyle v. Hostess Hotel, Inc.**

Our office represents the defendant, Hostess Hotel, Inc., in this alleged slip and fall case. Recently, our client received a demand letter from Pam Doyle's attorney along with a draft complaint, which her lawyer plans to file if the matter does not settle within 30 days. The demand letter and complaint were given to the insurance carrier for Hostess Hotel, Inc., Stressfree Insurance Company (Stressfree), who then contacted our office.

The File includes the letter from Stressfree, the demand letter from Pam Doyle's attorney along with a draft of the Complaint, the Client Intake Interview Sheet, the Incident Report and a flyer that advertised the New Year's Eve party at the Hostess Hotel. I have also included a Library, which includes the only legal principles and authorities you should consider and rely upon in completing this task. You should assume that all of the information in the File is factually accurate, except for the averments in the draft Complaint and demand letter, which relate to the allegations of negligence against our client.

I ask that you prepare a well-reasoned letter in response to the questions raised by Karen Spencer, the Claims Analyst at Stressfree who is handling this matter. In your letter to Ms. Spencer, number your answers to correspond with the questions in Ms. Spencer's letter. Ms. Spencer is an experienced Claims Analyst and understands legal argument. Support your response to her with legal principles applied to the specific facts and use citations where appropriate. In order to be complete in your analysis, you should include all arguments that could be made even if they would have to be raised in the alternative to another argument and you should note and distinguish any facts or legal principles which could be argued to support a different conclusion.

Stressfree Insurance Company

987 Main Street
Northbrook, Pennsylvania

"We've got you covered!"

July 15, 2003

Barry Apgar, Esquire
Law Offices of Apgar & Rale
78 South 11th Street
Hometown, PA

Our insured: Hostess Hotel, Inc.
Our file: #12345
Claim Number SIC007-03
Date of incident: January 1, 2003

Dear Barry,

As we discussed over the phone, I would like you to serve as defense counsel and represent our insured, Hostess Hotel, Inc., with respect to the above referenced claim. Hostess Hotel, Inc. is the owner of the Hostess Hotel, where the incident involving Pam Doyle occurred.

I have enclosed a copy of a demand letter and draft of a Complaint, which were sent to the manager of the Hostess Hotel, Brad Smiley, by Chauncy Chase, Esquire, and all of the documents we have in this file. Mr. Chase is representing Pam Doyle, who fell on the premises of the Hostess Hotel while attending a New Year's Eve party there.

Obviously, I am concerned about the likelihood of liability on the part of our insured in this situation. Based on the information you have at this point and any research you may consider, please give me a written answer to these specific questions:

1. Did the Hostess Hotel breach any duty to properly maintain the sidewalks leading to the parking lot at the time in question?
2. Is the Hostess Hotel liable for any harm which occurred to Ms. Doyle when she slipped on the premises while walking on the grassy area where snow and ice had accumulated?
3. What effect, if any, does Ms. Doyle's conduct have on the potential liability of the hotel for her injuries?

As always, I appreciate your guidance.

Very truly yours,
Karen Spencer
Karen Spencer
Senior Claims Analyst

Law Offices of
Chauncy Chase, Esquire & Associates
678 South Street
Remington, Pennsylvania

July 12, 2003

Brad Smiley, Manager
Hostess Hotel
300 Garden Street
Deer Lake, Pennsylvania

Re: Pam Doyle v. Hostess Hotels, Inc.

Dear Mr. Smiley,

I am writing on behalf of my client, Pam Doyle, who suffered extensive injuries and continues to endure pain and suffering as a result of a fall on your premises, located at the Hostess Hotel, 300 Garden Street, Deer Lake, Pennsylvania, on or about 3 a.m. on January 1, 2003. Ms. Doyle was attending a New Year's Eve party at the Hostess Hotel on the evening of December 31, 2002, and the early hours of January 1, 2003. As she was leaving the Hotel, Ms. Doyle fell because of the hazardous conditions on the property of the Hostess Hotel. These hazardous conditions were the result of the negligence of Hostess Hotels, Inc. by and through the Hostess Hotel and its agents and employees. Your liability is clear: my client fell and sustained serious injuries due to the slippery conditions at the Hostess Hotel.

I will forward the medical bills, which to date total over \$56,000, and supporting documentation under separate cover within the next two days. In addition, Ms. Doyle lost 7 weeks of work from her job as a teacher and continues to undergo treatment, including physical therapy for her right shoulder and aroma therapy for her headaches and anguish.

On behalf of my client, I am making a demand for \$250,000 to settle this case fully and finally. While we would prefer to settle this matter expeditiously, without litigation, we are prepared to file the enclosed Complaint unless we have an agreed settlement within thirty days of the date of this letter.

I look forward to hearing from you.

Very truly yours,
Chauncy Chase
Chauncy Chase, Esquire

cc:pri:w/enclosure

Law Office of Chauncy Chase
BY: Chauncy Chase, Esquire
I.D. 12345
678 South Street
Remington, Pennsylvania
(123) 567-8910

DRAFT

IN THE COURT OF COMMON PLEAS FOR THE COUNTY OF PIKE
COMMONWEALTH OF PENNSYLVANIA
CIVIL ACTION - LAW

Pam Doyle	:	Docket #
Plaintiff	:	
vs.	:	
	:	
Hostess Hotel, Inc.	:	
Defendant	:	

COMPLAINT

Plaintiff Pam Doyle, by and through her attorney, Chauncy Chase, Esquire, brings this civil action for negligent infliction of personal injury and in support thereof, avers as follows:

1. Plaintiff is Pam Doyle (“PLAINTIFF”) an adult individual who resides at 40 Porch Lane, Remington, Pike County, Pennsylvania.
2. Defendant is Hostess Hotel, Inc. (ADEFENDANT@) a corporation existing under the laws of the State of Delaware and which has a registered place of business located at 300 Garden Street, Deer Lake, Pike County, Pennsylvania.
3. At all relevant times, Defendant owned and operated Hostess Hotel, including the sidewalk, parking lot and adjacent grassy areas, located at 300 Garden Street, Deer Lake, Pike County, Pennsylvania.
4. At all relevant times, the employees of the Hostess Hotel were acting as agents within the course and scope of their employment on behalf of Defendant.
5. Defendant had a duty to guests of the Hostess Hotel to keep the sidewalk and the grassy areas adjacent to the parking lot free of any ice and snow and in a condition safe for walking.

6. Defendant had notice of the hazardous condition consisting of ice and snow that existed on Defendant's sidewalk and the grassy areas adjacent to Defendant's parking lot.

7. Defendant failed to maintain the sidewalk in a condition for people to safely walk on it forcing the Plaintiff to use a path on the grassy area adjacent to the parking lot as an alternate route to her vehicle.

8. At or about 3 a.m. on January 1, 2003, Plaintiff was walking on a path in the grassy area adjacent to the parking lot after exiting Defendant's hotel when, solely as a result of Defendant's negligence, Plaintiff slipped because of the hazardous and slippery condition of the grassy areas adjacent to Defendant's parking lot.

9. Defendant's negligence consisted of the following:

a. Failing to maintain the sidewalk in a condition which would protect and safeguard persons walking on the sidewalk thereby causing Plaintiff to use an alternate route to her car where she slipped and fell;

b. Permitting ice and snow to accumulate in amounts sufficient to create hills and ridges on a path which had been formed in the grassy area adjacent to the parking lot, thereby making this area unsafe for travel and causing Plaintiff to slip and fall;

c. Permitting a dangerous condition to exist on the grassy area adjacent to the parking lot, which the defendant knew or should have known was used as a shortcut to the parking lot, causing Plaintiff to slip and fall.

10. Defendant's negligence caused Plaintiff damages, including but not limited to injury to the right shoulder, headaches, mental anguish and severe shock to Plaintiff's nerves and nervous system which has caused pain, suffering and economic losses now and in the future.

WHEREFORE, Plaintiff Pam Doyle demands judgment against Defendant Hostess Hotel, Inc. in an amount in excess of \$50,000.

Respectfully submitted,
Chauncy Chase
Chauncy Chase, Esquire
Counsel for Plaintiff

VERIFICATION

I, Pam Doyle, hereby verify that the statements in this complaint are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 42 Pa.C.S. § 4904 relating to unsworn falsifications to authorities.

Pam Doyle

INTAKE INTERVIEW

APGAR & RALE DEFENSE FILE: #12345

CLIENT: Hostess Hotels, Inc.
Brad Smiley, Manager, Hostess Hotel

Date: July 22, 2003

Brad Smiley, Manager of the Hostess Hotel, is an employee and agent of our client, Hostess Hotel, Inc. Hostess Hotel, Inc. is a Delaware Corporation with principal offices at 45 Business Court, Wilmington, Delaware. Hostess Hotel, Inc. has registered offices in Pennsylvania at 300 Garden Street, Deer Lake, Pike County, Pennsylvania. The office is inside the Hostess Hotel, which it owns and operates.

Mr. Smiley has been an employee of the Hotel chain for 11 years and the manager of the Hostess Hotel for 2 years. He was off duty at the time of the incident, but became aware of it on January 2, 2003, when he came back to work. He has been involved in other litigation and was a witness for our firm in that litigation. He is a sophisticated individual, makes a good appearance and is very knowledgeable about Hostess Hotel operations.

Mr. Smiley came in to talk about a letter he recently received from Chauncy Chase, Esquire, on behalf of Pam Doyle, who attended a New Year's Eve party on December 31, 2002 at the Hostess Hotel. He stated that there is no question that Ms. Doyle was on the premises with the permission of the Hostess Hotel, that she was attending a function at the hotel and that the incident occurred on hotel property. The letter from Mr. Chase included a draft of a Complaint, which Mr. Chase threatened to file if a settlement was not reached. The letter also contained a demand for resolving this matter. Mr. Smiley recently received medical records documenting: Ms. Doyle's injury; the expenses she incurred as a result thereof, which are in excess of \$56,000; and her ongoing course of treatment.

Mr. Smiley brought in a copy of the Hotel's confidential Incident Report. He had spoken to the Hostess Hotel Security Supervisor who was working the night of the incident. The Security Supervisor, Daniel Scott, has worked in the area of security for the last 5 years since retiring from a job as a Deer Lake Police Officer. Mr. Scott is an actual eyewitness to the incident and is a very reliable witness, according to Mr. Smiley.

No discovery has been requested by or provided to counsel for Pam Doyle. I advised Mr. Smiley not to discuss this incident with anyone except our office and to keep all documentation related to this incident confidential until we authorize release.

HOSTESS HOTEL INCIDENT REPORT

Number: #03-001

Date of Incident: January 1, 2003 **Time:** 3 a.m.

Location: Hostess Hotel (grassy area adjacent to parking lot)
300 Garden Street
Deer Lake, Pennsylvania

Injured Guest: Pam Doyle

Address: 40 Porch Lane, Remington, Pennsylvania

Purpose on premises: Attending Hostess Hotel New Year's party at Hotel

Occupation: Teacher

Injury: Complained of shoulder pain

Medical assistance provided: Aid offered, ambulance called

Ambulance: Community Ambulance Co.

Hospital: Deer Lake Regional Medical Center

Police officer involved: NA **If yes, identify:**

Report made: NA **If yes, copy requested:**

Description of Incident: I was on duty from 11 p.m. on 12/31/02 through 7 a.m. on 1/1/03. When I came on duty at 11 p.m., the sidewalk and parking lot at the hotel had been salted and cleared by maintenance and the air temperature was 35 degrees. However, by 2 a.m. the temperature had dropped and freezing rain began to fall. Although we salted again, at 3 a.m. the freezing rain continued to fall, and everything was covered with a very thin sheet of ice and was slippery. At the time of the incident, as the hotel guests were exiting the New Year's Eve party, I was standing at the beginning of the sidewalk which led to the parking lot. As the person, later identified as Pam Doyle, approached me, I told her to be careful on the sidewalk and in the parking lot because everything was slippery. She shook her head vigorously, said that her high heels made her unsteady and that she was going to walk on the snow in the grassy area adjacent to the parking lot for better traction. The grassy area was well lit from the lights in the parking lot. A rough path, which was a more direct route to the parking lot, had been created in this grassy area as a result of people using the area as a shortcut to the parking lot. The path which had been forged was covered with several inches of hardened ice and snow that had been packed down in uneven ruts as a result of people walking on it. I advised her that the sidewalk was a safer route to her vehicle but she ignored me indicating that she was familiar with the condition of the path on the grassy area but needed the snow for traction to remain steady. Within a few minutes, I saw her attempt to cross a snow-covered embankment on the path and slip on the snow and fall hard on her right side, striking a landscaping block. She complained of shoulder pain and I called the Community Ambulance, which transported her to Deer Lake Regional Medical Center.

Signed: Daniel Scott

Dated: January 3, 2003

Position: Security Supervisor
Hostess Hotel

PARTY PARTY PARTY PARTY PARTY

HOSTESS HOTEL, Inc.

Cordially invites you to attend a

New Year's Eve Party

December 31, 2002

Beginning at 9 p.m. until ?

At the Hostess Hotel
300 Garden Street
Deer Lake, Pennsylvania

\$99 per person

To make reservations, please call 800-678-9101 on or before December 15, 2002

LIBRARY

Donald GILLIGAN, Appellant,

v.

Villanova University, Appellee

Superior Court of Pennsylvania

584 A.2d 1005 (1990)

This case arises from a slip and fall by appellant, Donald Gilligan, on the campus of Villanova University on February 18, 1986, while walking across campus to attend a basketball game at the DuPont Pavilion. Appellant testified at trial that the weather was clear and cold and there had been snow flurries earlier in the day. He further testified that the conditions on campus that evening were treacherous due to ice and snow. Appellant's accident occurred when he and his friend were approaching the DuPont Pavilion. The testimony indicates that appellant and his friend were walking toward the pavilion on a sidewalk, which ended at some distance before allowing them to reach their destination. This sidewalk ended where another began, which would have provided access to the pavilion. Instead of using this latter walkway, which was not a direct path to the pavilion, the two

men traversed a grassy area in direct route to the pavilion. It is on this grassy area where the appellant fell. Appellant testified that this grassy area was snow covered, uneven, rather hilly and bumpy. Appellant testified that the sidewalks and driveways on the campus were not cleared off and the conditions were icy. Appellant did not walk on the street adjacent to the grassy area, as it also was iced.

At the close of appellant's case, the court granted appellee's motion for nonsuit. Appellant subsequently filed a motion for a new trial and/or for the removal of the nonsuit, which motion was denied. This appeal followed.

Our review of the compulsory nonsuit requires that we determine whether there was sufficient evidence from which a jury could have imposed liability on appellee.

The trial court, in entering an order for compulsory nonsuit, held that the evidence presented by appellant was insufficient to support recovery on two different theories of liability. We discuss each theory of liability *seriatim*.

First, the trial court held that appellant failed to present sufficient evidence to meet the requirements of the

doctrine of hills and ridges. This doctrine provides that an owner or occupier of land is not liable for general slippery conditions, for to require that one's walks be always free of ice and snow would be to impose an impossible burden in view of the climatic conditions in this hemisphere. Snow and ice upon a pavement create merely transient danger, and the only duty upon the property owner or tenant is to act within a reasonable time after notice to remove it when it is in a dangerous condition. (citation omitted) In order to recover for a fall on an ice or snow-covered sidewalk, a plaintiff must prove

(1) that snow and ice had accumulated on the sidewalk in ridges or elevations of such size and character as to unreasonably obstruct travel and constitute a danger to pedestrians traveling thereon; (2) that the property owner had notice, either actual or constructive, of the existence of such condition; (3) that it was the dangerous accumulation of snow and ice which caused the plaintiff to fall.

The trial judge stated that appellant failed to present any evidence that the snow and ice on the area where he fell had

accumulated in ridges and elevations, that appellee had notice of the allegedly treacherous condition, or that such condition caused appellant to fall. We agree with appellee that the doctrine of hills and ridges does not apply in the case *sub judice*, as appellant fell in a grassy area not intended to be traversed by pedestrians. It is only logical that the doctrine apply to areas such as sidewalks, parking lots, and other paved areas where pedestrians would be expected to travel. The purpose of the doctrine is to protect landowners from liability for slippery conditions of which, the owner may not have notice or sufficient opportunity to make safe. If this doctrine were to apply to all areas of a landowner's property, including grass areas, then a landowner would be responsible for clearing snow and ice from the entire property in order to avoid liability. Such an imposition would be impracticable and absurd. In any event, the trial court found that appellant failed to present sufficient evidence to impose liability under this doctrine; therefore, the court's application of the doctrine to this case was harmless error. The primary theory of recovery, which appellant asserts in his brief was also dismissed by the trial court as being supported by inadequate evidence and, therefore, not entitled to

consideration by a jury. This theory is based on appellee's alleged negligence in failing to provide a sidewalk, which leads directly to the pavilion, from the point at which the sidewalk on which appellant had been walking ended. The trial court reasoned that because a sidewalk existed which provided indirect access to the pavilion, and because appellant failed to offer evidence regarding the inadequacy or unsafeness of this walkway, then there was insufficient evidence from which a jury could conclude that appellee was negligent in failing to provide a direct walkway to the pavilion. We believe the trial court's disposition of this theory of recovery was correct. The evidence indicates that appellant had traveled to the campus for sporting events many times and knew of the existence of the sidewalk, which would have provided indirect access to his destination. Also, the record shows the existence of a roadway adjacent to the place where appellant fell. Appellant offered no evidence at trial that the sidewalk or the roadway were improperly maintained or inadequate. Furthermore, appellant offered no expert testimony or other evidence, which would have established a duty of appellee to provide a sidewalk in the area upon which appellant fell. Appellant has merely

established that he voluntarily chose to walk upon an allegedly snow-covered grassy area, not intended to be traversed by pedestrians, and subsequently fell. On these facts, we agree with the trial court that appellant has failed to state a cause of action in negligence.

Terry WENTZ, Appellant
v.
Pennswood Apartments, Appellee

Superior Court of Pennsylvania
518 A.2d 314 (1986)

The principal issue in this appeal . . . is whether the Pennsylvania “hills and ridges” doctrine applies to private walks, which are covered with ice or snow, or only to public sidewalks. . . .

On January 16, 1978, Terry Wentz, an employee of United Parcel Service, used a private walk to move from the street, where he had parked his truck, to the Pennswood Apartment Complex, Harrisburg, where he intended to deliver a package. Although the walkway was covered with ice and snow, he was able to gain entrance to the apartment without incident. He was unable to deliver the package, however, and was forced to return to his truck with it. While retracing his path over the privately maintained sidewalk, he slipped and fell with resulting injury. His action against the corporate owner of the apartment complex was tried before a jury. The jury rejected his claim and returned a verdict in favor of the defendant. . . . Wentz appealed.

He argues, on appeal, that the trial court erred by refusing to charge the jury on the Pennsylvania “hills and ridges” doctrine

It is axiomatic that a possessor of land owes a duty to protect his invitees from foreseeable harm. (citation omitted) An owner or occupier of land is subject to liability for harm which befalls his invitees due to a condition on his land if he:

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitee, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts Section 343. However, as is made clear by Section 343A of the Restatement, a possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. (citations omitted)

The doctrine of “hills and ridges” is not inconsistent with section 343 of the Restatement (Second) of Torts. The doctrine, as defined and applied by the courts of Pennsylvania is a refinement or clarification of the duty owed by a possessor of land and is applicable to a single type of dangerous condition, i.e., ice and snow covered walks. The rule holds that an owner or occupier of land is not liable for general slippery conditions for to require that ones walks be always free of ice and snow would be to impose an impossible burden in view of the climatic conditions in this hemisphere. (citations omitted)

Appellee argues that the doctrine of “hills and ridges” applies only to public sidewalks and not to private walks in an apartment complex. . . . On the contrary . . . decided cases disclose that the appellate courts of this Commonwealth have already applied the doctrine of “hills and ridges” to situations in which business invitees have fallen on ice covered private parking areas or walks. (citations omitted)

An instruction regarding the “hills and ridges” doctrine would have been proper in this case Nevertheless, it does not appear that appellant was prejudiced in any

way by the trial court’s failure to so charge. The doctrine of “hills and ridges” is not an extension or expansion of the duty which the law imposes upon an owner or occupier of land. It is rather, a limitation on the liability of such persons for conditions, which are caused generally by climatic conditions in this hemisphere. The doctrine of “hills and ridges” has always been deemed a principle of law intended to protect possessors of land by increasing, not decreasing, the proof required before a plaintiff can recover for injuries sustained as a result of a fall on an ice or snow covered surface. In the instant case, the trial court correctly instructed the jury regarding the duty owed by an owner of land to a business invitee. By virtue of this instruction, the jury was permitted to find the owner negligent for ice and snow covered walks even though the ice and snow had not been there for a sufficient time to accumulate as “hills and ridges.” This instruction was more favorable than the plaintiff was entitled to receive. If it had been given... it could have served only to increase the plaintiff’s burden of proof. We conclude, therefore, that the court’s failure to charge on “hills and ridges” was harmless in this case

Judgment affirmed.

Ruth CARRANDER, et.al., Appellees

v.

Paul FITTERER, et. al., Appellants

Supreme Court of Pennsylvania

469 A.2d 120 (1983)

This appeal arises from an action in trespass . . . in which appellee sought to recover for injuries sustained when she slipped on a patch of ice in a parking lot owned by appellants A jury found appellants to have been sixty-five percent negligent and appellee to have been thirty-five percent negligent, and awarded appellee damages of \$70,000, an amount which was molded by the trial judge to reflect the parties' percentages of negligence. The judgment entered was affirmed by a panel of the Superior Court, and this Court granted allowance of appeal.

We conclude that the evidence presented by appellee was insufficient to support a verdict in her favor. Accordingly, we reverse the order of the Superior Court

Appellee had been a patient of appellants' clinic for approximately seven years prior to the accident. On January 16, 1979, the day of the accident, appellee drove

to appellants' clinic to receive treatment for a back ailment. She parked her car next to a parked car in the patients' lot, which is built on an incline contiguous to the clinic. A sheet of smooth ice covered the area of the parking lot between the two cars, but the rest of the surface of the parking lot was free of ice and snow. . . . At trial, appellee testified that, while still seated in her car, she had become aware of the slippery conditions of the surface below her.

Although appellee was aware that several convenient parking spaces free of ice were available, she kept her car in the space, which she had chosen, alighted from her vehicle, and proceeded across the ice toward the clinic, placing her hand on the adjoining vehicle to help negotiate the slippery surface. . . . After receiving treatment, appellee retraced her steps to the rear of her car, where she again encountered the icy conditions. . . . Seconds later, she slipped and fell to the parking lot, sustaining a fracture of the left hip.

Appellee brought the present trespass action alleging that appellants had been negligent in failing to maintain the parking lot properly. At the close of appellee's case, appellants requested the entry of a compulsory non-suit on the ground that appellee had failed to establish a prima facie

case of negligence. The trial court denied the request and directed appellants to proceed with their evidence.

At the conclusion of the parties' presentation of evidence, the trial court instructed the jury that a possessor of land has only a limited duty to prevent harm to invitees from known or obvious dangers. The court also instructed that if the jury should find that appellee had been contributorily negligent, such negligence could be taken into account in apportioning fault, and that any negligence on appellee's part would mitigate appellants' liability, if any, to appellee. The court, however, refused appellants' proposed "assumption of risk" charge, reasoning that the defense of assumption of risk as a complete bar to recovery had been wholly merged with the defense of contributory negligence, and that the proposed charge was thus incompatible with Pennsylvania's comparative negligence statute, 42 Pa. C.S. §7102. After the jury's verdict, the trial court denied appellants' motion for judgment notwithstanding the verdict and for a new trial.

On appeal, a panel of the Superior Court sustained the trial court's denial of appellants' motions for judgment n.o.v. and a new trial, ruling that the trial court had not erred in refusing to charge the jury on the

defense of assumption of risk. On this appeal, appellants renew their contention that the motions for judgment n.o.v. and a new trial should have been granted.

On this record the controlling issue is whether the trial court properly allowed the case to proceed to the jury on appellee's theory that appellants owed a duty to prevent harm to appellee from a known or obvious danger. We conclude that appellee's own testimony compels the conclusion that, as a matter of law, appellants were under no duty either to take precautions against or to warn of the isolated patch of ice on the parking lot.

The standard of care a possessor of land owes to one who enters upon the land depends upon whether the person entering is a trespassor, licensee, or invitee. (citations omitted) The parties agree that the appellee was an invitee on the day she was injured.

* * *

[A]s is made clear by section 343 A of the Restatement. "[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." Restatement, *supra*, §343A.

A danger is deemed to be “obvious” when “both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising normal perception, intelligence, and judgment”. (citation omitted) For a danger to be “known,” it must “not only be known to exist, but... also be recognized that it is dangerous and the probability and gravity of the threatened harm must be appreciated”. (citation omitted) . . .

Appellee’s own testimony showed not only that the existence of the ice was obvious to a reasonably attentive invitee, but also that appellee herself was aware of the ice and appreciated the risk of traversing it. Before alighting from her vehicle, appellee knew both that a sheet of ice lay next to the driver’s side of the parking space which she had selected and that this condition presented a danger. She nevertheless proceeded across the ice, both when she emerged from her car and again on her return to the car. There was nothing presented on the record to indicate that, notwithstanding the obviousness of the danger, appellants should have anticipated that the patch of ice might go unnoticed by appellee or any other patient; on the contrary, appellants could reasonably expect that, in light of the number of clear, convenient spaces available, appellee and other invitees

would recognize the danger posed by the ice and choose to park in another, ice-free space to avoid it.

In light of appellee’s uncontradicted testimony, it must be concluded that the danger posed by the isolated patch of ice was both obvious and known, and that appellants could have reasonably expected that the danger would be avoided. Thus, appellee failed to establish the element of duty essential to a prima facie case of negligence, and appellants were therefore entitled to a judgment notwithstanding the verdict. . . .

Although appellee concedes that her testimony supports a determination that the danger was either known or obvious to her, she contends, and the Superior Court concluded, that her knowledge of the risk is relevant only to the question whether she assumed the risk, and not to the issue of whether appellants owed her a duty of care in the first instance. According to appellee, once the invitee proves the existence of the invitee-possessor relationship, the existence of a duty has been established, and the burden then shifts to the possessor of land to show that the invitee is not entitled to relief because the invitee assumed the risk of injury from a hazardous condition of the possessor’s property. Appellee argues that the comparative negligence statute

42 Pa.C.S. § 7102, reflects a legislative intent to remove assumption of risk as an absolute bar to recovery and to incorporate the defense into the comparative negligence framework.

Thus, Appellee asserts, the fact that she appreciated the dangerous condition of the parking lot and proceeded voluntarily to encounter it are facts which may be considered by the jury in apportioning fault, but should not operate as a total bar to recovery.

Appellee misperceives the relationship between the assumption-of-risk doctrine and the rule that a possessor of land is not liable to his invitees for obvious dangers. When an invitee enters business premises, discovers dangerous conditions which are both obvious and avoidable, and nevertheless proceeds voluntarily to encounter them, the doctrine of assumption of risk operates merely as a counterpart to the possessor's lack of duty to protect the invitee from those risks. . . . By voluntarily proceeding to encounter a known or obvious danger, the invitee is deemed to have agreed to accept the risk and to undertake to look out for himself. . . . It is precisely because the invitee assumes the risk of injury from obvious and avoidable dangers that the possessor owes the invitee no duty to take

measures to alleviate those dangers. Thus, to say that the invitee assumed the risk of injury from a known and avoidable danger is simply another way of expressing the lack of any duty on the part of the possessor to protect the invitee against such dangers.

Viewed in this context, appellee's claim based on the comparative negligence statute must fall. For fault to be apportioned under the comparative negligence statute, there must be two negligent acts: a breach of duty by the defendant to the plaintiff and a failure by the plaintiff to exercise care for his own protection. Whatever the effect of the adoption of a system of comparative fault on the defense of assumption of risk where that defense overlaps and coincides with contributory negligence, the adoption of such a system has no effect where, as here, the legal consequence of the invitee's assumption of a known and avoidable risk is that the possessor of land is relieved of a duty of care to the invitee.

As the record fails to establish a duty owed to appellee by appellants, the order of the Superior Court affirming the denial of appellants' motion for judgment notwithstanding the verdict must be reversed and the record remanded

42 Pa.C.S.A § 7102 **Comparative Negligence**

(a) **General Rule.** – In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

GRADING GUIDELINES

OVERVIEW

This task requires that the Applicant draft a letter to Karen Spencer, a Claims Analyst for the Stressfree Insurance Company. Ms. Spencer has written a letter to counsel, posing some specific questions regarding negligence claims against an insured, Hostess Hotel, Inc. Chauncy Chase, Esquire, represents Pam Doyle, who fell on the premises of the Hostess Hotel while attending a New Year's Eve party there. Mr. Chase has sent a demand letter and a draft of a Complaint he plans to file if the matter is not settled within thirty days. The File includes the letter from Stressfree Insurance Company, the demand letter from Pam Doyle's attorney along with a draft of the Complaint, the Client Intake Interview Sheet, the Incident Report and a flyer that advertised the New Year's Eve party at the Hostess Hotel. Also included in this Performance Test is a Library, which includes the only legal principles and authorities the Applicant should consider and rely upon in completing this task. The Applicant should assume that all of the information in the File is factually accurate, except for the averments in the draft Complaint and demand letter, which relate to the allegations of negligence against the client.

FORMAT

5%

The Applicants are asked to prepare a well reasoned letter in response to questions raised by Karen Spencer, the Claims Analyst at Stressfree Insurance who is handling this matter. The Applicant's letter to Ms. Spencer should number the answers to Ms. Spencer's questions to correspond with the questions in her letter. The Applicants are told that Ms. Spencer is an experienced Claims Analyst and understands legal argument and to support the answers with legal principles applied to the specific facts and citations where appropriate. All arguments should be included in the response even if they have to be raised in the alternative to another argument and any facts or legal principles which could be argued to support a different conclusion should be noted and distinguished in the answer.

LEGAL ANALYSIS

Question 1: The Hostess Hotel did not breach its duty to properly maintain the sidewalks leading to the parking lot at the time in question.

25%

*The "hills and ridges" doctrine is a refinement of the general duty owed by a possessor of land, which is applicable to ice and snow covered walks. Wentz v Pennswood Apartments

*The doctrine is intended to protect possessors of land by increasing the proof required before a plaintiff can recover for injuries sustained as a result of a fall on an ice or snow covered walkway. Wentz

*The purpose of the “hills and ridges” doctrine is to protect landowners from liability for general slippery conditions which, the owner may not have sufficient opportunity to make safe. **Gilligan v. Villanova University**

*The doctrine applies to areas such as sidewalks, parking lots, and other paved areas where pedestrians would be expected to travel. **Gilligan**

*The doctrine applies to private as well as public sidewalks. **Wentz**

*An owner or occupier of land is not liable for general slippery conditions for to require that one’s walks be always free of ice and snow would be to impose an impossible burden in view of the climatic conditions in this hemisphere. **Gilligan**

*A property owner or tenant has a duty to act within a reasonable time after receiving notice that a dangerous condition exists to remove ice and snow from a pavement. **Gilligan**

*In order to recover for a fall on an ice or snow covered sidewalk, a plaintiff must prove (1) that the snow and ice had accumulated on the sidewalk in ridges or elevations of such size and character as to unreasonably obstruct travel and constitute a danger to pedestrians traveling thereon; (2) that the property owner had notice, either actual or constructive, of the existence of such condition; (3) that it was the dangerous accumulation of snow and ice which caused the plaintiff to fall. **Gilligan**

*The freezing rain began to fall around 2 a.m. and was continuing to fall at 3 a.m. when Pam Doyle was leaving the Hostess Hotel.

*Although the hotel applied salt again, it did not have a reasonable opportunity to clear the sidewalk because the freezing rain continued to fall making it impossible to clear the ice from the sidewalk

*Since there was only a very thin sheet of ice on the sidewalk, the ice had not accumulated in an amount sufficient to create ridges or elevations of such size and character as to unreasonably obstruct travel and therefore the Hostess Hotel did not breach its duty to maintain the sidewalk in a safe manner.

*There are no facts to support a finding that snow and ice had accumulated on the sidewalk in ridges or elevations or that this accumulation caused her fall and therefore plaintiff may not recover for her slip and fall under the “hills and ridges” doctrine.

Question 2: The Hostess Hotel was not liable for the harm that occurred to Pam Doyle while she was walking on its premises on the grassy area where snow and ice had accumulated.

40%

*Possessors of land owe a duty to protect invitees from foreseeable harm. **Carrender v. Fitterer**

*As a person on the hotel premises to take advantage of the hotel's services, Pam Doyle was a business invitee. **Carrender**

*With respect to conditions on the land which are known or discoverable by the possessor, the possessor is subject to liability only if he knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitee; and should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and fails to exercise reasonable care to protect them against the danger. **Carrender**

*A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. **Carrender**

*The dangerous condition of the path in the grassy area was obvious since the path consisted of several inches of ice and snow that had been packed down unevenly and which could readily be seen since it was in a well lit area.

*Arguably, the Hostess Hotel should have anticipated the harm from walking on the grassy area because Hostess Hotel knew that a rough path had been formed through the grassy area by people who had used it as a short-cut to the parking lot.

*However, under these circumstances, there was no reason for the Hostess Hotel to anticipate that the danger would go unnoticed or that it would not be avoided.

*Ms. Doyle told the security supervisor that she was familiar with the condition of the path.

*The security supervisor advised Pam Doyle not to walk on the grassy area and directed Ms. Doyle to walk on the sidewalk which was the safer and intended route to her vehicle.

*Hostess Hotel is not liable for Pam Doyle's injuries because it did not breach any duty to protect her from the dangerous condition which existed on the snow and ice covered grassy area adjacent to the parking lot.

*Under the "hills and ridges" doctrine, in order to recover for a fall on an ice or snow covered sidewalk, a plaintiff must prove in part that the snow and ice had accumulated on the sidewalk in ridges or elevations of such size and character as to unreasonably obstruct travel and constitute a danger to pedestrians traveling thereon. **Gilligan**

*The "hills and ridges" doctrine only applies to areas such as sidewalks, parking lots and other paved areas where pedestrians would be expected to travel. **Gilligan**

*The doctrine does not apply to grassy areas such as the location where Pam Doyle slipped and fell because even though a path had been formed there from use, this area was not

intended to be traversed by pedestrians and the security supervisor directed her to use a different route. **Gilligan**.

*If the doctrine were to apply to all of a landowner's property, a landowner would face the unreasonable responsibility of having to clear his entire property in order to avoid liability. **Gilligan**

*Even though ice and snow had been permitted to accumulate on the grassy area where Pam Doyle slipped and fell in amounts sufficient to constitute a hazard to people traveling thereon, the Hostess Hotel would not be liable for the injuries suffered by Pam Doyle under the "hills and ridges" doctrine because said doctrine does not apply to areas not intended to be traversed by pedestrians.

*Alternately, Hostess Hotel was not liable for Pam Doyle's injuries because where an invitee assumes the risk of injury from obvious and avoidable dangers, the possessor owes the invitee no duty to take measures to alleviate those dangers. **Carrender**

*Plaintiff's voluntary assumption of the known and obvious risk posed by the slippery condition of the grassy area eliminated any duty that the Hostess Hotel may have had to maintain the path in the grassy area in a safe manner.

Question 3: Pam Doyle's conduct negates any duty that the hotel may have owed to her or, in the alternative, Pam Doyle's conduct can be used to offset or eliminate any liability on the part of the hotel if Hostess Hotel were found to have been negligent. **30%**

30%

*Where an invitee assumes the risk of injury from obvious and avoidable dangers, the possessor owes the invitee no duty to take measures to alleviate those dangers. **Carrender**

*When an invitee enters business premises, discovers dangerous conditions, which are both obvious and avoidable, and proceeds voluntarily to encounter them the doctrine of assumption of risk operates as a counterpart to the possessor's lack of duty to protect the invitee from those risks. **Carrender**

*By voluntarily proceeding to encounter a known or obvious danger, an invitee is deemed to have agreed to accept the risk and to undertake to look out for himself. **Carrender**

*Plaintiff was aware of the specific risk of dangerous conditions in the grassy areas adjacent to Defendant's parking lot since she was familiar with this area and she voluntarily assumed the risk by proceeding to walk across this area rather than the sidewalk which lead to the parking lot where she was directed by the Security Supervisor.

*Plaintiff's voluntary assumption of the known and obvious risk posed by the slippery condition of the grassy area eliminated any duty that the Hotel may have had to maintain the path in the grassy area in a safe manner.

*In the alternative, if it could be found that the hotel had a duty to maintain the path in the grassy area in a safe manner and that Pam Doyle did not voluntarily assume a known and avoidable danger, the Hostess Hotel would nonetheless not be liable to Ms. Doyle for her injuries based on her contributory negligence.

*A plaintiff's contributory negligence is a bar to recovery under the Comparative Negligence statute, where such negligence is greater than the causal negligence of the defendant. **42 Pa.C.S. Section 7102**

*For fault to be apportioned under the Comparative Negligence statute, there must be a failure by the plaintiff to exercise care for her own protection. **Carrender**

*Pam Doyle was negligent in walking on the snow and ice covered path on the grassy area adjacent to the parking lot while wearing high heels and being unsteady.

*Pam Doyle's causal negligence was greater than that of the hotel because she ignored the warning from the hotel's agent that the sidewalk was a safer course and proceeded to walk on a slippery area while in an unsteady condition.

*Even if the hotel was negligent, Pam Doyle's causal negligence, was greater than that of hotel, and therefore she is barred from any recovery by the Comparative Negligence statute. **42 Pa.C.S. Section 7101(a).**

*In the alternative, if Pam Doyle's causal negligence is found to be less than that of the hotel, the damages awarded against hotel and to Pam Doyle shall be diminished in proportion to the amount of negligence attributed to her. **42 Pa.C.S. Section 7101(a).**