

Essay Question PT

To: Arnold Able, Esquire

From: Applicant

Re: Frank Jones' Estate

Date: February 21, 2006

Per your instructions the following memo outlines the distribution of property for the estate of Frank Jones. The two key factors of this situation are that Mr. Jones' son, Sam, has disclaimed any interest in the Certificates of Deposit left to him under the will and that Mr. Jones' will did not name a beneficiary to the residuary of his estate. The impact of these two factors on the three assets you addressed in your memo will be discussed individually.

1. ABC Company Stock

Paragraph 3 of Mr. Jones' will bequeaths the shares of his stock in ABC Company to his family, divided equally. At the time of his death Mr. Jones owned 900 shares of stock. 20 Pa.C.S.A. section 2514 provides that when a testator uses the word "family" to identify those whom the testator wishes to benefit under his/her will, that term shall be construed as meaning those "who would take under the intestate laws if the testator...were to die intestate at the time such class is to be ascertained" Id. Under section 2102 & 2103 of the same chapter, Mr. Jones' family would be his surviving spouse, Wilma, and his two surviving children Dee and Sam.

These three individuals will be the recipients of the stock. Since Sam's disclaimer listed only the Certificates of Deposit, that is the only property affected by the instrument. Section 6201 states that in order to disclaim a gift, a disclaimer must "describe the interest disclaimed and declare the disclaimer and extent thereof..." 20 Pa.C.S.A. section 6201. Since Sam only specifically mentioned the Certificates of Deposit he is still entitled to some of the ABC Company stock. Because Mr. Jones' will provided for an equal distribution of this stock, each of the three family members, Wilma, Sam & Dee will receive 300 shares of ABC Company Stock.

2. Certificates of Deposit

Sam Jones' disclaimer dated 12/10/2005 is effective as it has complied with all the statutory requirements.

Under Pennsylvania law beneficiaries under a will have a right to disclaim if they (1) describe the interest disclaimed, (2) declare the disclaimer and the extent thereof; and (3) sign the disclaimer. Sam's disclaimer filed with the Orphans Court clearly complies with these basic requirements. Additionally, the interest in question, Sam's right to his

father's certificates of deposit is subject to disclaimer under 20 Pa.C.S.A. s.6203, as it is a present interest in property. When the disclaimer involved is an interest derived from a will, the disclaimer must be filed with the clerk of the orphan's court division in the county where the decedent was domiciled. Frank Jones was domiciled in Penn County. Sam has complied with this requirement because he filed the disclaimer in the Orphan's Court for Penn County. The more pressing question however is the effect Sam's disclaimer will have on the Certificates of Deposit.

The Code states with regard to effects of disclaimers that: "the disclaimer shall, for purposes of determining the rights of other parties, be equivalent to the disclaimant having died before the decedent in the case of a devolution by will or intestacy..." Thus, the disclaimer situation is the same as if Sam Jones had died prior to the death of Frank Jones. It is necessary to apply the anti-lapse statutes of the Code. Under section (9), the gift shall not lapse (pass under a residuary clause) 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. The final sentence in section (9) contains a proviso, which doesn't apply because the gift was to a child, and not a brother or sister, or the child of the brother or sister. The case of Estate of Bickert can be distinguished from the case at bar. In Bickert, the proviso which directed that gifts to siblings lapse and go back to the residuary estate applied. Here, the gift was to a child, and the proviso doesn't apply. Therefore, since because of filing the disclaimer Sam is considered deceased, the anti-lapse statute will apply and his half (30,000) will go to his two children per stirpes. Brian and Colleen will each get \$15,000. Dee will retain her \$30,000 because the facts indicate she is alive and has not disclaimed.

3. Cash and other personal property

Since Mr. Jones' will did not contain a residuary clause, the items not specifically mentioned in his will, namely the remaining cash and personal property, cannot be distributed under that document. According to 20 Pa.C.S.A. section 2101(a), any part of a decedent's estate not disposed of by will passes under the statutory provisions of intestacy outlined in that chapter. Because all of the decedent's children are also the children of his surviving spouse section 2102(3) will control this situation. Furthermore, as Mr. Jones did leave a will, albeit an incomplete one, this matter presents a partial intestacy situation addressed by section 2102(5) of 20 Pa.C.S.A. When read together, these two sections provide that the first \$30,000 and one-half of the remainder of the estate will pass to the surviving spouse, but the \$30,000 requirement of section 2102(3) is satisfied by the receipt of any property under a will in a partial intestacy situation. Since Wilma received Whiteacre under Mr. Jones' will, her first \$30,000 requirement has been satisfied. Therefore she is entitled to 1/2 of the property not provided for under the will.

The remaining property not disposed of by Mr. Jones' will passes to his children, Sam and Dee. Section 2103(1) of 20 Pa.C.S.A. indicates that the share of the estate to which the surviving spouse is not entitled passes to decedent's issue first, followed by other relatives. Since Mr. Jones is survived by his children, they are entitled to the property not taken by their mother. 20 Pa.C.S.A. section 2104(2) outlines the manner in which the distribution should be made to Sam and Dee. Since the siblings enjoy the same degree of consanguinity, they are entitled to equal shares under this statute. Thus, the 1/2

of the property not taken by their mother, Wilma, is divided equally amongst Sam and Dee.

As with the ABC Company stock, Sam's disclaimer has no effect on his inheritance of the cash and other personal property. This gift was not addressed by the disclaimer therefore the disclaimer does not apply to the gift.

The property not included in Mr. Jones' will therefore should be distributed \$60,000 to Wilma and \$30,000 each to Sam and Dee.

As described above, the ABC Company stock should be distributed such that Wilma, Sam & Dee will receive 300 shares of ABC Company Stock; the Certificates of Deposit should be distributed \$30,000 to Dee, and \$15,000 each to Brian and Colleen; and finally the cash and other personal property should be distributed \$60,000 to Wilma and \$30,000 each to Sam and Dee.

Essay Question 1

1.) Able will need to include the stolen jewelry on Trisha's 2005 tax return as income, and Able will need to take a deduction for jewelry returned on Trisha's 2006 tax return.

The issue here is whether stolen items (jewelry) are included as income on the tax return of the person who stole the items.

Under the IRS tax code property or income acquired even as a result of illegal activities shall be reported as income on a taxpayers tax return. A deduction on a subsequent year's tax return is allowed for property that is returned.

Here Trisha's 2005 tax return would need to include as income the value of the jewelry which she embezzled during 2005.

Here Trisha's 2006 tax return could include as a deduction the value of the jewelry that was returned in 2006.

Able will need to include the jewelry that Trisha embezzled during 2005 on her 2005 tax return and Able could take a deduction for the jewelry returned in 2006 on her 2006 tax return.

2.) Able violated the rules of professional conduct (RPC) when he coached Trisha on how to prepare wills but he did not violate the RPC when he gave seminars to Bank's Trust employees.

Under the RPC an attorney is not permitted to aid in the unauthorized practice of law, but may give general guidance for non-lawyers as long as no specific legal advice is given.

Here, Able's coaching was a violation of the RPC because Able knowing of Trisha's sideline in preparing wills coached her on how to prepare wills.

Here Able did not violate the RPC by giving general information seminars to bank employees, as long as no specific legal advice was given by Able to the bank's employees.

Able did violate the RPC when he coached Trisha on how to draft wills, because he was assisting the unauthorized practice of law.

Able did not violate the RPC when he gave general informational seminars to bank's employees.

3.) Trisha's list is not admissible to probate because it postdates the will.

Where a valid will exists, property of the decedent is distributed according to the terms of that will. A will may refer to and incorporate by reference an external document if that document is clearly identified in the will and in existence at the time the will is executed.

Here, Trisha executed her will in 1/2004 but did not prepare the list until 7/1/2004, therefore the list is not admissible into probate, even though the list is clearly identified in the will as describing the jewelry and was located in Trisha's personal desk at home. Since the list is unsigned, it is not admissible as a codicil (an amendment to a will).

4.) Yes, the jewelry list would be admissible to probate as a codicil. In Pennsylvania, wills or codicils can be handwritten (Holographic) and executed without witnesses or acknowledgement. The testator must sign the will or codicil at the logical end of the will or codicil. Witnesses are not needed in Pennsylvania either for a will or codicil to be valid. If two witnesses are used in PA the will becomes self proving and there would be no need to prove the signature of the testator when you go to probate the will.

Here, since Trisha signed the jewelry list it would be admissible for probate in PA because you do not need two witnesses to make a will or codicil valid. Here, when the codicil is admitted to probate the executor would need to prove that the signature on the codicil is Trisha's.

Therefore, Trisha's jewelry list would be admissible to probate.

Essay Question 2

1.) Al may be impeached by his prior convictions for robbery but not his intoxicated and disorderly behavior at the strip club.

Prior crimes involving falsity or dishonesty are admissible to impeach a witness who testifies. A conviction for robbery is a crime that involves dishonesty because it involves theft by force and theft is dishonest. Additionally, although the convictions were likely in 1998, convictions usually will not be excluded unless they were at least 10 year earlier. The robbery convictions will be admitted for impeachment.

The intoxicated and disorderly behavior at the strip club will not be admitted for impeachment purposes because Pennsylvania does not allow evidence of prior bad acts to impeach a witness. In federal court this would be admissible impeachment evidence.

The court will likely allow the robbery convictions to be used for impeachment but not the intoxicated and disorderly behavior at the strip clubs.

2.) The court should grant the divorce.

Darla filed a divorce complaint based on indignities. This is a fault ground for divorce that requires that the party against whom divorce is sought treated the one seeking divorce in a way that made life intolerable. Since Al frequented strip clubs and “socialized” with the dancers, and was publicly intoxicated and many of Darla’s friends and the public know about it, the court should hold this behavior made life for Darla intolerable and grant the divorce complaint based on the fault grounds of indignities.

There is no indication in the facts of any defense on Al’s behalf such as condonation (knowledge of the behavior, forgiveness and resumption of marital relations), justification, consent, recrimination, insanity, provocation, connivance, or collusion. Thus, again without a defense the complaint should be granted in favor of Darla based on Al’s behavior constituting indignities.

3.) Al and Darla should be charged with receiving stolen property and conspiracy. Al should also be charged with terroristic threats or harassment.

First, Al and Darla should be charged with receiving stolen property which is defined as receiving, retaining, or disposing of property known or believed to be stolen unless the intent to return it to the owner existed. Al knew the property was stolen because Bill told him he had obtained it in burglaries. Al took it from its hiding place (no theft occurred because Bill gave him permission) retained and disposed of it over the next two years by hiding it in his bedroom and spending it on household expenses. Darla is guilty of the same behavior in retaining and disposing of it and since Al told her the truth about its source she knew it was stolen property.

Both Al & Darla can also be charged with conspiracy because with intent of facilitating a crime they agreed with each other to commit a crime. With intent of facilitating the receipt of stolen property they agreed to commit the crime and retained and disposed of the money.

Al can be charged with terroristic threats for directly or indirectly communicating threats to another with intent of terrorizing them. At the Courthouse when Al told Wiley to tell Darla she would not live to see her next birthday if she did not withdraw her complaint he indirectly communicated a threat to Darla with the intent of terrorizing her.

Al and Darla can be charged with receiving stolen property and conspiracy to receive it since they conspired in retaining and disposing of it. Al can further be charged with terroristic threats.

3.) Wiley has violated the Rules of Professional Conduct in both cases. A contingent fee agreement must be in writing and such an agreement cannot go against public policy. Such agreements are not proper in divorce proceedings due to the nature of the divorce. Courts generally disfavor any act that would be contrary to resolving the proceeding in an equitable way. The fee agreement gives Wiley a vested interest in the outcome of the divorce proceeding, thus Wiley would be inclined to push Darla. Such an agreement is contrary to public policy.

The fee agreement for the criminal charges is also improper. First, the agreement is for the criminal charges, yet Wiley would be paid from the marital property settlement. If the divorce results in no settlement for Wiley, he would not get paid. Thus, Wiley's representation of Darla is compromised by his interest in the divorce proceeding. Second, contingency fee agreements in criminal cases are not permitted in Pennsylvania as they are also against public policy.

Essay Question 3

1.) Mike can successfully file a claim of false imprisonment against Larry for locking Mike in his shed.

In order to assert a claim of false imprisonment, an individual must show that he was (1) intentionally confined in a space; (2) that the defendant caused the confinement; (3) the plaintiff had no feasible or reasonable way of escaping from the space; and (4) plaintiff was conscious of the confinement or harmed by it.

In this case, Larry intentionally locked his neighbor Mike inside his shed. Under the facts, Larry intentionally locked Mike inside the shed, knowing there was no other way for Mike to escape in revenge for Mike leaving grass clippings and debris on Larry's property. Larry was the direct cause of Mike's confinement. The facts show that there was no other feasible way for Mike to get out of the shed. Mike was certainly aware of the confinement as shown by Mike's screaming to be let out and his beating the walls for eight hours. Mike was also likely harmed by the imprisonment as there is no evidence of Mike's access to food or water during the eight hour period.

Accordingly, Mike will successfully assert all the elements of false imprisonment and be able to assert a claim of false imprisonment against Larry.

Mike may also have a claim against Larry for trespass to land. Trespass to land occurs where a person enters on the land of another without permission or privilege. Here Larry entered Mike's property clearly without Mike's permission. He knew it was Mike's property because they were adjacent property owners for years and because the shed belonged to Mike and was located on Mike's property. He was not invited on the property by Mike, nor did he have permission to enter.

Mike would likely be successful in his tort actions for false imprisonment and trespass against Larry.

2.) Larry should file a claim for battery and a claim for assault against Mike for his actions occurring on and after July 4, 2005.

Assault is either (1) an attempted battery or (2) the intentional creation of fear or apprehension of immediate harmful or offensive contact. Mere threats and words are not enough to constitute assault; however, they will be sufficient if coupled with an act.

Mike committed an assault on Larry when he ran toward him with a chainsaw and threatened him. Although Mike's threat of "I'll trim you from limb to limb" would normally not be sufficient for an assault, this threat coupled with the fact that Mike ran toward Larry with a chainsaw that was on is an act sufficient for assault. It is apparent that Larry had a fear or apprehension of immediate harmful or offensive contact because he ran away fearing for his life.

Therefore, Larry should file a claim for assault and will be successful.

Larry may also sue Mike for battery based on the incident with the hole. Battery is the intentional harmful or offensive touching of another. The touching doesn't have to occur through one body part touching the body part of another. It may be accomplished through other instrumentalities. Here, Mike's digging and then camouflaging a hole which he then led Larry over would suffice. The contact would have been offensive to a reasonable person and Larry actually suffered an injury because of it, which will make his proof of damages simpler.

Again Mike has no defenses. He invited Larry onto his land and not only did he not warn Larry of the hidden, artificial danger, he lead him right to it.

3.) Mike should challenge by preliminary objection to "improper venue". Venue is proper where the defendant could be served, where the cause of action arose, or transactions or occurrences occurred giving rise to the cause of action. PA Rules of Civil Procedure allow improper venue as a preliminary objection. In fact it is deemed waived if not plead in defendant's responsive pleading.

Mike could be served at his domicile in C County and all actions arose and transpired in C County. D County has no contacts with this case, therefore D Court should transfer to a proper county, that being C County. Mike will prevail.

Essay Question 4

1.) News could only remove the case to the U.S. district court in Pennsylvania if jurisdiction would be proper in the U.S. district court in Pennsylvania. There are two ways to obtain jurisdiction in a federal court. The first is if the subject matter relates to a federal question. The second is diversity of citizenship jurisdiction. Regarding the first way, the claim must be related to a federal question, for example, a patent case or an antitrust case, to obtain subject matter jurisdiction. In this case, the cause of action was defamation under Pennsylvania Law, so there is no federal question. Regarding the second way, to obtain diversity of citizenship jurisdiction, each plaintiff must have a different citizenship from each defendant. In this case, Michelle has citizenship in Pennsylvania since she is the mayor of B Borough. If either Dave or News has citizenship in Pennsylvania, then diversity of citizenship would fail. Dave has citizenship in Pennsylvania, since the facts indicate that he is from B Borough. Thus, the case could

not be removed to the federal court. Note also the citizenship of News, is State J, where it is incorporated and where its principle place of business is located. Moreover, diversity of citizenship requires an amount in controversy greater than \$75,000. This is met in this case. But, as discussed above, the case could not be moved into federal court without separating the claims against Dave and News.

2a.) News should defend the defamation action under PA law based on the privilege to republish the accounts of official government proceedings. Defamation is defined as a false statement of or concerning the plaintiff that is published and causes harm to the plaintiff. PA law provides for a privilege to republish verbatim the proceedings of official government proceedings. Here, the reporter for News attended a meeting of the Borough Council where the alleged defamatory statements were made. The article published by News accurately reported verbatim Dave's statements as well as the subsequent actions of the Borough Council.

2b.) Dave and News could assert defenses that neither acted with the required malice in making the alleged defamation statements. Under the First Amendment of the U.S. Constitution in matters concerning a public official, a plaintiff must prove that not only did the defamation occur but that the defendant acted with malice. Malice is defined as knowledge of falsity or the reckless disregard for falsity. Here, Michelle is the mayor and the alleged acts related to Michelle's actions as mayor. This is clearly a matter of public concern. Here, no facts indicate News had knowledge of the falsity or acted recklessly in accurately reporting the statements made. As for Dave, the facts indicate that he misunderstood the information in the report and mistakenly assumed Michelle made the trip. He did not however make a further investigation of the expenditures. This may be negligent but as this is a matter involving a public official, at least recklessness must be found.

2c.) The court may rule against a summary judgment for Dave but it should find a partial summary judgment for News but it is in the courts discretion. The issue is whether a court would sustain a motion for summary judgment in the matter.

Under the law, a finding of summary judgment requires proof, that there is no genuine issue of material fact; the motion is supported by affidavits and deposition testimony establishing that there is no genuine issue of material fact (not just based on the pleadings); and the moving party should get a judgment as a matter of law. The court will review the evidence in a light favorable to the non-moving party. The court may grant a partial summary judgment as well in its discretion.

As for Dave, There may be a genuine issue as to a material fact as to whether Dave acted with reckless disregard to the truth about whether Michelle had actually traveled to Las Vegas and the using of borough funds. Because he did not investigate the truth of the matter he was asserting adequately or accurately, the court in reviewing the evidence in a light most favorable to the non-moving party, could find there is a genuine issue of material fact in dispute. Despite the support of affidavits and deposition

testimony, the facts still leave an issue as to Dave's conduct and thus he, the moving party should not get a judgment as a matter of law.

However, it could be found the News' motion for a summary judgment will be granted (thus a partial summary judgment) because there is no real dispute as to a genuine issue of material fact. Because News was just reporting on a public meeting and the occurrences therein, and News was reporting verbatim believing in the truthfulness of the report, there may be no genuine issue of material fact for the court to review and News will be granted a partial summary judgment. However, this is in the court's discretion and must be considered in a light most favorable to Michelle, the non-moving party.

Essay Question 5

1.) Ann will prevail in her breach of contract claim against Brewery. This case involved a unilateral contract. Unilateral contracts occur when the offeror makes an offer that can be accepted by full performance. Unilateral contracts usually occur in prize and reward situations. Acceptance of a unilateral offer consists of knowing the offer exists and acting in full performance of the offeror's request.

In this case, Ann may have gone fishing in order to socialize with friends, but her initial intent is inconsequential. As soon as Ann felt the fish bite her hook, one of her friends told her about the Big Bass contest and prize. Therefore, before Ann completed her acceptance by reeling in and actually catching the fish, Ann knew of the Big Bass contest. Ann knew of the unilateral offer. Ann examined the fish for the tag and presented it to Brewery.

Brewery's offer required no formal entry. The offer was that who caught Big Bass on hook and line and presented it to Brewery would be entitled to \$5,000. Ann caught Big Bass on hook and line and presented it to Brewery, thus accepting its offer and unilateral contract. Brewery refused to pay her because she was on a social outing and not participating in the contest even though there was no formal entry required.

Brewery's refusal to pay Ann the \$5,000 guaranteed in the unilateral contract constitutes a breach.

2.) Ann will prevail in the declaratory judgment because she obtained an easement by prescription on the dirt road. An easement is a right to use and enjoy someone else's property. In PA to obtain an easement by prescription one has to continuously use or occupy the part of land where the easement is located for the statutory period of 21 years openly and notoriously, hostile to the true owner and the use

has to be “actual”. For parties in privity the statutory period may be achieved by “tacking”, which means to accumulate the complete period of use among the successive owners.

Ann’s use of the dirt road is continuously as given in the fact pattern and lasted over 23 years, which is longer than the statutory period, by “tacking”, since Ann’s parents and Ann cumulatively used the road for that period. Bob’s sign did not actually stop the use in 2001.

The use is open and notorious, since everyone can see it. It is hostile to Bob’s ownership, since Bob is the true owner and never permitted the use explicitly. (in fact he wanted to stop the use by “no trespassing” sign.)

And it is actual use since Ann and her parents are using it as a normal owner would use. Therefore, Bob’s barrier should be removed since Ann already acquired an easement in the dirt road by prescription.

3.) Bob will prevail in his action for an injunction against Ann & B&B Inc. Once an easement is established, the holder may not unreasonably exceed the scope of the easement. Here, the easement was established by prescription and is therefore limited to the use that has been made of it for the 21 years. While Ann and her parents occupied Blackacre and acquired the easement on Whiteacre, they were only using it for ingress & egress to a single family house. Ann’s change in the width of the easement and the frequency and nature of the vehicles using the easement is outside the reasonable scope of the easement and places an unreasonable burden on Whiteacre. Bob is entitled to an injunction to stop the interference with his use and enjoyment of his land.

4.) Carol is entitled to specific performance of the oral contract for sale of Whiteacre based on the doctrine of part performance. Land sale contracts are subject to the statute of frauds and must be in writing. However, a contract for the sale of land may be taken out of the statute of frauds through the doctrine of part performance. An oral contract for the sale of land may be specifically enforced if the following requirements are met: 1.) full or partial payment; 2.) buyer took possession of the land and; 3.) buyer made improvements to the land. Here Carol has performed all 3 of these. She has moved onto the land, thus taking possession. She has made repairs and additions to the property. Also, she has paid the delinquencies which may be considered part of the contract price. The contract is enforceable. Land is always considered unique and therefore specific performance is the appropriate remedy.

Essay Question 6

Ed should assert a claim for breach of fiduciary duties owed in a close corporation, as a well as a breach of duty of loyalty claim. Owners of a close corporation have particular fiduciary duties owed to each other. Here AC appears to be a close corporation with only three shareholders who are also directors. Thus each shareholder owes a heightened fiduciary duty to the other shareholders. Here Fred and George’s

action of squeezing Ed out of his director's position based on issues of vengeance breach that fiduciary duty. This act was not done in good faith with the best interest of the company in mind but was done for personal spite. Thus in voting Ed out of his director's position with no legitimate business reason they have breached their fiduciary duty to him as a shareholder in their close corporation.

Further they have breached their duty of loyalty to AC (mainly to Ed as the only other shareholder) by conducting a conflicted transaction when doubling the price that they as directors of PI charge to AC. As they are on both sides of this transaction as directors in both corporations, their conflicted transaction must be fair, disclosed, and ratified by a majority of disinterested directors or unaffected shareholders. Here their conflicted action was not at all fair as they doubled the price they charged for paint to AC in order to increase their own profit as directors of PI. Thus they have breached their fiduciary duties owed in a close corporation and breached their duty of loyalty as well. Ed as the aggrieved shareholder should bring these claims against Fred and George.

2.) AC will be required to deliver the stock to the bank. A stock transfer restriction such as, rights of first refusal in stock have been upheld. If the right of first refusal is valid it can be enforced except against a bona fide transferee who took without notice of the restriction. A transferee would be put on notice if the stock certificate itself contained the restriction on transferability in the legend or if it had actual awareness. Additionally, here the bank might have been put on notice if the articles or the bylaws contained any references to the right of first refusal. However, the facts state no such reference was made in the articles or the bylaws. The agreement was the only thing that contained notice of the right of first refusal. The bank was not given a copy of this agreement, therefore, in light of all the facts the bank did not have notice.

The bank paid value for the shares because it gave a loan to Ed in exchange for him pledging the stocks as collateral.

Although, the right of first refusal might normally be enforceable it will not be enforceable against the bank in this case since it paid value and had no notice of the restriction. AC will be required to deliver the shares to the bank.

3.) AC is relieved from delivery of the stain to Wally. Here there is an issue of impossibility. For the seller's performance to be excused the goods must be unique, identified to the contract at the time, destroyed by no fault of buyer or seller and the risk of loss was on the seller. Here this is the last 1,000 gallons of stain, the facts show the goods were identified to the contract and held for Wally. AC agreed to store the stain at their risk and the lightning strike was not the fault of AC or Wally, thus all of the conditions are met for excuse of the seller's performance based on commercial impossibility. Wally thus has no actionable claim for breach of contract but Wally will get his money returned as restitution or to avoid unjust enrichment.

4.) Wally's brother can assert a claim for breach of an express warranty under the code. Express warranties are affirmations of quality or performance which come from

the mouth of the seller. They need not be expressed as terms of warranties, but need only be part of the “basis of the bargain”. Express warranties become the “basis for the bargain” when the buyer relies on them as reasons for buying this particular product. If the statements are those which would entice the buyer to purchase, they are part of the basis. The assertions that the exterior would be safe in “a non skid condition” and “safe for walking in all weather condition” are express warranties. Wally was looking for a sealant that wouldn’t skid, that’s what the salesman showed him, and that’s what he bought. A breach of warranty claim for Wally’s brother will lie against AC for the defective product.

AC’s claim that there is lack of privity between Wally’s brother and AC and thus Wally’s brother cannot recover on the contract will fail. In Pennsylvania the code provides that privity will extend to members of Wally’s family or his guests, as long as it is reasonable to expect that such person may be affected by the goods. Here, the injured party was his brother, and the injury took place on his deck, with a product regularly used for household purposes, ie. making the deck safe.