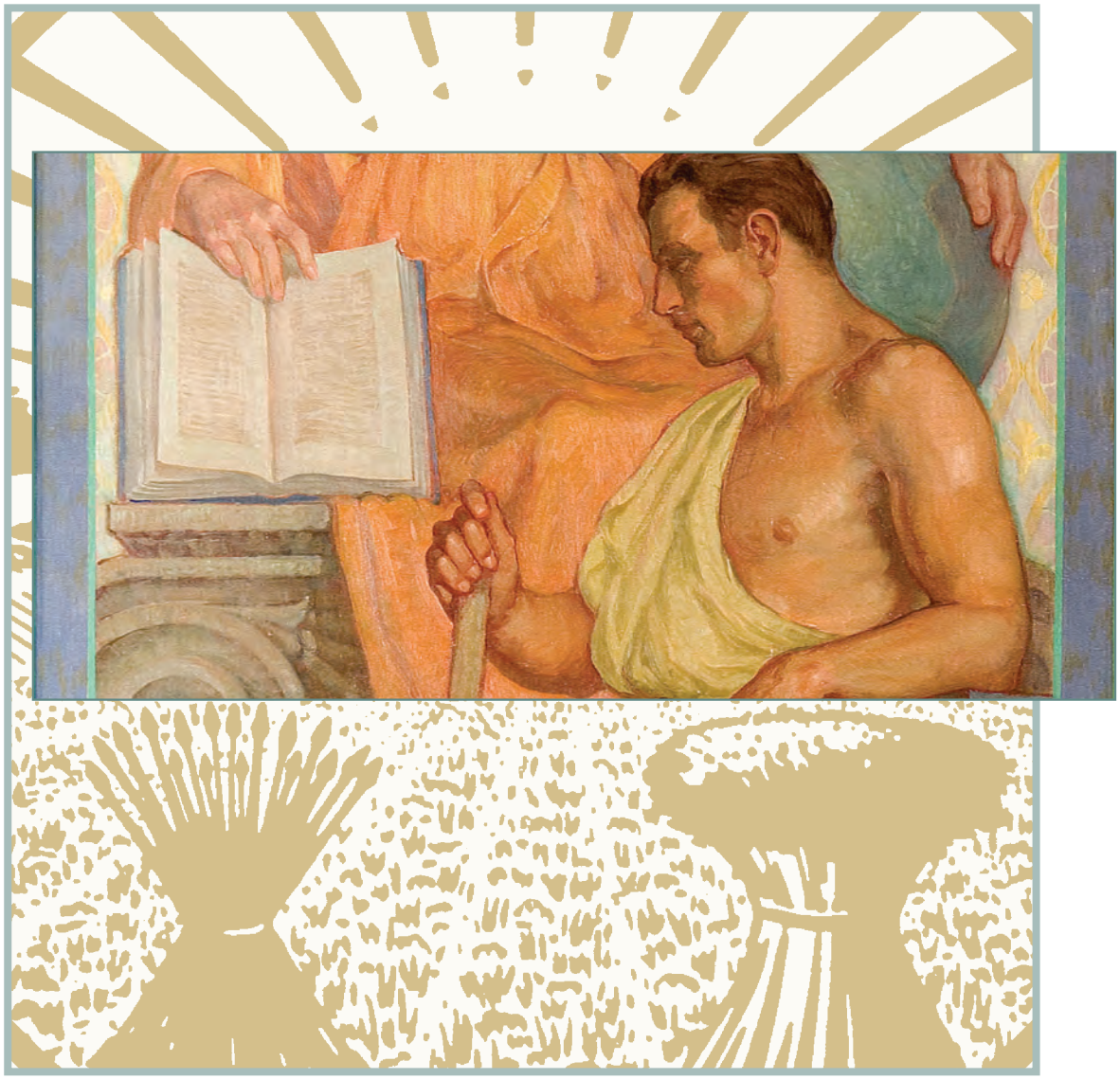
THE SUPREME COURT *of* OHIO

February 2016 Ohio Bar Examination

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers



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FEBRUARY 2016 OHIO BAR EXAMINATION

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OHIO BAR EXAMINATION

FEBRUARY 2016 OHIO BAR EXAMINATION

Essay Questions and Selected Answers

MPT Summaries and Selected Answers

The February 2016 Ohio Bar Examination contained 12 essay questions, presented to the applicants in sets of two. Applicants were given one hour to answer both questions in a set. The length of each answer was restricted to the front and back of an answer sheet.

The exam also contained two Multistate Performance Test (MPT) items. These items were prepared by the National Conference of Bar Examiners (NCBE). Applicants were given 90 minutes to answer each MPT item.

The following pages contain the essay questions given during the February 2016 exam, along with the NCBE's summaries of the two MPT items given on the exam. This booklet also contains some actual applicant answers to the essay and MPT questions.

The essay and MPT answers published in this booklet merely illustrate above-average performance by their authors and, therefore, are not necessarily complete or correct in every respect. They were written by applicants who passed the exam and consented to the publication of their answers. See Gov.Bar R. I, Sec. 5(C). The answers selected for publication have been transcribed as written by the applicants. To facilitate review of the answers, the bar examiners may have made minor changes in spelling, punctuation, and grammar to some of the answers.

Copies of the complete February 2016 MPTs and their corresponding point sheets are available from the NCBE. Check the NCBE's website at ncbex.org for information about ordering.

QUESTION 1

In response to several drunken driving incidents, the City of Green enacted an ordinance banning the sale and consumption of alcohol within the city limits. The ordinance has no exceptions. Green Church has been located within the city limits for more than 100 years. Sacramental consumption of alcohol is a widely accepted and integral part of the Green Church mass. Because of the ordinance, Green Church is prohibited from holding services that include consumption of the sacramental alcohol within the city limits.

The City of Blue has enacted an ordinance banning the sale and consumption of alcohol in a designated area of the city that has been the site of several drunken driving incidents. The only building located in the area subject to the alcohol ban is Blue Church, which is the only church in the City of Blue. Blue Church also considers sacramental consumption of alcohol as a widely accepted and integral part of its mass. In addition to holding mass in this building, Blue Church also holds wedding receptions and other events during which alcohol is consumed. As a result of the ordinance, Blue Church is effectively prohibited from holding services that include consumption of sacramental alcohol on church property.

The State of Franklin has enacted the following laws:

- A law authorizing a two-minute silent period at the start of each school day, which is to be used for meditation or voluntary prayer. The law states: "At the commencement of the first class of each day in all grades in all public schools, the classroom teacher may announce that a period of silence not to exceed two minutes in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in." The law was passed in response to a U.S. Supreme Court decision striking down a Franklin state law authorizing the reading of a state composed prayer at the start of each school day.
- A law creating a tuition voucher program where any student in kindergarten through 8th grade who is currently enrolled in a failing public school system under state control may receive a tuition voucher to partially offset the cost of attending another participating public or private school. While less than 10 percent of eligible students have taken advantage of the tuition voucher program, of those students, more than 95 percent use the vouchers to enroll in Catholic schools.

Both the Green and Blue ordinances, as well as the Franklin state laws have been challenged as violative of the First Amendment of the United States Constitution by parties who have standing to challenge the ordinances and laws.

How will the Court likely rule in each of the challenges? Explain your answers fully.

City of Green: The court will likely uphold the city's ordinance. The issue at hand is whether the city's ordinance violates the First Amendment of the U.S. Constitution (incorporated through the Fourteenth Amendment), which guarantees the free exercise of religion. The First Amendment prohibits the government from enacting any law that interferes with the free exercise of religion. However, laws of general applicability are constitutional so long as the burden that the law places on the free exercise of religion is incidental to the law, which otherwise has a neutral purpose. In this case, the city, which is responding to several drunken driving incidents, is banning the sale and consumption of alcohol entirely. The law is not targeted at a particular religion or the church. Instead, the law, which is otherwise neutral, only places an incidental burden on religion. As a result, the ordinance is constitutional.

City of Blue: The court will likely strike down the city's ordinance. The issue in this case is also whether the city's ordinance violates the First Amendment of the U.S Constitution. As with the City of Green's ordinance, this ordinance deals with the free exercise of religion. However, unlike in the City of Green's ordinance, the burden placed on Blue Church cannot be said to be merely incidental to the general applicability of the law. In this case, the only building located within the area that is subject to the ban is Blue Church. As a result, only religion is affected by the ordinance. Thus, although on its face the law is generally applicable to all conduct, only religious conduct is actually being regulated. As a result, this ordinance violates the free-exercise clause.

Silent Period: The court will likely strike down the Franklin statute authorizing a two-minute silent period. The issue at hand is whether the law authorizing the two-minute silent period at the start of each school day violates the Establishment Clause of the First Amendment. The Establishment Clause provides that the government will not pass any law respecting the establishment of any religion. A law that deals with the Establishment Clause is subject to the Lemon test. Such a law will not violate the Establishment Clause if it has a secular purpose, its primary effect is neither to advance nor inhibit religion, and it does not result in excessive government entanglement in religion. In this case, the statute violates all three prongs of the Lemon test. The law has a religious purpose, as it was passed in response to the invalidating of the law authorizing reading of a prayer. This law is merely meant to take that law's place. It also has a primary effect to advance religion by encouraging "voluntary prayer." Finally, it causes excessive entanglement by encouraging prayer and permitting the teacher (a state actor) from requiring such silent period and not permitting other activities. As a result, the law is unconstitutional.

Tuition Voucher Program: The court will likely uphold the tuition voucher program. The issue here is also whether the law violates the Establishment Clause. Thus, the law will be subject to the Lemon test, which provides that a law will not violate the Establishment Clause if it has a secular purpose, its primary effect is neither to advance nor inhibit religion, and it does not result in excessive government entanglement in religion. In this case, the law has the secular purpose of assisting poor children in attending high-quality schools. The primary effect is to cause high-quality education. It does not result in excessive entanglement because families decide the schools the children will attend, not the state. Further, the Supreme Court has upheld such voucher programs as not being violative of the Establishment Clause. Thus, this program is constitutional.

QUESTION 2

Scenario 1: Associate of an Ohio law firm (Firm) worked frequently with Paralegal, an employee of the legal department of Client, one of Firm's regular clients. Over time, Associate and Paralegal forged a close friendship. Recently they went out for drinks after work and ended up having sex and sharing confidences, including Paralegal's revelation that Client instructed him to hide and withhold certain documents that are unfavorable to Client's case.

Associate disclosed to Partner, her supervisor at Firm, both her relationship with Paralegal and that Client was intentionally hiding and withholding documents. Partner instructed her to disregard anything she was told by Paralegal, that her duty of loyalty to Client requires her to maintain its confidences and secrets, and that if she revealed her sexual relations with Paralegal, she might lose her law license.

Scenario 2: Novice landed a coveted job in the Anytown, Ohio, municipal prosecutor's office. At orientation he learned that the office has an established and published policy of providing "open discovery" in every criminal or traffic case prosecuted in the municipal court. On its website and by written response to all requests for discovery in criminal and traffic cases, the prosecutor's office represents to defense attorneys that it will provide all reports and any and all written or recorded materials available to the prosecutor at the first pretrial or, at the latest, 30 days before trial.

After a few weeks on the job, Novice discovered that the chief of the Anytown police department (Chief) has directed his officers to not turn over to the prosecutor's office any exculpatory evidence before the first day of trial, so the prosecutor "will not have it to disclose" to the public defender and/or private defense attorneys. Novice also learned that his supervising attorney, Supervisor, is aware of Chief's direction.

The Anytown Municipal Court has a firm policy, memorialized in a court order, of not permitting plea bargains or any reductions or dismissals of charges unless approved by the court at least one week before trial. After six months on the job, Novice concluded that virtually all cases were resolved by pleas at pretrial and that the effect of Chief's policy is that no exculpatory police evidence is ever disclosed to the court or defense counsel at or before the pretrial. He is convinced that Chief's nondisclosure policy, with the knowledge of Supervisor, misrepresents to the court and defense counsel the "open discovery" policy of the prosecutor's office, denies defendants their constitutional rights, and causes injustice.

When Novice expressed his concerns to Supervisor, he was told that he was a rookie and should not criticize policies favorable to the office and established by older, more experienced officials. Further, Supervisor cautioned Novice to keep his thoughts to himself or risk losing his job.

Does the conduct of each of the lawyers described above (Associate, Partner, Novice, and Supervisor) violate any obligations and duties imposed on them by the Ohio Rules of Professional Conduct? Explain your answers fully.

You need not identify any of the Rules by specific number.

A

This question raises issues of ethics and professional responsibility and is thus governed by the Ohio Rules of Professional Conduct (RPC).

Scenario One

Associate

Associate violated the RPC in a number of ways. First, his sexual relationship with Paralegal was improper because Paralegal is considered Associate's client (or at least an agent of the client). Sexual relationships between attorneys and clients create a conflict of interest that cannot be waived. If Associate's sexual relationship with Paralegal began before the attorney-client relationship, it would not be an issue.

Second, Associate violated the RPC by not withdrawing from the representation when Paralegal indicated Client's intention to hide unfavorable documents. This is likely fraud and perhaps criminal. An attorney may not facilitate fraudulent or criminal activity by his client, and if the client insists, the attorney must withdraw from the representation. Further disclosure, to the court or other authorities, might also be required, depending on the client's conduct. A subordinate attorney is permitted to defer to his supervisor on ethical quandaries and is not responsible for the supervisor's actions so long as the supervisor's handling of the issue is reasonable. Here, Partner's handling of the issue is not reasonable, so Associate cannot simply say that the boss told him not to say anything. In fact, Associate may have a duty to report the misconduct of Partner.

Partner

Partner also violated the RPC. First, Partner violated the RPC by perpetuating the fraud committed by Client. As set forth above, an attorney must not commit a fraud on the court or assist a client in the commission of a crime.

Second, Partner violated the RPC by not withdrawing as counsel for Client once Paralegal revealed Client's fraudulent/criminal plans. Not only does Associate need to withdraw, the whole firm must withdraw.

Third, Partner violated the RPC by telling Associate not to report his relationship with Paralegal. Partner is required to report such misconduct to the authorities. Partner also should have taken responsibility for his subordinate employee and either ordered Associate to end the relationship or terminated Associate's employment. It should be noted that Associate's relationship with Paralegal doesn't necessarily mean Partner can't work with her, as the conflict in this context is personal to Associate and not imputed to Partner.

Scenario Two

Novice

Similar to the situation in Scenario One, if Supervisor's resolution of this ethical issue was arguably correct, Novice would probably be fine going along with Supervisor. However, here, Supervisor is not conducting himself properly, nor is his and Chief's justification that most cases end in plea deals going to help the situation. Novice was correct to bring his concerns to Supervisor, but once he realized that Supervisor insisted on violating the RPC, Novice had a duty to report Supervisor's misconduct to the appropriate authorities. Novice violated the RPC by not doing so.

Supervisor

Supervisor violated the RPC by turning a blind eye to the Police Department's nefarious activity. An attorney may not commit a fraud on the court, nor may an attorney intentionally misrepresent facts to opposing counsel. Furthermore, a public prosecutor has a heightened duty to engage in responsible and ethical prosecutorial conduct, which includes turning over exculpatory (Brady) evidence in a timely fashion. Supervisor seems to be skirting around this responsibility if not directly violating it. His blatant misrepresentation to the court is especially troubling.

Supervisor also committed an RPC violation by summarily shutting down Novice's attempt to raise his concerns. Supervisor is putting his own reputation before his ethical obligations, and his threat to Novice is inappropriate.

QUESTION 3

On a warm summer evening in Anytown, Ohio, Joe was home alone, sitting on the front porch of his house when he heard a loud bang from behind his house. Joe got up and ran around the house to the back yard and found Adam Arsonist (Adam) and his accomplice, Flame, throwing molotov cocktails into Joe's detached garage. Adam was still armed with a molotov cocktail and, when seeing Joe approach, turned to throw a firebomb at Joe's house. Joe pulled out his .44 Magnum and shot Adam in the chest. Joe then turned his attention to Flame and held him at gunpoint, threatening to shoot him too if he didn't get on the ground until the police arrived.

Because Joe's neighbor had called the police when Adam and Flame set Joe's garage on fire, a plainclothes police officer (Cop) was on the scene immediately and witnessed the shooting of Adam by Joe. With his gun drawn, Cop ordered Joe to drop his .44 and get on the ground. In response, Joe told the approaching unidentified stranger (Cop) that he was trespassing, ordered him to get off his property, and fired a warning shot from his .44 Magnum into the air to scare him and let him know he meant business. Upon hearing and witnessing the warning shot, Cop took dead aim at Joe and shot him in the chest, causing Joe to fall to the ground and drop his weapon. Joe was seriously injured from the gunshot wound to his chest and was knocked unconscious.

Flame was so scared from what he had just witnessed, he picked up Joe's gun, turned, and began to run away from the scene. Cop gave chase across the back yard and shot at Flame several times. One shot fired by Cop hit Flame in the back and dropped him, causing his eventual death.

Adam survived the shooting and was charged with arson of the garage and attempted arson of Joe's house. Adam was also charged with the aggravated murder of Flame.

Joe was charged with the felonious assault of Adam and aggravated menacing of Cop.

Cop was charged with felonious assault of Joe and aggravated murder of Flame.

What defenses, if any, should each defendant assert, and what is the likelihood of success on each defense? Explain your answers fully.

The answers printed in this booklet were selected because they were among the better answers written

Adam: With respect to arson of the garage, Adam should defend on the basis that an element of arson is that the structure be an occupied structure. Ohio has eliminated the requirement that the structure be occupied. Therefore, he is not likely to succeed on this defense.

With respect to the attempted arson of Joe's house, Adam should defend on the basis that he did not get dangerously close to the commission of the crime. However, in Ohio, the defendant need only take a substantial step toward the commission of the crime. The facts indicate that Adam turned to throw a firebomb at Joe's house, which is likely enough of a substantial step to be guilty of attempt. Thus, Adam is not likely to succeed on this defense.

With respect to the aggravated murder of Flame, Adam should defend on the basis that Cop killed Flame, not Adam. From the facts, it appears that the aggravated murder was murder during the commission of arson, one of the enumerated felonies permitting the aggravated murder charge. At common law, felony murder is murder during the commission of a dangerous felony. However, at common law, a co-felon could not be charged with felony murder of his co-felon. In Ohio, a felon may be charged with the murder of his co-felon under the felony murder doctrine. In addition, Ohio follows the proximate cause theory of felony murder, which means that the defendant may be guilty even if a third party commits the killing. Finally, the killing must be before the felon reaches a place of temporary safety. In this case, Adam is charged with the murder of his co-felon by a police officer while the officer was pursuing Flame immediately after the felony. Although Adam could not be convicted under these facts at common law, he can be in Ohio. Thus, his defense will not succeed.

Joe: With respect to the felonious assault charge, Joe should claim self-defense. A person is entitled to protect himself from injury using reasonable force. Deadly force may be used if the person reasonably fears death or great bodily harm. However, in Ohio, the person must retreat if retreat can be made safely before resorting to deadly force. In addition, deadly force may never be used to protect property. The firebomb was meant for Joe's house, in which case deadly force would not be available to Joe. But it could have easily been thrown at Joe. However, even if it were thrown at Joe, Joe would have to retreat if feasible. In this case, Joe was in his back yard and there is no evidence that retreat was unavailable. In addition, although one is not required to retreat within his own house, this privilege does not apply in the back yard. Thus, Joe likely could have retreated, and thus his claim for self-defense will likely fail.

With respect to the aggravated menacing charge, Joe should claim defense of property. A party may use reasonable force to defend property. Joe reasonably believed that Cop (who was plainclothes) was trespassing. He did not use any force directly against Cop. This would be permissible to defend the property. Thus, he is likely to succeed.

Cop: Cop should defend the assault on the basis of self-defense and defense of others. Cop is not likely to succeed on self-defense (as discussed above) because Joe fired into the air, not at Cop. Thus, Cop had no reason to fear death or great bodily harm. Defense of others allows a person to defend a third party who would otherwise be able to have the defense of self-defense. However, in Ohio, defense of others is not available if the person defended was the original aggressor, as is the case here.

Cop should defend the murder on the basis that he was attempting to capture a felon. A person may use reasonable force to attempt to capture an escaping felon. Although Flame had the gun, there is no evidence Cop had to use deadly force to stop Flame. Thus, this defense is likely to fail.

QUESTION 4

Mary and Sam are both residents of Anywhere, Ohio, and they entered into the following transactions.

A. Mary's Transactions: Mary owns a flower shop, which she operates as a sole proprietorship. On May 1, 2014, Mary borrowed $10,000 from Fred in order to buy a delivery van for her business, and the same day Mary signed a security agreement granting Fred a security interest in the van. On May 5, 2014, Fred filed a financing statement with the Ohio Secretary of State. Mary bought the van from a local car dealer, who issued a certificate of title showing Mary as the sole owner. Mary delivered the certificate of title to Fred for him to hold until the loan was repaid.

On June 1, 2014, Mary needed more capital to operate her business, so she borrowed $25,000 from First Bank. As part of her disclosure statement to First Bank, Mary fully disclosed the facts of her loan from Fred. First Bank approved the loan and obtained a signed security agreement in which Mary granted First Bank a security interest in "all of the equipment and receivables" of the flower shop. On June 20, 2014, First Bank filed a financing statement with the Ohio Secretary of State covering "all of the equipment and receivables of Mary's business." First Bank did not actually fund the loan until September 15, 2014. Due to the delay in funding by First Bank, and unbeknownst to First Bank, Mary got nervous and borrowed another $25,000 from Fred on July 1, 2014, at which time she signed a security agreement giving him a security interest in "all of the equipment and receivables of Mary's business." Fred filed a financing statement with the Ohio Secretary of State on July 15, 2014.

On January 1, 2015, Mary defaulted on all of her loans. Her business had assets consisting of the delivery van and $15,000 in receivables.

B. Sam's Transactions: Sam owns a hardware store. Due to increasing pricing pressure from the "big box" retail hardware stores, sales at Sam's store were declining steadily. On February 1, 2015, Sam borrowed $15,000 from Second Bank to try to keep his store afloat. Second Bank took a security interest in "all of Sam's inventory, equipment, and receivables." On February 15, 2015, Second Bank fully funded the loan and filed its financing statement with the Ohio Secretary of State.

On February 20, 2015, Lawns R Us, a manufacturer of expensive riding lawnmowers agreed to extend $37,000 credit to Sam for the purchase of 15 new lawnmowers. Sam signed a purchase money security agreement in favor of Lawns R Us, specifying the new mowers as collateral. On February 21, 2015, Lawns R Us filed a financing statement with the Ohio Secretary of State and placed a notice in the local newspaper that it had a lien on the mowers at Sam's store. Lawns R Us delivered the mowers to Sam on February 25, 2015.

On July 15, 2015, Sam defaulted on all of his loans. He has 12 of the new mowers left in inventory.

With respect to the following priority disputes, who should prevail and why?

1. *Fred v. First Bank* over the delivery van.
2. *Fred v. First Bank* over Mary's receivables.
3. *Lawns R Us v. Second Bank* over Sam's remaining inventory of mowers.

Explain your answers fully.

The answers printed in this booklet were selected because they were among the better answers written

For a security interest to attach, the debtor must sign an authenticated security agreement, the creditor must give a value, and the debtor must acquire rights in the collateral. Following attachment, a security interest can be perfected in one of five ways depending on the type of collateral.

1. Fred (F) v. First Bank (FB): Delivery Van

F has priority to the delivery van because F and FB are both unperfected, but F's security interest attached first. In Ohio, vehicles may only be perfected by noting a lien on the vehicle's certificate of title. Neither creditor did so, so neither creditor is perfected.

F's security interest attached on May 1 when (1) Mary (M) signed a security agreement, (2) F gave value (the loan), and (3) M acquired the collateral (van). Although F filed a financing statement and possessed the van's certificate of title, as noted above, these would not serve to perfect F's interest.

FB's security interest did not attach until September 15. Although (1) M signed a security agreement on June 1 and (2) M had rights in the collateral at that time, FB did not give value until it funded the loan on September 15. FB filed a financing statement, but this would not perfect the interest in the van.

As between unperfected security interests, the first to attach has priority. F attached first, so F has priority as to the van.

2. F v. FB: Mary's Receivables

FB will have priority to M's receivables. As noted above, a security interest must be attached in order to be perfected. Although FB filed its financing statement on June 20, it did not give value (and thus did not fully attach its security interest) until September 15. At that time, FB obtained a perfected security interest.

F's security interest in M's receivables attached on July 1 when (1) F gave a loan, (2) M signed a security agreement, and (3) M already had an interest in the collateral. F perfected by filing on July 15. Thus, F perfected on July 15 and FB perfected on September 15.

Although F perfected before FB, as between perfected security interests, the first to file or perfect wins. Because FB filed first, it will have priority to the receivables.

3. Lawns R Us (L) v. Second Bank (SB): Mowers

SB has priority over L on Sam's (S) remaining mowers. On February 1, the first two elements of attachment for SB's security interest occurred. On February 15, SB completed attachment of its interest when it funded the loan and perfected its interest by filing a financing statement.

L attempted to obtain a seller purchase money security interest (PMSI) in S's mowers, but failed to do so. A supplier of inventory may acquire a seller PMSI in inventory (which gives super-priority over other security interests) if they (1) file a financing statement before delivery of the goods, and (2) send an authenticated notice to adverse creditors. Here, L properly filed its financing statement prior to delivery of the mowers, but rather than sending an authenticated notice to SB, it placed a notice in the newspaper. This does not satisfy the provisions of UCC Article 9, and L would not receive a seller PMSI in the mowers.

As a result, SB and L both have perfected security interests. SB perfected first and L failed to achieve PMSI super-priority, so SB has priority to the mowers.

QUESTION 5

Farmer owns and lives on a small farm in Eastern Ohio. Recently, Driller, a company specializing in deep injection shale mining, acquired ownership of and the mineral rights to the property adjacent to Farmer's property. Farmer became aware of Driller's plans and was worried about possible negative impacts to his property. The following events have occurred:

Driller sent an employee to survey its new property to prepare for the installation of a well. Mistaking Farmer's long driveway for an access road, Driller's employee drove up the driveway to Farmer's house. Seeing Driller's truck in his driveway, Farmer came out of the house and yelled at the employee to get off his property. Driller's employee immediately turned the truck around and left Farmer's property.

Driller needed a significant amount of water to conduct its drilling operations. There was a pond existing on Driller's property that was about half full. Driller pumped water into the pond and raised it to its highest level. That night, a heavy thunderstorm caused the pond to overflow and water flowed into Farmer's low-lying field, destroying a crop of soybeans.

When the well became operational, it generated regular loud noises that could be clearly heard in Farmer's nearby house, including at night. Farmer complained to Driller that his family could not sleep, but Driller replied that it was not economically feasible to run the well other than around the clock.

Finally, a few weeks after the well was in operation, a minor earthquake occurred in the area of the well. The earthquake rattled Farmer's house and caused damage in the form of broken windows and shattered dishes. State authorities determined that the earthquake was caused by Driller's injection of large volumes of liquid into the ground as part of the mining process.

Farmer intends to bring suit in the local common pleas court of general jurisdiction seeking damages for each of the four events that occurred. For purposes of your answer, you may assume that the lawsuit is proper in all procedural respects, and that Driller had obtained all of the necessary state and local permits needed to conduct its mining operation.

On what tort theories should Farmer base his claim for each of the events listed below? What must he prove to prevail on each? What damages (in general terms, not specific dollar amounts) can he recover if he prevails?

1. Driller's employee driving up his driveway?
2. The overflow from Driller's pond?
3. The noise generated by the operation of Driller's well?
4. The earthquake caused by Driller's injection of liquid into the ground?

Explain your answers fully.

A

1. Farmer has a successful claim for trespass to land against Driller's employee or Driller. The intentional tort of trespass to land is the intentional invasion by defendant of plaintiff's land. The invasion is all that is required to make out a successful case for this tort. Mistake of fact as to the ownership of the property is not a defense. Farmer need only prove that there was an invasion to his land.

Here, Driller's employee invaded Farmer's land when he drove up his driveway. Therefore, Farmer can succeed with his claim, but is likely to be awarded only nominal damages or damages for actual harm done to his property. Here, Driller immediately turned and left and, therefore, no actual damages were caused.

In addition, Farmer could sue Driller for the tort under a theory of respondeat superior. Under this doctrine, employers are liable for torts of their employees who are acting within the scope of their employment. Here, Driller's employee was on an errand to survey property for Driller, and thus was acting in the scope of employment when the trespass occurred.

2. Farmer also has a trespass to land action for the invasion of the water from Driller's pond. In addition to the elements stated above for trespass to land, a trespass need not be plaintiff's actual physical invasion of his or her person, but can be found where the plaintiff causes some other thing to enter onto plaintiff's land. Here, Driller's pond water entered onto Farmer's land. This caused a physical invasion and damaged Farmer's soybean crops. Driller will be liable for the actual damages – here, destruction of Farmer's crop of soybeans. It is possible that Driller could also be sued on a negligence theory if raising the water to its highest level was unreasonable and breached a duty owed to Farmer and other adjacent landowners.

3. Farmer can make out a claim of private nuisance. A nuisance is a substantial and unreasonable interference with the use or enjoyment of another's property. Substantial means that it is annoying to an average person in the community. Unreasonable means that the utility of defendant's actions are not greater than the injury caused to plaintiff. Here, Farmer's family is kept up all night and cannot sleep. A court will balance the equities to see if this harm is greater than that of Driller's profit loss if he were not running his well 24 hours a day. Because Farmer owned his small farmland first and Driller then bought the rights in the property next to Farmer, this goes toward a finding that Farmer's use and enjoyment is being interfered with. Not being able to sleep all night is significant. Also, the court will look to the profits generated and the harm that would be caused by issuing an injunction so that the well did not run all night. Farmer can likely get injunctive relief during at least some of the nighttime hours.

4. Farmer likely can make out a claim for an abnormally dangerous activity under a theory of strict liability. While it is unclear whether injecting liquid itself is abnormally dangerous, here it would be found as such because it has caused an earthquake. An abnormally dangerous activity is one which i) creates a foreseeable and highly significant risk of physical harm even where reasonable care is used and ii) is an activity that is not commonly engaged in.

Defendants are strictly liable for any harm caused by such activities. Here, injecting liquid is not commonly engaged in and is part of a mining process. Mining activities and blasting are typical examples of activities which qualify as abnormally dangerous. Here, the earthquake shattered Farmer's dishes and broke his windows, and State authorities did determine it was because of Driller's actions. Therefore, they are strictly liable to Farmer for the damages caused to his home and dishes.

QUESTION 6

Scenario 1: Amy died owing a $1,000 debt to Deserving Kid Charity (DKC), a non-profit entity supporting the needs of poor and dying children. Executor of Amy's Estate determined that there were insufficient estate funds to pay the outstanding debt. Executor emailed DKC, stating: "I will personally pay Amy's debt out of my own pocket next week because you guys are awesome." DKC seeks to enforce Executor's promise to pay.

Scenario 2: Earl told Grace that if she married him, he would give her $200,000 upon their marriage to pay off all her premarital debts. Induced thereby, Grace married Earl. However, Earl refused to give Grace the money to pay off her premarital debts. Grace now seeks to enforce Earl's promise to her.

Scenario 3: On February 1, 2016, Iggy agreed to sell, and Jane to buy, Iggy's house for $300,000, with a closing date of "no sooner" than February 5, 2017. On February 4, 2016, Jane called Iggy and said she no longer wanted the house. Iggy seeks to enforce his agreement with Jane.

Scenario 4: On Monday, Karl asked Lori to sell him a bag of trinkets for $400 on credit. Lori told Karl that she would not sell the goods to him because she did not believe he could pay the debt. Karl's sister Pegasus stepped in and said, "Give it to him and, if he doesn't pay you, I will." Induced thereby, Lori gave the goods to Karl.

On Tuesday, Karl asked Lori if she would sell him a second bag of trinkets for $500 on credit. Lori again said that she would not sell the goods to Karl because she did not believe that he could pay her back. Pegasus stepped in and said, "I will pay for the trinkets; just give them to him." Induced thereby, Lori gave the goods to Karl.

Neither Karl nor Pegasus ever paid the debts. Lori now seeks to enforce Pegasus' promises to pay Monday's $400 debt and Tuesday's $500 debt.

Scenario 5: Ronda entered into a verbal agreement with Sam to purchase Sam's puppy for $700. Ronda wanted to commit the deal to writing. However, Sam persuaded Ronda that no writing was necessary because, secretly, Sam was waiting for a higher offer from a different party. Sam later received a better offer from a different party and refused to sell the puppy to Ronda. Ronda seeks to enforce her agreement with Sam.

For each of the above scenarios, discuss whether there is compliance with the Statute of Frauds and the effect, if any, it has on each party's claim to enforce their contract(s). Discuss your answers fully.

A

The Statute of Frauds sets forth that certain contracts need to be in writing and signed by the party to be charged in order to be valid. Contracts made in anticipation of marriage, contracts that will take longer than a year to perform, contracts for the sale of land, contracts made by an executor of an estate in which they will personally pay for debt of decedent, contracts for the sale of goods $500 or more and suretyship contracts all must be in writing.

1: This is a contract involving **a promise by an executor of an estate to personally be liable for a debt of the estate**. This falls within the statute of frauds and must be in writing and signed by the party to be charged. Executor is the executor of Amy's estate and her estate has insufficient funds to pay for the $1000 debt that Amy had to Deserving Kid Charity. Executor's email promising to personally pay the debt from his own funds is a sufficient writing to satisfy the SOF. Assuming that Executor signed the email, this will be enforceable and Deserving Kid's Charity will be able to get the money from Executor.

2: This is a contract made in **anticipation of marriage** and needs to be in writing and signed by the party to be charged in order to be enforceable. Earl told Grace that he would give her $200,000 to pay off her debts if she married him. This promise induced Grace into marrying Earl. Unfortunately for Grace, this promise by Earl was not in writing nor was it signed by him. If she tries to collect on this promise, she will lose because Earl will use the SOF as a defense.

3: This is a **land sale contract** and needs to be in writing and signed by the party to be charged in order to be enforceable. A valid land sale contract also needs to have the parties' names, a description of the land, and the cost. A closing date is not necessary. Iggy and Jane entered into a contract for the sale of Iggy's house for $300,000 with a closing date of no sooner than February 5, 2017, more than a year later. This would be a valid land sale contract had it been in writing and signed by Jane. However, there is no evidence in the facts that this agreement was written or signed. When Iggy seeks to enforce this contract with Jane she will bring up the SOF as a defense and he will not be able to seek specific performance on the contract. Had there been more details here, such as reliance on the part of Iggy, he possibly could have sought a remedy through equity, but there is no evidence here of that.

4: Part of this is a **suretyship contract** and it needs to be in writing and signed by the party to be charged and the other a sale for goods over $500. A suretyship contract arises when a third party vows to take on the debt of another and pay for it in the event the original party cannot. Here, regarding the first $400 transaction, Pegasus is acting as the surety by telling Lori that she would pay for the trinkets if Karl didn't pay for them. This contract would need to be in writing and signed by Pegasus in order for Lori to collect the $400. However, the second scenario would not qualify as a surety. Here, the language by Pegasus is "I will pay for the trinkets; just give them to him." Pegasus is not taking on the debt of another. She is offering to pay for the trinkets. This would be a **sale of goods over $500**, however, and would still need to be in writing and signed by Pegasus in order for Lori to collect.

5: This is a contract for the **sale of goods in excess of $500** and would need to be in writing and signed by the party to be charged to be enforceable. An exception to this rule is if a party wrongfully induces the other party into believing that a written contract is not necessary. The puppy is $700 and this is a verbal agreement. Normally, Sam would be able to use the SOF as a defense for him not to have to go through with the contract, but not in this case, because Sam acted fraudulently in inducing Ronda to not enter into a written contract.

QUESTION 7

Officer and Detective, employees of the Anytown Police Department, were sent to investigate reports that a man, Suspect, was cultivating and selling marijuana from his home in an upscale neighborhood in Anytown, Ohio. They remained parked on the street outside Suspect's home for two hours, but saw no activity at or around Suspect's home. They saw a woman heading in their direction cross the street in violation of Anytown's jaywalking ordinance. Officer got out of the cruiser and stopped the woman, intending to issue her a jaywalking citation.

At the same time, Detective walked up to Suspect's front door and knocked, but no one answered. He could hear a dog barking loudly toward the back of the house, so he decided to try the back door. Detective walked up the driveway and came to the gate in the privacy fence that enclosed Suspect's back yard. Unable to see over or through the closed fence, Detective opened the unlocked gate and walked toward the back patio, which was surrounded by tall shrubs screening it from view. Detective went around the shrubs and stepped on the patio, intending to knock on the back door to see if anyone answered. At that moment, he saw several planters containing tall, leafy plants which, based on his many years of experience as a police detective, he believed were marijuana. When Detective knocked on the back door, Suspect answered. Detective arrested Suspect and seized the plants. Based on what he had discovered up to this point, Detective later obtained a warrant to search inside Suspect's home and seized additional evidence that Suspect was growing and selling marijuana from his home.

Meanwhile, Officer stopped the woman who had jaywalked. She was wearing shorts and a t-shirt, appropriate for the warm summer day that it was, and carrying a bag from a nearby fast food restaurant, Burger Place. In response to Officer's questions, she identified herself as Walker and showed him her driver's license. Within three or four minutes, Officer finished and handed her the citation.

As Walker started to walk away toward Suspect's home, Officer said, "Where are you headed?" Walker pointed to Suspect's house and said, "I'm taking some burgers I just bought over to my friend's house for lunch."

Now realizing that Walker was in the neighborhood to see Suspect and believing that she might be connected with his drug business, Officer asked Walker if he could verify that she had no weapons on her and, before she answered, he patted down her outer clothing, but felt nothing suspicious.

Officer asked if he could take a look in the Burger Place bag. Walker hesitated and reluctantly opened the bag, which contained large bundles of cash and several plastic baggies containing a leafy substance. Officer seized the bag and arrested Walker.

The plant matter seized from Suspect and Walker was later confirmed to be marijuana. Suspect and Walker have been charged with drug trafficking. They have each filed a motion to suppress evidence, asserting that the marijuana and other evidence detailed above was seized in violation of their Fourth Amendment rights.

1. How should the court rule on Suspect's motion to suppress the marijuana seized from his patio?

2. How should the court rule on Suspect's motion to suppress the evidence seized from inside his home?

3. How should the court rule on Walker's motion to suppress the evidence seized from the Burger Place bag?

Explain your answers fully.

You may assume that all conduct of Detective and Officer constituted "state action" and that Suspect and Walker each have standing to assert their respective motions.

The answers printed in this booklet were selected because they were among the better answers written

A

1. Marijuana Evidence

The court should grant Suspect's motion to suppress evidence of the marijuana seized from the patio.

The Fourth Amendment, subject to certain exceptions, protects individuals from warrantless searches of their home when conducted by government agents. The Fourth Amendment's protection extends not only to the home itself, however, but the curtilage, the area adjacent to the home to which home life naturally extends. A search subject to the Fourth Amendment occurs when a government agent, such as an officer, physically invades such a protected area.

In the present case, the officer, a government agent, physically invaded the Suspect's backyard and patio. These areas, particularly the patio, are so close to the house and intimately connected with daily private life that they are within the definition of curtilage, and, therefore, protected by the Fourth Amendment. The officer's physical invasion without a warrant, therefore, constitutes a warrantless search and it violates the fourth amendment, unless an exception applies.

Importantly, the plain view exception does not apply in this particular case. This exception to the Fourth Amendment provides that evidence may be collected when: 1) the criminality of evidence is readily apparent; 2) the officer has lawful access to the place where the criminal evidence is in plain view; and the officer has lawful access to the area required to take possession of the evidence. Here, as noted above, the officer did not have lawful access to the curtilage surrounding the suspect's home. Therefore, the exception does not apply.

Further, the doctrine of open fields does not apply to remove this evidence from fourth amendment protection because it could not clearly be seen from merely entering the property. It was hidden behind both a fence and bushes. Therefore, there was an expectation of privacy in these areas subject to protection.

Under the Fourth Amendment, evidence such as the illegally seized marijuana is not admissible in a prosecutor's case-in-chief.

2. Evidence from the Home

The court should grant suspect's motion to suppress evidence from inside the home.

Where officers illegally gather evidence under the Fourth Amendment, fruit of the poisonous tree doctrine holds that any evidence seized as a result of illegally gathered evidence is also inadmissible in the case-in-chief. In the present case, while the evidence inside the home was, seemingly, gathered in compliance with the Fourth Amendment, probable cause for the warrant was based on illegally obtained evidence in the marijuana. Since the marijuana was illegally obtained, it cannot form the basis for a probable cause search warrant without causing the taint of illegality on evidence in the house. Therefore, the evidence in the house is inadmissible.

3. Walker's Motion

The court should admit the evidence found in Walker's bag.

The officer impermissibly frisked Walker because he did not have reasonable suspicion that she was armed, as he only frisked her when he found out she was going to the Suspect's home. This is not a permissible warrants patdown under Terry Frisk rules.

Evidence of the search, however, should be admitted. While the suspect's Fourth Amendment privileges were violated, the evidence in the bag was not the result of such a violation. An officer with reasonable suspicion of criminal activity can conduct a Terry stop and ask an individual questions. If they give consent to search, an officer can search that area. Here, Officer had reasonable suspicion of criminal activity due to Walker's association with Suspect, and he obtained consent to search from Walker. The consent appears to be given voluntarily, as there is not requirement that the officer tell Walker that she can decline. Therefore, the evidence is admissible.

QUESTION 8

Technologies, Inc. (Technologies) is an Ohio corporation. It has issued 600 shares of voting shares (Shares). Inventor owns 200 Shares, Lawyer owns 130 Shares, and Accountant, Funder, and Banker each own 90 Shares. At the organizational meeting of Technologies, all of the Shareholders properly adopted Regulations which provided that all of the Shareholders would be Directors and elected themselves as Directors. The Board of Directors has elected Inventor as president and chief executive officer, Inventor's son as vice president, Lawyer as secretary, and Accountant as treasurer. The Board authorized the employment of Inventor and Inventor's son as full-time employees and authorized Technologies to enter into one-year Employment Contracts with Inventor and Inventor's son, whereunder each of them will receive salaries of $200,000 a year, subject to the right of Technologies to renew for two more years. Accountant and Lawyer provide services as needed to Technologies, but are not employees.

Shortly after the establishment of Technologies, Inventor sent to the Shareholders an Action by Written Consent proposing to amend the Regulations to permit Technologies to indemnify its Directors and officers to the fullest extent permitted by law, since such a provision was not already in the Regulations. The Written Consent was signed by Inventor, representing 200 Shares, and Lawyer, representing 130 Shares. Accountant, Funder, and Banker did not sign the document.

Eleven months after Technologies was organized, a shareholders meeting was held. All shareholders were present in person and waived notice of the time and place of the holding of the meeting. The following proposals were made and voted upon.

A. To change the name "Technologies, Inc." to "New Venture Funds." All shareholders voted in favor.
B. To amend the Regulations, reducing the number of Directors to one regardless of age. Inventor and Lawyer voted 330 Shares in favor, and Accountant, Funder, and Banker voted 270 shares in opposition.
C. To amend the Articles of Incorporation to expand its purposes to permit Technologies to undertake any business lawful under the laws of the State of Ohio. The current Articles of Incorporation limits its purposes to operating and owning manufacturing businesses in Ohio. Lawyer, Accountant, Funder, and Banker voted their 400 Shares in favor. Inventor voted 200 Shares in opposition.
D. To sell substantially all of the assets of Technologies for $550,000. Lawyer, Funder, and Banker voted 310 Shares in favor. Inventor and Accountant voted 290 Shares in opposition.
E. To not renew the Employment Contracts. Lawyer, Funder, and Banker voted 310 Shares in favor. Inventor and Accountant voted 290 Shares in opposition

1. Was the written action amending the Regulations to provide for indemnification validly adopted?

2. Which actions, if any, at the shareholders' meeting are valid, and which actions, if any, are invalid?

Explain your answers fully.

Regulations: The action to amend the Regulations was not validly adopted. Regulations are initially adopted by the shareholders of a corporation and may be amended by the affirmative vote of a majority of shares eligible to vote. Thus, if a vote were taken, the amendment to the Regulations would have been validly adopted because 330 of the 600 outstanding shares voted in favor of the amendment. However, in order for an action by written consent to be valid, all of the shareholders eligible to vote must sign the action. In this case, Accountant, Funder, and Banker did not sign the action. As a result, the amendment to the Regulations was not validly adopted.

Shareholders Meeting:

A: The name change is not valid. The name of a corporation is included in the articles of incorporation of the corporation filed with the Ohio Secretary of State. An amendment to the articles of incorporation is considered a fundamental change and thus, needs 2/3 approval from outstanding shares entitled to vote. In this case, all of the shares voted in favor, so a name change would be permitted. However, a corporation must include in its name some designation that it is a corporation (e.g., Incorporated, Inc.). Because the new name does not include any such designation, it is invalid.

B: The amendment to the Regulations is valid. Once adopted, Regulations of a corporation may be amended by a majority of the shareholders entitled to vote. In addition, in Ohio, a corporation is only required to have one director, regardless of the number of shareholders, and there is no requirement that the director be a certain age. Because a majority of shares voted in favor of this proposal, the amendment passed and is valid.

C: The amendment to the Articles of Incorporation is valid. An amendment to a corporation's articles of incorporation is a fundamental change. In Ohio, all fundamental changes require the affirmative vote of at least 2/3 of outstanding shares. In addition, a corporation's purpose may be all lawful purposes. Thus, the change to expand Technologies' purpose to "any business lawful under the laws of the State of Ohio" is permissible. In addition, because 400 of the 600 shares (2/3 of the outstanding shares) voted in favor of the amendment, it was validly adopted.

D: The sale is not valid. A sale of substantially all of the assets of a corporation is a fundamental change. As discussed above, Ohio requires that all fundamental changes require the affirmative vote of at least 2/3 of the outstanding shares. In this case, only 310 of the 600 shares voted in favor of the sale. Because this does not meet the required threshold of 400 votes, the resolution did not pass.

E: The action not to renew the Employment Contracts is not valid. The shareholders of a corporation elect the board of directors of a corporation. The board of directors of the corporation is in charge of the management and operations of the corporation and may appoint officers of the corporation to run the day-to-day operations of the corporation. However, the shareholders do not have direct control of the day-to-day operations of the corporation. Such operations include renewing and terminating employment contracts. This is a matter for the board of directors of the corporation. The board of directors acts by majority vote. In this case, the shareholders were attempting to pass a resolution on not renewing Employment Contracts, which is an operational matter reserved to the board. Thus, it is invalid and should have been raised at a board meeting and not a shareholders meeting. If this matter were properly proposed at a board meeting, however, it would have passed because 3 of the 5 board members voted in favor of the resolution. In addition, because Inventor has one of the Employment Contracts, as an interested director, he would not have been permitted to vote on his contract.

QUESTION 9

Dale and Mary married in 1960 and have been lifelong residents of Ohio. They have three adult children, Judd, Hal, and Cindy.

In 2008, when Dale's health began to deteriorate, he executed a valid Ohio will (2008 Will), which provided as follows:

1. I give $20,000 to my son, Judd, to assist him in paying for college expenses for his children.

2. I give my rental property on Smith Street (Rental Property) to my son, Hal, subject to any mortgage or liens. The Rental Property currently is worth $60,000 and is subject to a mortgage of $40,000.

3. I give my mother's oil paintings (Oil Paintings) worth $40,000 to my daughter, Cindy.

4. I give my 2008 Toyota to my son, Hal.

5. I give my 2007 Ford pick-up truck to my son, Judd.

6. I give the rest of my non-household tangible personal property to my children in equal shares.

7. I give all the rest and residue of my property to my beloved wife, Mary.

The following events occurred after Dale executed his 2008 Will:

- Dale gave Judd a $10,000 check when Judd's oldest son started college in 2014. The only notation on the check was "college expenses."

- The value of the Rental Property had decreased to $20,000 due to Dale's inability to maintain the property. The Rental Property was still subject to the mortgage debt, which had a balance of $25,000.

- A fire occurred at Dale's house in late 2014, which damaged the Oil Paintings. An insurance claim for the policy limits of $30,000 was made to Insurance Company by Dale just prior to his death.

- Dale sold the 2007 Ford pick-up in 2010.

- Dale purchased a 2014 Dodge Charger in 2014.

Dale passed away in early 2015, survived by Mary, Judd, Hal, and Cindy. Dale's probate estate consists of the following property:

- The Rental Property still subject to the mortgage debt.

- The 2008 Toyota worth $15,000.

- The 2014 Dodge Charger worth $25,000.

- A check from Insurance Company for $30,000 received shortly after Dale's death.

- An account at Big Bank in the amount of $250,000.

The 2008 Will named Dale's attorney as executor (Executor). Mary has expressed disappointment to Executor that Dale did not specifically leave her a vehicle under the 2008 Will.

Shortly after the filing of the inventory listing the above assets, the Probate Court issued a Certificate of Transfer for the Rental Property to Hal. Hal subsequently accepted payments from the tenants for one month; however, he quickly realized that the value of the Rental Property was less than the outstanding mortgage debt. Hal requested Executor to pay off the mortgage debt; however, the Executor has informed Hal that the estate does not intend to pay the mortgage. Hal, thereafter, drafted a document (Document) that provided as follows:

> This Document relates to my inheritance of the Rental Property under my father's 2008 Will.
>
> I hereby disclaim any interest I have in the Rental Property unless and until the estate pays off the outstanding balance of the mortgage.
>
> In the event the estate agrees to pay off the mortgage, I revoke this disclaimer and will accept the Rental Property free and clear of any liens.

Hal signed the Document under oath, delivered a copy to Executor, and filed an original of the same with both the Probate Court and the County Recorder.

Four months have passed since appointment of Executor, and Mary has elected to take under Dale's will. However, she insists that she is entitled to receive both of the vehicles. Hal claims the 2008 Toyota should go to him. Judd claims the 2014 Dodge Charger should go to him.

1. To whom should the $30,000 check from Insurance Company be distributed?

2. To whom and in what proportions should the $250,000 in the Big Bank account be distributed?

3. How should Executor address Hal's attempted disclaimer of the Rental Property, including the request that estate pay off the mortgage debt?

4. What right, if any, does Mary have to one or more of the vehicles, and how should Executor resolve the conflicting claims?

Explain your answers fully.

1. $30,000 check. The $30,000 check should go to Cindy. Ademption occurs when property that is bequeathed is no longer in the estate at the time of the testator's death. If property is adeemed, the gift lapses and falls to the residue. However, there are exceptions to ademption. If property is destroyed and insurance proceeds are issued after the testator's death, the donee is entitled to those proceeds so long as they are identifiable cash proceeds. Cindy was bequeathed the oil paintings, which were damaged. The insurance proceeds were issued after Dale's death, so Cindy is entitled to those proceeds.

2. $250,000 Big Bank account. Mary is entitled to $240,000 and Judd to $10,000 if Mary can show that $10,000 of Judd's share was satisfied during Dale's life. Any property not specifically bequeathed in a will falls to the residue of the estate. Satisfaction occurs where a testator gifts a donee a portion of their inheritance pre-mortem. A writing is not required to show satisfaction. Rather, clear and convincing evidence of the donor's intent that the inter vivos gift was in satisfaction of part of the inheritance will suffice. In his will, Dale stated the $20,000 was for college expenses, and the $10,000 check to Judd stated it was for college expenses. This would likely show Dale's intent for the check to be in partial satisfaction of Judd's inheritance. The rest of the account would fall to the residue since it is not specifically bequeathed in Dale's will. Therefore, Mary would be entitled to $240,000 and Judd would be entitled to $10,000.

3. Rental Property. Hal's attempted disclaimer is invalid, as is his request that the estate pay off the mortgage. A disclaimer occurs where a donee disclaims all or part of their inheritance in a signed writing. The disclaimer must exist before the donee takes possession of or benefits from the property. Hal took possession of the Certificate of Transfer of the Rental Property and accepted payments from a tenant for one month. Therefore, he accepted benefits from the property and his disclaimer is invalid. Hal also must take the property subject to a mortgage. Dale's will specifically states that Hal takes the property subject to any mortgages or liens. It does not matter that the value of the home has subsequently decreased. The Executor should deny both of Hal's claims.

4. Vehicles. Mary is entitled to the 2014 Dodge Charger, but not the 2008 Toyota. The spousal elective share allows a spouse to take certain things that were not bequeathed to her under her spouse's will. The purpose is to provide for the needs of the spouse after the testator's death. Under the spousal elective share, a spouse is entitled to take up to two vehicles. The election is not automatic. The spouse must elect to take her share by filing a claim with the executor or probate court. However, a spouse may not elect to take property that has been specifically devised under the will. Here, the 2008 Toyota was specifically devised to Hal, so he is entitled to that car. If she properly files an election, Mary is entitled to the 2014 Charger because it is not specifically devised. While Dale's will did give the rest of the non-household property to his children in equal shares, this is a general gift, and the spouse may elect to take her vehicle from general gifts. Furthermore, Judd is not entitled to the 2014 Charger simply because Dale left him the 2007 Ford truck. Dale sold the truck during his life, and the proceeds are not identifiable. Dale's gift of the Ford truck to Judd has been adeemed by extinction, so the gift fails. Judd is not entitled to the proceeds from the sale either. Therefore, the Executor should find that Mary is entitled to the 2014 Dodge Charger if she properly files her election and Hal is entitled to the 2008 Toyota.

QUESTION 10

John Smith, a landlord in Anytown, Ohio, owned an apartment building. In January 2013, John Smith entered into a lease agreement with Ed and Elizabeth Jones. The lease was for a two-year term running January 2013 through December 2014. Both Ed and Elizabeth signed the lease agreement. Early in 2014, Mr. Smith fell ill, and his grandson, John Smith III, took over managing the apartments.

In August 2014, John Smith III noticed that the Joneses had fallen behind in the rent and spoke to Elizabeth about it. Elizabeth advised that she would try to catch up. She also stated that they would be vacating the apartment at the end of the lease term. John Smith III told Elizabeth that, if she found a new tenant who was willing to move into the apartment in January 2015, he would forgive the past due rent. Elizabeth was able to locate a new tenant, who contacted John Smith III and signed a lease for the apartment for a period to begin in January 2015.

John Smith III became concerned that his ailing grandfather needed every penny of the rent money from the apartment building to pay medical expenses. On September 1, 2014, John Smith III's attorney filed an action in the Anytown Common Pleas Court captioned *John Smith III v. Elizabeth Jones*. The single page complaint made reference to the lease agreement, but did not attach it, and sought the back rent owed on the apartment.

Elizabeth retained an attorney who, on September 15, 2014, filed an answer on her behalf, denying the allegations of the complaint. Her attorney did not plead any affirmative defenses.

On November 15, 2014, two months after the answer was filed, Elizabeth's lawyer served an amended answer with a counterclaim seeking to recover a $1,000 refundable security deposit she and Ed had paid and which she anticipated the landlord would refuse to return to her at the end of the lease period.

1. What grounds, if any, are there upon which John Smith III's attorney can move to dismiss the counterclaim?

2. What viable affirmative defenses could Elizabeth's attorney have pleaded in the answer to the complaint?

Explain your answers fully.

Do not discuss agency in your answer.

A

John Smith III's (JS III) attorney could attempt to dismiss the counterclaim due to untimely filing. A party may amend freely within 28 days of filing (complaint or answer) or 28 days after a responsive pleading is due (doesn't apply here as this was the responsive pleading). Since Elizabeth's attorney filed outside the 28 days, the filing was untimely. Outside the 28 days, the party can amend by leave of court, after ensuring no undue prejudice against the other party will occur. Here, the court will rule in favor of JS III on the untimeliness, but may allow the pleading to stand if Elizabeth's attorney is able to make a showing of no undue prejudice. It is likely the court will allow the amendment, since it is only two months after the answer was filed and a few weeks after an amendment would have been allowed by right. There is nothing in the facts to indicate undue prejudice would occur.

JS III could also move to dismiss because he has not yet breached the return of the security deposit. It is not yet due to be returned and JS III has not stated any intention to breach. Further, the deposit would still be subject to deduction for damages to the apartment (beyond normal wear and tear), so the amount to be returned cannot yet be determined.

Elizabeth's (E) attorney should have pled failure to join Ed as a necessary party, lack of privity with JS III, estoppel, and failure to attach the lease. Ed is a necessary party and he is jointly liable on the lease with E and his interest and E's are joined. Further, E is entitled to have Ed joined to protect her interest and potential liability.

Outside of agency, E does not have privity with JS III, who is the grandson of the landlord. E contracted for the lease with the landlord (John Smith) and the suit should be in his name as he is the only one entitled to enforce it. JS III could assist with the lawsuit, but has no independent basis to be a party or bring an action. He lacks standing, therefore, the allegations, even if true, would prevent JS III from recovering.

Estoppel should have also been pled. JS III and E agreed that E would not be liable for the unpaid rent if E found a new tenant to move in in January 2015. E, acting in reliance on this, performed her part of the deal by locating a tenant who signed a lease on the apartment. Although the contract was not in writing, it was not required to be. JS III would be estopped based on E's reliance and performance of the contract.

Finally, E should have raised the defense of failure to attach the lease to the complaint as the complaint referred specifically to the lease. In this situation, where money owed as a debt on a contract is alleged based on a document specifically referred to, that document must be attached.

QUESTION 11

Owner owned the real property (Property) located at 111 Apple Street, Anytown, Ohio. In November 2015, he entered into negotiations with Buyer for the sale of the Property to Buyer. During the negotiations, Owner told Buyer that his (Owner's) Sister had a two-year lease that would expire in February 2017 and that the Property was not otherwise encumbered. They agreed on a price and, further, that the deed of conveyance would be a general warranty deed. Prior to a closing and without telling Buyer, Owner prepared, signed, and recorded a properly notarized general warranty deed, which stated as follows:

General Warranty Deed

Owner, a single man, of Any County, Ohio, for valuable consideration paid, grants, in fee simple and with general warranty covenants, to Buyer, whose tax mailing address is 111 Apple Street, Anytown, Ohio, the following property:

Full Legal Description
Also known as: 111 Apple Street
Anytown, Ohio

Subject however to any due and unpaid taxes, which are an exception.

Prior Instrument Reference, Volume 37, Page 23
Executed this 27th day of January 2016.

/s/OWNER

Owner sent Buyer a letter informing him that he had executed and recorded the deed, but never physically delivered it to Buyer. What Owner did not tell Buyer was the following:

(1) Sister's written, but unrecorded, lease contained a provision giving Sister a right to renew the lease for an additional year beyond February 2017.

(2) Owner had granted Company a written utility easement over Property allowing Company to run its buried electric lines to Company's warehouse, which is adjacent to Property. The easement was never recorded.

(3) Over 10 years ago, Owner had orally told Church that its members were free to park their cars on the Property each Sunday whenever the Church parking lot overflowed.

When Owner told Sister, Company, and Church that he was selling the Property to Buyer, each approached Buyer seeking assurances that he would do nothing to disturb their "interests" in the Property. This was the first time Buyer became aware of these "interests."

Additionally, before the closing date, Buyer learned that there was a delinquent property tax bill in the amount of $4,000, which is a lien on the Property.

Owner now insists that Buyer complete the transaction. Buyer consults you as his lawyer, and asks your advice on the following questions:

1. Was the deed that Owner recorded, but never delivered to Buyer effective to convey the Property to Buyer?

The answers printed in this booklet were selected because they were among the better answers written

2. If Buyer decides to complete the transaction,

a. What are the covenants of title that a general warranty deed includes?
b. Has Owner breached any of them?
c. What remedies, if any, does Buyer have for any breach?
d. Who is responsible for paying the back taxes?

Explain your answers fully.

Do not discuss the Statute of Frauds.

A

1. There is not effective conveyance of Property to Buyer. In order for conveyance to be proper, an owner must deliver a deed to a buyer, either directly or through escrow. Recording a deed does not fulfill effective conveyance, but puts others on notice of the property. Since the deed has not been delivered either physically or through an escrow account, effective conveyance has not yet occurred. Also, Owner's notarized and recorded general warranty deed only places the property on notice to others that Buyer will have the property, but it does not constitute delivery of the deed. Thus, without delivery, no conveyance has occurred.

2. If Buyer completes the transaction, the covenants of title the general warranty deed includes marketable title and property free of encumbrances. Here, Owner and Buyer entered into a contract for the sale of Property and Owner provided that the property was free of encumbrances, except for Sister's two-year lease, showing Owner indicated to Buyer that Property fulfilled the general warranty. Since Property actually had a right to renew by Sister, an unrecorded utility easement, and delinquent property tax bill, these three items inhibit Property and act as an encumbrance. The promise to Church does not act as an encumbrance because Owner orally agreed to allow the church parking, but did not create an easement right for Church, indicating the formation of a license which expires when conveyance occurs or Owner refuses the parking. Finally, the delinquent property tax bill places the property in potential foreclosure unless paid, inhibiting the marketable title of the property. As such, Owner conveys a property without marketable title and filled with encumbrances. By conveying the property without marketable title and free of encumbrances, Owner breached the covenants of title under a general warranty deed.

Due to Owner's breach, Buyer has the remedy to reject the conveyance or recover part of the sale price. Since Owner conveyed property without marketable title, a court may void the contract through rescission and treat the contract as though it never occurred. Here, Owner breached the covenants of title several times and purposefully, indicating that the best course of action may be to treat the contract as never created and place both parties in the position before contracting. Additionally, a court may find that the encumbrances burden the land, thus reducing the value, thus reducing the contract price. Buyer may show that the renewed lease interferes with his right to enjoy the land and the utility easement actually deprives him of some of the land, showing a reduced value of the land previously unknown. Due to this unforeseen reduced value, Buyer is entitled to a reduction in the price he paid for Property. However, a court is also likely to prohibit remedy under the policy of "buyer's remorse." Buyer's remorse occurs where a buyer takes the land subject to unforeseen problems as it was the buyer's duty to inspect. Here, Buyer had no notice of the utility easement as it was not recorded, but did not follow up on the lease contract, indicating Buyer may not have fully inspected the land. As such, Buyer may not be owed any remedy.

Finally, if Buyer completes the transaction, he will take Property subject to the back taxes, but may pursue Owner for the amount. In Ohio, when a property contains delinquent taxes, the buyer of the property takes the property subject to those taxes. Ohio allows for remedy by allowing the buyer to seek the amount owed for those taxes from the seller. Since Buyer completed the transaction, he took Property and, therefore, took the delinquent taxes owed on Property. However, the law allows that after Buyer pays the taxes, he may seek refund from Owner.

QUESTION 12

On Sunday morning at 11:45 a.m., the Anytown, Ohio Police received a 911 call from an individual identifying herself as Robin. She stated she had just witnessed a driver of a car, with vanity plates "Joker," pass her on the highway heading toward Anytown at a high rate of speed. Robin further stated the male driver caused her concern because he appeared to be texting and looking at his phone with one hand and driving with the other.

The information was relayed to Officer Wayne at 11:50 a.m., as he was enjoying a cup of coffee a half a mile from the town square. Minutes later, Officer Wayne heard a loud crash from the direction of the square. Within seconds, Officer Wayne arrived at the square to observe that a vehicle with license plate "Joker" had crashed through the large window of Alfred's Bakery.

Officer Wayne was immediately approached by Mary, a pedestrian, who was crying hysterically and holding a small child. She screamed, "He just drove straight through the red light and into the store for no reason! He almost killed us!"

Officer Wayne entered the store to find the driver unconscious at the wheel. The store owner Alfred was lying on the floor ten feet away. He told Officer Wayne the force of the impact knocked him over two tables. He further added that his lower back was in extreme pain.

Alfred sued Driver in common pleas court seeking compensatory and punitive damages for recklessly causing injuries to his back. Driver has denied the allegations and claims that the accident was unavoidable after he was cut off by an unknown vehicle. Driver further denies causing any injuries, asserting Alfred's injuries were pre-existing.

During the discovery phase of the case, Alfred's counsel subpoenaed Driver's cell phone records from Driver's wireless company, which revealed a series of eight texts being exchanged during the relevant time period. Alfred's counsel also obtained Driver's emergency room report, which indicated he told the treatment staff that he had no recollection as to what caused the accident. Defense counsel subpoenaed Alfred's medical records from a routine physical two years before the accident, in which he told his doctor of nagging lower back pain from swinging his golf clubs too hard.

On the day of trial, Officer Wayne appeared pursuant to his subpoena, prepared to testify as to his observations. Robin, the 911 caller, and Mary, the witness at the scene, could not be located.

During the trial, Alfred's attorney sought to introduce the following evidence and, on each occasion, Driver's attorney objected on the ground of hearsay:

a. Robin's 911 recorded phone call;
b. Officer Wayne's testimony about what Mary told him at the scene of the accident;
c. Officer Wayne's testimony about what Alfred told him concerning his injuries;
d. Driver's phone records; and
e. Driver's medical record containing his statement.

Driver's attorney sought to introduce in evidence Alfred's medical record from two years ago concerning his nagging lower back pain. Alfred's attorney objected on the ground of hearsay.

How should the court have ruled on each of the hearsay objections? Explain your answers fully.

The answers printed in this booklet were selected because they were among the better answers written

Under the Ohio rules of evidence, hearsay is an out-of-court statement that is made to prove the truth of the matter asserted. Generally, hearsay is inadmissible as evidence, unless one of several exceptions apply. Further, the evidence must be relevant. To be relevant, the evidence must make a material fact more or less likely than would be the case if the evidence was not admitted. Also, even if relevant, the probative value of the evidence at issue must not be substantially outweighed by its prejudicial effect.

Driver's objections:
a: Overrule the objection. Under the rules, present sense impression is an exception to hearsay. A present sense impression is made when a person that saw or heard an event, thus having personal knowledge, makes a statement to what he saw or heard at the time of the event of shortly thereafter. Here, Robin witnessed driver's car with the plates "Joker" and his apparent texting, then related to the dispatcher this information just after she witnessed Driver pass her. Therefore, the statement is admissible and availability of the declarant, Robin, is irrelevant.

b: Overrule the objection. An excited utterance is an exception to hearsay. An excited utterance is made by a person in a heightened sense of passion and the statement is made before the declarant can calm down or have sufficient time to evaluate the situation. Here, Mary witnessed the Driver drive through the light and into the store, making the excited utterance while crying hysterically immediately thereafter as the Officer immediately ran to her after seeing Driver go past. Therefore, despite Mary's unavailability, the statement will be admissible.

c: Overrule the objection. A declarant can speak to his state of mind as to his feelings, including physical, at the time of the statement. Here, although Officer is not a doctor, Alfred stated to Officer that he was experiencing extreme lower back pain. This statement is admissible, regardless of the fact that Alfred is available to testify as well.

d: Overrule the objection. A business record exception to hearsay exists if the record was made by an employee of a business in the ordinary course of that business/duty. Here, the wireless phone company as producer of the cell phone automatically has phone records of each client's calls. Although the records would have been on the phone and not handwritten by an employee of the wireless company, these records would still be viewed and electronically recorded by employees of the wireless company.

e: Sustain the objection. A person can admit evidence of a statement made for the purposes of medical diagnosis or treatment. However, any not-medially related statements made at such a time are hearsay and inadmissible. Here, Driver mentioned to treatment staff that he had no recollection of the accident. This statement has nothing to do with his medical diagnosis or treatment, so the statement will not be admissible.

Alfred's objection: Overrule the objection. Again, a person can admit evidence of a statement made for the purposes of medical diagnosis or treatment. Here, although Alfred's statement relates to past injury and not the current incident, this statement should be admissible because it is relevant to the material fact/issue that his pre-existing injuries were present and could alter the compensatory and punitive damages that he seeks for the back injury suffered by Driver's accident. Therefore, the medical record of Alfred's statement will be admissible.

MPT 1

In re Anderson

Examinees' law firm represents Nicole Anderson, a residential landlord in Lafayette, Franklin. Anderson seeks legal advice regarding a workers' compensation claim that has just been filed against her by Rick Greer, a handyman Anderson retained to perform general maintenance and repair work on the 11 single-family homes that she rents out. Greer fell off a ladder and broke his arm while he was painting the exterior of one of Anderson's houses. Anderson did not maintain workers' compensation insurance coverage because she did not believe she was required to insure Greer against injury. If Greer is found to be Anderson's employee, she could face substantial personal liability, as well as penalties under the Workers' Compensation Act for failing to provide this coverage. However, if Greer was an independent contractor at the time that he was injured, he is not covered by the protections of the Workers' Compensation Act. Examinees' task is to draft an objective memorandum analyzing whether Greer would likely be considered an employee of Anderson or an independent contractor under the applicable statutory provisions and case law. The File contains the instructional memo from the supervising attorney, a transcript of a client interview, an email exchange between Anderson and Greer, and a copy of the workers' compensation claim submitted by Greer to Anderson for processing. The Library contains excerpts from the Franklin Labor Code and two Franklin cases.

A

Calvetti, Lawrence & Masterson
Attorneys at Law
84 Richmond Avenue, Suite 1300
Lafayette, Franklin 33526

MEMORANDUM

To: David Lawrence
From: Examinee
Date: February 23, 2016
Re: Nicole Anderson - Workers' Compensation Claim

You have asked me to analyze whether Rick Greer, a handyman retained by our client Nicole Anderson, would be considered an employee of Ms. Anderson under applicable statutory provisions and case law.

Answer

In short, Mr. Greer would not be considered an employee of Ms. Anderson. Mr. Greer had the right to control how he accomplished the specific jobs that Ms. Anderson hired him to perform. In addition, six of the eight secondary factors under *Doyle* point toward an independent contractor relationship. Finally, policy considerations support the fact that Mr. Greer is in a position to assume the risk of injury in his business.

Analysis

The Franklin Worker's Compensation Act provides that any person rendering service for another, other than as an independent contractor, is presumed to be an employee. Franklin Labor Code § 257. The burden is on the employer to establish that an injured person claiming to be an employee was an independent contractor where there is proof that the injured person was at the time of the injury performing services for the alleged employer. Franklin Labor Code § 705. Whether a person is an employee or independent contractor will be determined on the basis of three considerations: (1) who had the right to control the work, (2) the secondary factors set forth in *Doyle*, and (3) policy considerations.

1. Right of Control Test

The primary method to determine whether or not a person is an employee or an independent contractor is the right-of-control test first set forth in *Doyle v. Workers' Compensation Appeals Board*. The *Doyle* court held that, because all meaningful aspects of the relationship were controlled by the employer, the persons providing services were employees. But, this type of control requires "pervasive control over the operation as a whole." *Doyle*. In *Doyle*, the only decisions the employees (who were unskilled harvesters) made were which plants were ready to pick and which needed weeding. All other aspects of the relationship (price, cultivation, fertilization, inspection, payment, dealings with customers) were controlled by the employer.

In applying the *Doyle* test, the Franklin Court of Appeals later determined that a handyman who fell from a roof while trimming bushes at a diner in Jefferson was an independent contractor and therefore not eligible for workers' compensation benefits. *Robbins v. Workers' Compensation Appeals Board*. In *Robbins*, the court held that the plaintiff, Matthew Robbins, was engaged merely to produce the result of trimming the bushes, and the purported employer, Alana Parker, did not have the power to control the manner or means of accomplishing that task. Robbins admitted that he is able to select the jobs he performs, that no one tells him how to do his work on the jobs he accepts, and that Parker did

not tell him how to do the trimming at the diner when he was injured. Furthermore, Robbins chose the dates and times he was to perform his services. In addition, this lack of supervision was not the result of the unskilled nature of the job, as it was in *Doyle*. In fact, Robbins had 25 years of experience in the industry, and most of his work comes from word-of-mouth referrals.

Ms. Anderson's case is more similar to the Robbins facts than to the *Doyle* facts. Ms. Anderson indicates that Mr. Greer generally "figures out what the problem is and then fixes it." Ms. Anderson does not micromanage Mr. Greer, and she has confidence that he knows what he is doing. In fact, the extent of most of her involvement in the projects is to review his work after it is complete and make sure the work was done correctly before she pays him. Ms. Anderson admittedly does get more involved in the process if she wants something to look a certain way when the job is finished. For example, she may pick out a ceiling fan or a paint color. However, this degree of supervision is not inconsistent with finding Ms. Anderson to be an independent contractor. An independent contractor "may retain broad general power of supervision and control as to the results of the work so as to ensure satisfactory performance of the contract." *Harris v. Workers' Compensation Appeals Board*. According to the *Harris* court, this broad power of supervision can extend into details, including the right to inspect, stop the work, and make suggestions or recommendations as to the details of the work. *Harris*. This type of interaction and control will not change the independent contractor relationship into an employment relationship. *Harris*.

Given that Ms. Anderson retains general control over the work that Mr. Greer performs, but does not exhibit a pervasive control over the operation as a whole, the right-of-control test favors Ms. Anderson.

2. *Doyle* Factors

In addition to the right-of-control test, the *Doyle* case sets forth secondary factors to determine whether a person is an employee or independent contractor. The *Doyle* factors are not a set of separate tests that must be met before a person is determined to be an employee or independent contractor. Instead, they are to be applied as a cohesive test, with the weight given to any one factor depending on the totality of the factors. *Robbins*. Thus, it is a fact-specific and qualitative inquiry. *Robbins*.

The *Doyle* factors are:

(1) whether the worker is engaged in a distinct occupation or an independently established business.
(2) whether the worker or the principal supplies the tools or instrumentalities used in the work, other than those customarily supplied by employees.
(3) the method of payment, whether by time or by the job.
(4) whether the work is part of the regular business of the principal.
(5) whether the worker has a substantial investment in the worker's business other than personal services.
(6) whether the worker hires employees to assist him.
(7) whether the parties believe they are creating an employer-employee relationship.
(8) the degree of permanence of the working relationship.

Taking the *Doyle* factors together, Ms. Anderson would be considered an independent contractor under this secondary analysis as well.

(1) Mr. Greer was engaged in an independently established business.

In *Robbins*, the plaintiff had an independent gardening service that he had run for 25 years. He had several different clients, although he did not advertise. Similarly, Mr. Greer has an independent handyman business. He had other clients, whom Ms. Anderson called as references. In addition, he does repair and maintenance for Ms. Anderson's friend Jim,

who owns an eight-unit apartment complex. In fact, last year he completed a large remodel at Jim's apartment complex. Mr. Greer also indicated in emails to Ms. Anderson that he has other customers for electrical and plumbing work and routine maintenance and repairs. In addition, unlike Mr. Robbins, Mr. Greer advertises in the Yellow Pages under "Greer's Fix-Its," a trade name. Taken together, these facts are evidence that Mr. Greer had an independent handyman business and was not providing services solely for Ms. Anderson.

(2) Mr. Greer supplied the tools or instrumentalities used in the work.

Mr. Robbins supplied all of his equipment that he used for the job, and the restaurant for which he was providing services would not normally have the tools that he used. As discussed above, Ms. Anderson has picked out ceiling fans and fixtures for her rental properties on occasion. In addition, she sometimes picks out paint when there is a particular color that she wants Mr. Greer to use. However, Mr. Greer provides everything else and carries in his truck all of the tools that he would normally need in providing handyman services (*e.g.*, power drills, saws, wrenches, screwdrivers). As with the first factor, the facts here also point to Mr. Greer being an independent contractor. Ms. Anderson would not normally have these types of tools in a rental business, and Mr. Greer owns them for use in his business.

(3) The method of payment is indeterminate.

In this case, Mr. Greer was paid sometimes by the hour and sometimes by the job. However, the payment is negotiated for each project, and Ms. Anderson pays him when the work is done. In addition, when the project is particularly large or complex, they negotiate a higher fee. She also reimburses him for any materials that he purchases for use in the projects. This arrangement is very similar to the arrangement in *Robbins*, where Mr. Robbins sometimes charged by the hour and sometimes by the job, but in either case was paid on a job-by-job basis, with no obligation on the part of either party for work in the future. In addition, Ms. Anderson did not pay taxes on payments to Mr. Greer. It should be noted that Ms. Anderson did pay Mr. Greer a monthly retainer so that he would be available when needed. However, on balance, it is unlikely that this fact would outweigh the other factors.

(4) The work is not part of the regular business of Ms. Anderson.

In *Doyle*, the court found that the employees' work constituted "a regular and integrated portion of the business operation, in that its entire business was the production and sale of agricultural crops." On the contrary, in *Robbins*, the court held that Mr. Robbins' gardening work was "wholly unrelated to the restaurant business; it constitutes only occasional, discrete maintenance." In addition, the work was to be performed when the diner was closed so that the work would not interfere with the diner's regular business. Mr. Anderson's case is very similar to the facts in *Robbins*. Ms. Anderson's business is rental properties. Notwithstanding the fact that the properties will need repair and maintenance, repair and maintenance is not Ms. Anderson's business. In addition, Ms. Anderson indicated in her emails to Mr. Greer that the work would need to be coordinated with the tenants to ensure that it is a convenient time for the tenants. She was attempting to ensure that Mr. Greer's work did not interfere with her regular business.

(5) Mr. Greer has a substantial investment in his business other than personal services.

Mr. Greer, much like Mr. Robbins, has a substantial investment in his handyman business, including all of his equipment and tools.

(6) The use of other employees is indeterminate.

Mr. Greer did not hire any employees to assist him. However, this is consistent with the court's finding in *Robbins* and is indeterminate of the employment relationship. This factor alone cannot outweigh overwhelming evidence to the contrary. *Robbins*.

(7) Ms. Anderson believed they were creating an employer-employee relationship.

Although Mr. Greer never indicated explicitly whether he believed there was an employer-employee relationship, the fact that he had other clients and worked on other jobs serves to undercut an assertion that he believed he was an employee. In addition, Ms. Anderson indicates that it never occurred to her that Mr. Greer may consider himself an employee.

(8) The working relationship was not permanent.

Finally, in *Robbins*, the degree of permanence in the working relationship was found in favor of an independent contractor relationship because there was no set date that Mr. Robbins was to return to perform more work. Instead, he understood that he would be contacted only when his services were needed. Similarly, the communications between Ms. Anderson and Mr. Greer indicate that Mr. Greer was available for services, and that Ms. Anderson would contact him when his services were needed. In addition, he handles a varying number of projects a month, and although he spends on average about 10 hours a month working on Ms. Anderson's projects, it could be as little as 5 hours or up to 20 hours. Whenever work is needed, Ms. Anderson calls Mr. Greer and he "fits her into his schedule." Thus, there is no permanent schedule. Mr. Greer works Ms. Anderson into his schedule as jobs become available.

Altogether, six of the factors point toward an independent contractor relationship.

3. Policy Considerations

Finally, a court will look to policy considerations in determining whether an employment relationship exists. The court "must consider the remedial purpose of the workers' compensation laws, the class of persons to be protected, and the relative bargaining positions." *Robbins*. An independent contractor relationship should arise only "where the worker had control over how the work was done and, in particular, had primary power over work safety and could distribute the risk and cost of injury as an expense of his own business." *Robbins*. Mr. Greer was in a position much more similar to the position of Mr. Robbins than the position of the growers in the *Doyle* case. Mr. Greer was free to take or reject jobs that Ms. Anderson offered. As discussed above, he negotiated payments based upon the scope or difficulty of the job. He was not in a weaker bargaining position than Ms. Anderson. In addition, Mr. Greer could spread the risk of injury over his business. The risk of injury would not be assumed by the public at large. Instead, it would be assumed by Mr. Greer's business, over which he exercised independent control.

MPT 2

Miller v. Trapp

In this performance test item, examinees are associates at a law firm representing Katie Miller, a college student. Miller would like to pursue claims for civil assault and battery against musician Steve Trapp in connection with an incident that occurred after a concert by Trapp's band, the Revengers. Miller was injured when, after the concert, Trapp stormed offstage, punched a photographer, and then yelled at Miller and grabbed her upheld smartphone with such force that he dislocated her shoulder. Examinees have two tasks to complete: (1) draft a demand letter on behalf of Miller in anticipation of a lawsuit for assault and battery against Trapp, and (2) draft a brief memo to the partner setting forth an analysis and recommendation of the compensatory and punitive damages that Miller can reasonably and realistically expect to recover from Trapp at trial. The File contains an instructional memorandum from the assigning partner, the law firm's guidelines for drafting demand letters, an excerpt from Miller's blog RockNation, a magazine article about the incident at the concert, a file memorandum summarizing a phone conversation with Trapp's attorney, and summaries of Franklin jury verdicts in civil cases. The Library contains three Franklin cases.

A

Stuart, Parks & Howard LLC
Attorneys at Law
1500 Clark Street
Franklin City, Franklin 33007

To: Attorney Mr. Saul Leffler
From: Timothy Howard, Partner
Date: February 23, 2016
Re: Katie Miller v. Steve Trapp - Demand Letter

The Law Firm of Stuart, Parks & Howard LLC represents Katie Miller in the following action for civil assault and battery against your client, Steve Trapp.

The purpose of this letter is to set forth basis for Miller's assault and battery claims against Trapp and to illustrate that Miller will be able to recover compensatory and punitive damages against Trapp should the matter go forward to litigation.

Steve Trapp ("Trapp") is the guitarist and lead vocalist for the popular rock band the Revengers. Katie Miller ("Miller") is a college reporter who validly obtained a press pass to the Revengers' concert at the Franklin City Arena on February 9, 2016. Following the concert, which ended approximately 11:00 p.m., Miller awaited offstage with several other photographers and journalists for the chance to speak with Trapp. While walking off stage, Trapp punched Nina Pender ("Pender"), a photographer from Celebrity magazine, in the nose and wrestled the camera out of her hands while Pender attempted to take a picture of Trapp. This incident was captured by other photographers who witnessed it. Following the incident with Pender, Trapp continued through the line of photographers and journalists, yelling obscenities and pushing individuals, until he encountered Miller. Trapp, whilst looking at Miller, and raising his arm as if to strike Miller yelled, "get out of my way, you little punk, or I'll beat the hell out of you." Instead of striking Miller, Trapp grabbed the smartphone out of Miller's hand, which she was holding tightly, and smashed it on the ground. In the process of prying the phone out of Miller's hand, he pulled on Miller so violently so as to dislocate Miller's shoulder. The extent of the injuries required Miller to seek medical attention at the hospital. It took four long hours for the doctor to pop Miller's shoulder into place. During this four-hour time period, Miller described her pain as "unbelievable." To date, Miller has endured $5,000 in medical bills, had her arm in a sling for three days, missed a week's worth of work in the school cafeteria, which cost her $100 in wages and Miller had to spend $500 to replace the smartphone that Trapp smashed.

Miller has valid claims against Trapp for both battery and assault. As you well know, an actor is subject to liability to another for battery if he acts intending to cause a harmful or offensive contact, or an imminent apprehension of such a contact, and a harmful or offensive contact results. *Horton v. Suzuki*, Franklin Court of Appeal (2009). A plaintiff prevails on a claim for battery if the defendant intended to cause a contact that turned out to be harmful or offensive; lacking the intent to harm or offend the defendant is not an excuse. To prevail on a claim for battery, the plaintiff must prove that she did not consent (real or apparent) to the contact. Actual physical contact with the defendant is not necessary to constitute battery, so long as there is contact with an object closely identified with the body. *Polk v. Eugene*, (Fr. Sup. Ct. 2004). In *Polk*, the Franklin Supreme Court found a battery occurred when the plaintiff intentionally grabbed a plate out of defendant's hand. The Franklin Supreme Court in *Riley v. Adams* (1960) held that "[k]nocking or snatching anything from plaintiff's hand or touching anything connected with his person, when done in an offensive manner, is sufficient to constitute offensive touching." Here, Trapp grabbed the smartphone held tightly in Miller's hand and smashed it to the ground. Trapp did this after threatening Miller that he would "beat the hell out of" her if she did not get out of the way. Clearly, grabbing the smartphone, held tightly by Miller, in a manner that dislocated her shoulder is both harmful and offensive. The phone was connected to Miller and it was offensively snatched away by Trapp. Miller did not consent to "a certain amount of jostling" by attending the concert and going backstage. While

some jostling such as pushing and shoving to get through a crowd can be expected, a dislocated shoulder as a result of Trapp's action extends far beyond the scope of jostling. Clearly, grabbing a tightly held phone out of Miller's hands was anything but accidental. It was an intentional act committed by Trapp that caused harm to Miller. Accordingly, Miller will prevail in her claim of battery against Trapp.

An actor is subject to liability for assault if he acts intending to cause a battery or imminent apprehension of a battery and the plaintiff is put in well-founded apprehension of imminent battery. *Brown v. Orr*, Franklin Court of Appeal (2000). While words standing alone cannot constitute assault, they may give meaning to an act, and when taken together, they may create a well-founded fear of battery in the mind of the person at whom they are directed. *Brown* citing *Holmes v. Nash* (Fr. Sup. Ct. 1990). Here, Trapp, whilst looking directly at Miller raised his arm as if to strike Miller and yelled at Miller to "get out of my way, you little punk, or I'll beat the hell out of you." Much like in *Brown* citing *Holmes*, the threat to "beat the hell out of" Miller, coupled with Trapp raising his arm as if to strike Miller enables Miller to prevail on her claim of assault against Trapp. In addition, as discussed *supra*, Trapp did commit battery against Miller, thereby further bolstering her assault claim. Miller will prevail in her claim of assault against Trapp.

For intentional torts like assault or battery, the plaintiff can seek compensatory and punitive damages. Compensatory damages may include medical expenses, lost wages, and pain and suffering. Pain and suffering includes physical pain, as well as mental suffering, such as insult and indignity, hurt feelings, and fright caused by battery. Mental suffering may be inferred from proof of fright caused by sudden, unprovoked and unjustifiable battery. *Horton*. Punitive damages may be awarded for conduct that is outrageous, because of the defendant's reckless indifference to the rights of others. *Polk*. Punitive damages are awarded in the jury's discretion to punish the defendant for his outrageous conduct and to deter him and others like him from similar conduct in the future. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause, and the wealth of the defendant. While punitive damages are not awarded as a matter of right, compensatory damages are mandatory. Once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss. As you see, Miller will be entitled to both compensatory and punitive damages as a result of Trapp's intentional torts.

If you wish to avoid litigation, we are demanding $ _____ to settle.

Please comply with the demands of this letter by March 7, 2016.

Failure to comply with the two week deadline of March 7, 2016, will result in this matter moving forward to litigation, which, coupled with the pending suit between Pender and Trapp, will result in further negative publicity for your client. It is well known that Trapp is famous and wealthy and recently released a new album. Trapp has also had other run-ins with the law so a jury might feel the need to deter a multiple offender like Trapp. If this case goes to litigation, we will demand a jury trial and leave it up to a jury of Franklin County residents to decide whether Trapp should be punished for this outrageous conduct. The wealth of Trapp will be a factor. As you know, Trapp is already dealing with a lawsuit from Pender where Pender is seeking $5 million in damages.

I look forward to hearing your response on this matter.

Very Truly Yours,

_____
Timothy Howard, Partner
Stuart, Parks & Howard LLC

A

MEMORANDUM

To: Timothy Howard, Partner
From: Examinee
Date: February 23, 2016
Re: Recommendation of Specific Amounts of Damages

In the case at issue, Miller has encountered $5,000 in medical bills, $100 in lost wages and $500 to replace her phone. This totals $5,600 in known compensatory damages. This is the minimum we would reasonably expect to recover at trial. We will also be able to recover for pain and suffering as part of compensatory damages. For intentional torts like assault or battery, the plaintiff can seek compensatory and punitive damages. Compensatory damages may include medical expenses, lost wages, and pain and suffering. Pain and suffering includes physical pain, as well as mental suffering, such as insult and indignity, hurt feelings, and fright caused by battery. Mental suffering may be inferred from proof of fright caused by sudden, unprovoked and unjustifiable battery. *Horton*. Punitive damages may be awarded for conduct that is outrageous, because of the defendant's reckless indifference to the rights of others. *Polk*. Punitive damages are awarded in the jury's discretion to punish the defendant for his outrageous conduct and to deter him and others like him from similar conduct in the future. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause, and the wealth of the defendant. While punitive damages are not awarded as a matter of right, compensatory damages are mandatory. Once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.

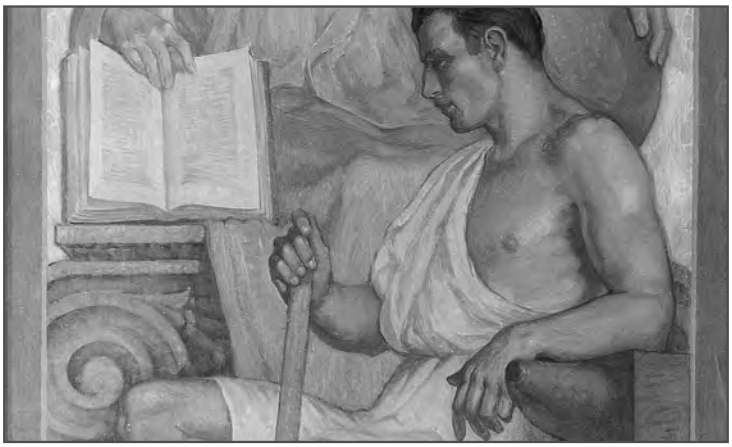
Following the recent jury awards in *Cook v. Matthews Garage* ("Cook") of $360,000, *Alma v. Burgess* ("Alma") of $1,500,000 and *Little v. Franklin Chargers Inc.* ("Little") of $52,000, I would suggest the following expectation of damages:

Medical Expenses - $5,000 in medical bills
Additional Expenses $600 for the cost of the phone and lost wages
Pain and suffering - $40,000 - (taking into account the *Little* award of $40,000 for a dislocated shoulder) higher if captured and uploaded to YouTube.
Punitive Damages - $85,000 to $225,000 (see below).

The two variable damages are the pain and suffering and the punitive damages. *Little* is the most similar of the recent decisions to our case in that the plaintiff suffered a dislocated shoulder and was humiliated in front of onlookers. If the incident was captured on video and uploaded to YouTube, Miller might be able to seek a higher amount of compensatory damages in pain and suffering due to the humiliation.

The punitive damages that were granted in the recent decisions (*Cook* and *Alma*) were five times compensatory damages in *Cook* and two times compensatory damages in *Alma*. In *Cook*, the plaintiff was the husband of a customer and the defendant knew that the employee had a history of violence. In *Alma*, the conduct was a stabbing. Our situation more closely resembles *Cook* in that the defendant had a history of violence and the behavior was outrageous. Trapp does have a history of violence and he is wealthy, so we might be able to ask for an amount 3 to 5 times the compensatory damages. Technically, as long as we are keeping the ratio to single digits, we will comply with the Supreme Court's guidelines to punitive damages as held in *State Farm v. Campbell*. However, by asking for too much in punitive damages, we might lose out. The jury in *Little* did not grant any punitive damages. *Little* requested four times the amount of compensatory. However, the conduct in *Little* can be shown as different in that the conduct was not outrageous.

In conclusion, the minimum we should seek is $130,000.00, but we might be able to seek as much as $270,600.00 if we want to push the envelope on punitive damages and negotiate higher with Trapp's attorney.



On the cover:

Detail from the Thomas J. Moyer Ohio Judicial Center Law Library Reading Room Mural 7, which depicts the availability of knowledge in printed books.

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