JULY 2015
PENNSYLVANIA BAR EXAMINATION

Essay Questions and Examiners’ Analyses and Performance Test

Pennsylvania Board of Law Examiners
601 Commonwealth Avenue, Suite 3600
P.O. Box 62535
Harrisburg, PA 17106-2535
(717) 231-3350
www.pabarexam.org

©2015 Pennsylvania Board of Law Examiners
# Table of Contents

Index ........................................................................................................................................... ii

Question No. 1: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines .......... 1

Question No. 2: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines .......... 8

Question No. 3: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines .......... 16

Question No. 4: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines .......... 23

Question No. 5: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines .......... 34

Question No. 6: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines .......... 43

Performance Test and Grading Guidelines .................................................................................. 51
Index

Question No. 1

1. Decedents’ Estates: writing after signature
2. Decedents’ Estates: latent ambiguity
4. Professional Responsibility: contingent fee

Question No. 2

1. Torts: false imprisonment, intentional infliction emotional distress
2. Civil Procedure: discovery regarding net worth
3. Torts: conversion
4. Evidence: impeachment, prior conviction

Question No. 3

1. Criminal Law: burglary, second degree (felony) murder
2. Evidence: hearsay, present sense impression
3. Family Law: equitable distribution, increased value non-marital property

Question No. 4

1. Constitutional Law: substantive due process
2. Civil procedure: rule 11 motion for sanctions
3. Employment Law: sexual harassment, hostile work environment, supervisor affirmative defense
4. Evidence: relevance, prejudice
Question No. 5

1. Property: special, general warranty deeds
2. Contracts: accord and satisfaction
3. Contracts: personal satisfaction
4. Contracts/Property: implied warranty habitability construction

Question No. 6

1. Corporations: dividend, fiduciary duty
2. U.C.C. Art. II: demand for assurance
3. U.C.C. Art. II: repudiation remedies, right to cover
Question No. 1

Roger, age 55, was a successful investment counselor in E County, Pennsylvania. He had never married, having concentrated on his career as well as being an avid fan of the Steeltown Burghers, a professional football team. His home contained a room dedicated to the Burghers, with numerous team items such as autographed footballs, jerseys, and trophies. He also had a multi-year, expensive private suite at the Burghers’ stadium, and annually bought 10 season tickets, which he gave or sold to others. All private suite holders are told at the time they purchase a suite that a perk for loyal season suite purchasers was that they would sometimes be given bonus season tickets or discounts from the Burghers. His close friends, John and Bill, would often join Roger for Burghers games and fan events in Roger’s home.

In 2010, Roger began dating Melanie, despite her minimal interest in the Burghers. Within a few months Roger proposed to her, and they married later in the same year.

Shortly after the wedding, Roger contacted Larry, a practicing E County lawyer, who was his friend of many years, and also a Burghers season ticket and suite holder, to prepare a will that was properly signed and witnessed and stated the following disposition of his estate:

“to my friends and fellow Burghers' fans John and Bill, all of my Steeltown Burghers team items in my home, equal shares in my stadium suite, and all of my Burghers season tickets for the next season after my death, 5 tickets to John and 5 tickets to Bill; 5% of the residue of my estate to John; and all of the remainder of my estate to my wife Melanie.”

Prior to signing the will, Roger told Larry that he wanted to give everything relating to the Burghers to John and Bill because as avid Burghers' fans they would appreciate the items.

In December of 2014, after several months of arguments between Roger and Melanie, she left Roger’s home, threatening divorce. In January 2015, Roger sent her a check for $2,000 with a letter saying that, “I understand why you left and hope you return. I will pay you $2,000 a month for your support while we are separated, for as long as you live. Sign and return a copy to
me if that is OK.” Melanie promptly signed and returned the letter. In February 2015, Melanie consulted Seamus, a lawyer practicing in E County, to discuss a divorce. When she showed Seamus a copy of Roger’s letter offering money, and a list of Roger’s assets with total net value of several million dollars, Seamus orally offered to take Melanie’s divorce case for a fee of 1/3 of any alimony she obtained with a divorce decree. Melanie agreed and directed Seamus to begin work on the divorce but to await her instruction to file.

Roger became depressed over the following months, with no reconciliation with Melanie, and decided to revise his will. He then wrote on his will, below his signature, “John’s share of the residue of my estate is increased to 50%,” without an additional signature.

Early in June 2015, Melanie telephoned Roger to inform him that a divorce complaint was going to be filed by Seamus the next day. Roger reacted by drinking excessively on the night of the call and drove his car off the road, colliding with a tree and died instantly. The day before his death, the Burghers sent a letter to Roger to thank him for his long term support, advising him that he had been issued 4 free premium seating season tickets in addition to his annual 10 season tickets he had already ordered for the upcoming season.

1. What effect does the handwritten addition to his will have on the distribution of Roger’s estate?

2. John and Bill claim they should receive the 4 bonus Burghers season tickets issued to Roger, and Melanie objects, claiming they are part of the residuary estate. How should the court analyze the issue, and based on the facts who is entitled to the 4 tickets?

3. Roger made the $2,000 payments to Melanie from January to June 2015. Assuming they file separate federal tax returns, what would be the federal income tax consequences to each of them for calendar year 2015?

4. Did Seamus violate any of the Rules of Professional Conduct regarding the form and type of his fee agreement with Melanie, assuming its terms remained unchanged as of the time when the divorce was to be filed?
1. Roger’s written statement after his signature will not have any effect on the distribution of his estate.

The Pennsylvania Probate, Estates and Fiduciaries Code section 2502 requires that a will be signed “at the end thereof.” 20 Pa. C.S.A. §2502. Any wording added after the signature of the testator is not effective to supplement, negate or alter the provisions of the will above the signature. See, In Re Teed’s Estate, 225 Pa. 633, 74 A. 646 (1909). Any writing after the signature to a will does not invalidate the provisions that precede the signature. 20 Pa. C.S.A. §2502(1). Roger may have intended to amend his will to deprive Melanie of a large portion of his estate by expanding John’s share of his residuary estate from 5% to 50%, but his mere addition of the language after his signature is not sufficient to do so without another signature, which the narrative does not indicate. John’s share of the residue of the estate remains at 5%.

2. The court should determine whether Roger’s bequest of his Burghers tickets contained an ambiguity, and would likely conclude that there was a latent ambiguity in the bequest that should be resolved by extrinsic evidence. Based on the extrinsic evidence set forth in the facts the court would likely find that it was Roger's intent to include the additional 4 tickets as part of the bequest to John and Bill.

An “ambiguity” in a will may be either “patent” or “latent.” A “patent ambiguity” is defined as being apparent on the face of the will and is “a result of defective or obscure language.” In Re Estate of Schultheis, 747 A.2d 918 (Pa. Super. 2000), appeal denied, 563 Pa. 703, 761 A.2d 551 (2000). The language of Roger’s will was, on its face, quite clear as to the bequest of his Burghers season tickets for the next season after his death, 5 each, to John and Bill. No patent ambiguity is presented in Roger’s will by this language.

In light of the dispute between Melanie and John and Bill over the tickets, the court would need to assess whether the language, “all of my Burghers season tickets for the next season after my death, 5 tickets to John and 5 tickets to Bill” as set forth in Roger’s will contained a “latent ambiguity.” A latent ambiguity is defined as an ambiguity that arises from collateral facts that make the meaning of a written document uncertain, although the language appears clear on the face of the document. Krizovensky v. Krizovensky, 425 Pa. Super. 204, 624 A.2d 638 (1993), appeal denied, 536 Pa. 626, 637 A.2d 287 (1993).

In order for a court to determine whether a document contains a latent ambiguity, it should hear evidence from the parties and then decide whether there are objective indications that the terms are subject to differing meanings. Krizovensky, 624 A.2d at 643. In this case, Roger annually purchased 10 season tickets and had purchased that number for the upcoming season at the time of his death in 2015. Four tickets were issued to him by the Burghers shortly before his death in gratitude for his long-term investment in the suite and season tickets. Here there is a latent ambiguity in the bequest of the season tickets because Roger gave all of his tickets to John and Bill, five tickets to each, but at the time of his death he owned 14 tickets for the upcoming football season.
When such evidence indicates that a term or phrase set forth in a will is subject to different interpretations and therefore has a latent ambiguity, parol evidence is then admissible to explain or clarify the ambiguity, “irrespective of whether the latent ambiguity is created by the language of the will or by extrinsic or collateral circumstances.” In Re Estate of Schultheis, supra. Parol evidence is accepted to determine the decedent's true intent. Estate of McKenna, 340 Pa. Super. 105, 489 A.2d 862 (1985). In Schultheis, the testator had bequeathed all of his stock by designating a specific amount of shares of stock to particular beneficiaries, but had forgotten an additional sum of shares, as his attorney testified the decedent thought he was distributing all of the shares. The Superior Court affirmed the lower court’s determination to add the additional shares to the specific legatees, as the bequest was ambiguous and extrinsic evidence established that the shares were intended to be included when the will was written.

The narrative here indicates that Roger wrote his will with a bequest of his “Steeltown Burghers collection” to John and Bill, and also gave them an equal share in his stadium suite. The language in the will establishes that Roger had an intent to give “all” of his season tickets to John and Bill, and the facts indicate that Roger would have been advised that a benefit for loyal season suite holders included the possible receipt of bonus tickets. Larry, a Burghers suite holder himself, could establish that at the time of executing his will, Roger would have known that as a benefit of being a suite holder, the Burghers might have given him bonuses including more tickets, at some time in the future. Additionally the facts establish that Melanie had little interest in the team and Roger considered John and Bill to be fellow Burghers fans. Larry could also testify that it was Roger's intent to give everything relating to the Burghers to John and Bill because as avid fans they would appreciate the items. Based on this evidence, the Court would likely determine that it was Roger's intent to have John and Bill split the 4 additional season tickets despite the designation of 10 tickets in his will, because consistent with his bequest of all of his other Burghers items, he would have intended John and Bill as his fellow fans to have any additional tickets as part of the entire scope of Roger’s property related to the Burghers.

3. The payments by Roger to Melanie would be deductible on Roger’s final tax return and should be reported by Melanie as income as the payments met the definition of “alimony/separate maintenance.”

Section 71 of the Internal Revenue Code defines “Alimony or Separate Maintenance Payments” as income to the recipient, as long as the payments are in cash, rather than marital property or other tangible goods and:

(A) such payment is received by (or on behalf of) a spouse or former spouse pursuant to a divorce or separation instrument,
(B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income and not allowable as a deduction under Section 215,
(C) in the case of an individual legally separated from his spouse under a decree of divorce or separate maintenance,
the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.

See 26 U.S.C.A 71(b)(1). A Divorce or Separation Instrument is defined as follows:

(A) a decree of divorce or separate maintenance or a written instrument incident to such a decree
(B) a written separation agreement, or
(C) a decree (not described in subparagraph A) requiring a spouse to make payments for the support or maintenance of the other spouse.


When a divorce or separation agreement or decree providing such periodic payments is silent as to the nature of the payments made to a spouse, the payments will be presumed as income to the recipient and deductible to the payor. It is necessary for the non-alimony/separation payment designation to be set forth in the document by, for example, identifying such payments as part of the property distribution, to negate such a presumption. Estate of Goldman v Commissioner, 112 T.C. 317 (1999). After Melanie left, Roger sent her a check for $2,000 with a letter stating that, “I understand why you left and hope you return. I will pay you $2,000 a month for your support while we are separated, for as long as you live. Sign and return a copy to me if that is OK.” Melanie promptly signed and returned the letter. Thus, Roger and Melanie had an agreement of separation encompassed in Roger’s letter to Melanie offering to pay her $2,000 per month in support and her signed acceptance of Roger’s offer. Section 71 (b)(1)(A) requiring a “divorce or separation instrument” includes such agreements which are not encompassed in a divorce decree. Richardson v. Commissioner, 59 T.C. Memo, 1995-554, affirmed, 125 F.3d 551 (7th Cir. 1997). In this case, the payments were being received pursuant to a separation agreement, the payments were not designated as not includable in gross income, Roger and Melanie were not living in the same household, and the payments would end at Melanie’s death or if she had reconciled and resumed cohabitation with Roger. The payment meets the definition of a "separate maintenance payment."

Melanie must report the monthly payments as income for federal tax purposes in calendar year 2015. Roger’s final income tax return for that year should take a deduction of the payments pursuant to IRC Section 215, 26 U.S.C.A. 215. The deduction is an "above the line" deduction authorized under Section 62 of the IRC, regardless of whether or not he itemizes deductions.
4. Seamus violated Rule of Professional Conduct 1.5 which prohibits an oral contingent fee and any contingent fee based on obtaining a divorce.

The Pennsylvania Rules of Professional Conduct (RPC), primarily Rule 1.5, govern multiple aspects of fee agreements for legal services. Section (b) of RPC 1.5 states:

When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

Pa. R.P.C. 1.5(a).

Seamus proposed his fee to Melanie orally when she met with him, at which time she agreed to the representation. The narrative does not indicate that he had regularly represented her, so he was obligated to put his fee requirement in writing, either before or within a reasonable time after commencing the representation. The question states that Seamus was going to file the divorce action in June 2015 several months after the oral agreement, and commencement of his representation in February, and there is no evidence in the facts that the fee agreement was ever reduced to writing. Seamus violated this provision because he did not communicate the basis or rate of the fee to Melanie in writing within a reasonable time after commencing representation.

Seamus offered to take 1/3 of whatever alimony Melanie would receive in the divorce. Section (c) authorizes contingent fees in general, but also states that such agreements “shall be in writing,” with no exception for an established client. Pa. R.P.C. 1.5(c). Section (d) furthermore states that:

A lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support.

Pa. R.P.C. 1.5(d).

Seamus' fee was contingent on obtaining a divorce for Melanie as his fee was contingent on Melanie receiving alimony as part of a divorce. The amount of his fee was also contingent on the amount of alimony obtained, as he agreed to a fee of 1/3 of any alimony she obtained. Roger died the day before the divorce complaint was to be filed, which negated the prospect of future alimony payment, but Seamus did precisely what is prohibited by the Pennsylvania Rule of Professional Conduct 1.5 (c) and (d) by offering an oral agreement for a contingent fee of 1/3 of Melanie’s alimony resulting from the prospective divorce. He has violated the RPC both in not providing a written agreement and by entering into a prohibited type of contingent fee.
Question No. 1: Grading Guidelines

1. **Writing below signature of will**

Comments: Candidates should recognize that any language written below the testator’s signature on a will is ineffective to amend or alter its terms.

3 points

2. **Ambiguity alleged in will**

Comments: Candidates should understand the definitions of a patent and latent ambiguity in a will, and the manner in which such a claim should be analyzed and determined by the court.

7 points

3. **Federal tax consequences of separate maintenance payments**

Comments: Candidates should recognize the Internal Revenue Code provisions and limitations regarding separate maintenance payments for federal income tax and deductions.

6 points

4. **Oral and contingent fee agreement**

Comments: Candidates should recognize that an oral contingent fee agreement is prohibited by the RPC, and a contingent fee based on recovery of alimony in divorce is also prohibited by the RPC.

4 points
Question No. 2

Tim is the sole proprietor of a business in B City, Pennsylvania. The business operates from a small building with an office and a storage garage for maintenance equipment. On Monday, May 5, 2014, Tim learned that during the weekend the fence around the property had been pried loose, the garage had been forcibly entered, and a new zero-turn lawn mower valued at $4,800 was missing. Tim immediately suspected that Rob, a former employee who had recently been fired, might be involved. He filed a report with the B City Police.

Tim soon learned through “word on the street” that Rob was seen at a local bar offering to sell a zero-turn mower for cash. Disgusted with the lack of progress by the police, he decided to take matters into his own hands.

Tim contacted Rob by cell phone and advised Rob that he was considering rehiring him for an unexpected opening. Rob replied that he was interested, and they agreed to meet at the office on Friday after work hours. Rob appeared as agreed, and Tim asked if he would like to return to work. Before Rob could answer Tim physically attacked him, slammed him against the wall, and placed him in a headlock. He forced Rob into a nearby closet and locked the door. Rob tried to force the door open but could not.

An infuriated Tim screamed, “You know what this is about – where’s my mower?” Rob denied any knowledge of the mower. Tim warned Rob that he “will rot in there” unless he confessed and that in a couple of days he would be dead. Tim threatened to bury Rob’s body under a foot of concrete on the property and it would never be found. Unable to free himself from the closet after 20 minutes, Rob told Tim that he did not steal the mower, but he knew where it was. Rob offered to take Tim to recover it but said he would need to go along to show him where it was located.

Tim freed Rob from the closet and ordered him into the passenger seat of the company truck. Tim told Rob he was armed and not to “try anything stupid.” Tim drove the truck as Rob directed.
After several blocks, while stopped in traffic Rob quickly opened the passenger door, fled from the truck and ran to a nearby building. The B City Police were called and filed criminal charges against Tim for his conduct.

Rob suffered physical bruises on his neck from the assault. The next day he began to experience panic attacks as a result of Tim’s actions. Rob was evaluated at the local hospital and diagnosed with severe anxiety. He was prescribed anti-anxiety medication and is being treated for anxiety and panic attacks as a result of this incident. The mower, which was severely damaged beyond repair, was recovered in a commercial storage unit rented solely by Rob.

Rob's attorney filed a civil complaint against Tim in the county court of common pleas in which B City is located setting forth the causes of action supported by the above referenced facts. Tim pled nolo contendere to a count of misdemeanor assault in a plea bargain offered because he had no criminal record, and he was sentenced to 2 years of probation. Rob’s prior criminal record consists of a misdemeanor drug possession conviction in 2012 and a misdemeanor conviction eight years ago for receiving stolen property.

1. In addition to assault and battery, what intentional tort causes of action should have been included in Rob's complaint against Tim, and with what likelihood of success?

2. In the civil suit filed against Tim, Rob's attorney wishes to obtain copies of tax returns and financial information on the assets and net worth of both Tim and his business. How should Rob’s attorney proceed to obtain the information, and with what likelihood of success?

3. What tort claim, if any, can Tim assert against Rob in a counterclaim for the damage to the mower?

4. Rob and Tim intend to testify at the civil trial, and counsel for both parties filed a Motion in Limine requesting that the court prohibit the introduction into evidence of their client’s criminal convictions for purposes of impeachment. How should the Court rule?
1. **In addition to assault and battery, Rob should also bring tort causes of action for false imprisonment and intentional infliction of emotional distress and should be successful on both claims.**

Tim’s actions of forcing Rob into the closet after the assault and locking him in it for 20 minutes, then ordering him into the company truck and traveling several blocks constitute the intentional tort of false imprisonment.

An actor is liable for the tort of false imprisonment if the following three elements are proven:

(a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and  
(b) his act directly or indirectly results in such a confinement of the other, and  
(c) the other is conscious of the confinement or is harmed by it.


Tim forced Rob into the closet after assaulting him and then locked the door, intending to confine Rob inside. Tim confined him so that he could intimidate Rob and coerce him into disclosing what he knew about the missing property. Rob tried to free himself from the closet but could not. He was confined for 20 minutes until the confinement and threats caused Rob to say that he knew where the missing lawn mower could be recovered. Although Tim permitted Rob to leave the confinement of the closet, he then ordered him into the passenger compartment of the truck by coercion, further threatening Rob that he was armed. Rob continued to be confined inside the company truck by boundaries fixed by Tim as they drove from the business. It was only after they had driven several blocks in the vehicle that Rob was able to free himself from the truck and Tim’s confinement.

Rob was fully aware of his confinement in the closet and the truck under the direct acts and threats from Tim, and was harmed as evidenced by the panic attacks and need for anti-anxiety medication. Rob should be successful on his claim for false imprisonment.

Rob should also bring a cause of action for intentional infliction of emotional distress. "To prove a claim of intentional infliction of emotional distress, the following elements must be established:

1. the conduct must be extreme and outrageous;  
2. it must be intentional or reckless;  
3. it must cause emotional distress; and  
4. that distress must be severe."

The Pennsylvania Supreme Court has not specifically adopted Section 46 of the Restatement (Second) of Torts but has cited the section as setting forth the minimum elements necessary to sustain a cause of action. Taylor v. Albert Einstein Medical Center, 562 Pa. 176, 181, 754 A.2d 650 652 (2000) (citations omitted). It has recognized the gravamen of the cause of action as being the outrageous conduct of the tortfeasor:

Only if conduct which is extreme or clearly outrageous is established will a claim be proven. . . . "The conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society."


“Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim, 'Outrageous!'” Banyas v. Lower Bucks Hospital, 293 Pa. Super. 122, 437 A.2d 1236 (1981) quoting Restatement (Second) of Torts §46, cmt. d. (1965). “Section 46 of the Restatement (Second) of Torts characterizes this tort as the actions of 'one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress.'” Hooten, supra.

As applied to the facts, Tim’s conduct was extreme and outrageous under the circumstances, in addition to being criminal. Tim lured Rob into meeting him after the work place had closed so others would not be present. This was designed by Tim so that he could assault and coerce Rob into divulging information which Tim suspected Rob knew regarding the theft of the mower. He threatened to let Rob die in the closet and then told Rob that he would conceal his body. Tim freed Rob from the closet, but only after his threats and confinement forced Rob to tell him that he could produce Tim’s missing property. Tim continued to confine Rob by ordering him into the truck under the continuing threat to Rob’s safety. It is likely and probable that an average member of the community would consider this type of action to be outrageous and far outside the bounds of ordinary decency. The finder of fact should conclude that this conduct satisfies the first element of the tort.

As to the second element, it is clear that Tim’s actions were intentional and calculated. The intent required is acting with the knowledge that severe distress is substantially certain to be produced by the conduct. Hoffman v. Memorial Osteopathic Hospital, 342 Pa. Super. 375, 492 A.2d 1382 (1985). Tim intentionally and deceptively placed the call to Rob on the false premise of offering to rehire him. He then deliberately physically assaulted Rob and confined him initially in the closet in the office, while also threatening to keep Rob confined until he died. These acts intentionally caused Rob to suffer severe emotional distress and coerced him into confessing any knowledge or information which he had regarding the theft and location of the missing mower. It was Tim’s intention to cause Rob to become emotionally distressed and upset in order to pressure him to admit to stealing the mower as Tim believed, or to provide any information Rob had regarding that theft or the disposition of his property.

As a result of Tim’s assault on Rob, his confining him in the closet and threatening to keep him locked up until he would die, Rob was diagnosed with severe anxiety, suffered panic attacks, and continues to undergo treatment for anxiety and panic attacks. He is being treated through prescription medication for stress. His treatment for the condition caused by Tim’s actions is continuing. Thus, the
third and fourth elements are satisfied. In conclusion, Rob will also likely be successful on his claim against Tim for intentional infliction of emotional distress.

2. Rob’s counsel should file a motion with the court seeking to obtain financial information related to the net worth of Tim and his business, and the court would likely permit the discovery of such information because under the facts the claims of false imprisonment and intentional infliction of emotional distress are intentional torts involving outrageous conduct which, if successfully proven would permit punitive damages to be awarded.

Information relating to a defendant’s wealth is discoverable under the Pa.R.C.P. if punitive damages are claimed. Pa.R.C.P., Rule No. 4003.7 provides as follows:

**Pa.R.C.P. Rule 4003.7 – Punitive Damages**

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

A plaintiff may properly seek punitive damages “where the defendant’s actions are so outrageous as to demonstrate willful, wanton or reckless conduct. The purpose of punitive damages is to punish a tortfeasor for outrageous conduct and to deter him or others like him from similar conduct.” *Hutchison v. Luddy*, 582 Pa. 114, 122, 870 A.2d 766, 770 (2005). Tim acted intentionally and maliciously by locking Rob in the closet, assaulting, and threatening him with the purpose to coerce a confession from him through fear and intimidation. This was outrageous conduct for which punitive damages should be available to punish Tim and to deter him and others from engaging in such action. This evidence is discoverable and may be relevant and admissible because it relates to the wealth of the defendant, and it may be considered in the assessment and potential award of punitive damages. *Field v. Merriam*, 506 Pa. 383, 485 A.2d 742 (1984). A jury must consider the wealth of the defendant in addition to the character of the act underlying the claim, and the harm suffered in order to assess punitive damages against a defendant. *Sprague v. Walter*, 441 Pa.Super. 1, 656 A.2d 890 (1995), *appeal denied*, 543 Pa. 695, 670 A.2d 142 (1996).

Rob should file a motion with the court to permit discovery of the financial information pursuant to Rule 4003.7. The court should permit Rob to seek discovery of financial information regarding Tim and his business because of the outrageous conduct involved in the intentional tort claims and the possible award of punitive damages and enter an appropriate order pursuant to Rule 4003.7. Financial information regarding Tim and his business could be used at trial, and therefore the court should permit discovery of the same. The financial information could be used at trial for the fact-finder to assess Rob’s claim for punitive damages and determine an appropriate amount if they are awarded. Therefore the court should permit the discovery request under any restrictions that are appropriate. Upon obtaining an order from the court, the Pennsylvania Rules of Civil Procedure will govern the methods of obtaining discovery of the information, which vary from parties and non-parties.
3. Tim can file a counterclaim for the tort of conversion against Rob for the wrongful possession of the mower.

Tim can assert a counterclaim against Rob for conversion because of his interference with Tim's use and possession of the mower based on its recovery in Rob’s control and possession at his storage unit.

The Pennsylvania Supreme Court has detailed the elements of conversion in *Norriton East Realty Corp. v. Central-Penn National Bank*, 435 Pa. 57, 60, 254 A.2d 637, 638 (1969) as follows:

_Salmond_ defines conversion as “an act of willful interference with a chattel, done without lawful justification, by which any person entitled thereto is deprived of use and possession.” _Salmond, Torts_ (10th ed. 1945) at 286. _Prosser_ describes the following ways in which a conversion can be committed: (a) Acquiring possession of the goods, with an intent to assert a right to them which is in fact adverse to that of the owner. (b) Transferring the goods in a manner which deprives the owner of control. (c) Unreasonably withholding possession from one who has the right to it. (d) Seriously damaging or misusing the chattel in defiance of the owner’s rights. _Prosser, Torts_, §15 (2d ed. 1955).

Conversion is defined under Pennsylvania law as “the deprivation of another's right of property in, or use or possession of a chattel or other interference therewith without the owner's consent and without lawful justification.” _L.B. Foster Company v. Charles Caracciolo Steel and Metal Yard, Inc._, 777 A.2d 1090 (Pa. Super. 2001). Conversion is a civil action equivalent which includes the criminal offenses of theft or receiving stolen property. This tort also encompasses any transfer of possession of a tangible object – with or without knowledge – which deprives the rightful owner of possession and control of an object of tangible personal property. No knowledge of a wrongful action is required for the civil claim. One can be liable for conversion without knowledge of the wrongful prior conversion or any criminal actions of an actual or purported predecessor in the chain of title. _Id._

In these facts, Tim has had his personal property wrongfully taken from his possession and control, was deprived of its possession and use for a period of time, and the mower was damaged beyond repair. The severely damaged item was discovered in a unit rented by Rob and thus was in his possession and control. It is not material whether he stole the property for Rob to be liable for conversion. Rob’s possession of the personal property to the exclusion of the lawful owner without permission is sufficient to establish the tort of conversion.

4. The Court should rule that Rob’s prior conviction for receiving stolen property is _crimen falsi_ and admissible for impeachment purposes, but Rob’s drug possession conviction and Tim’s assault conviction are not _crimen falsi_ and therefore are not admissible for impeachment.

The Pennsylvania Rules of Evidence provide in relevant part as follows:
Rule 609. Impeachment by Evidence of a Criminal Conviction

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

(b) **Limit on Using the Evidence After 10 years.** This subdivision (b) applies if more than 10 years have passed since the witness’s conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:
   (1) its probative value substantially outweighs its prejudicial effect; and
   (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

Pa.R.E. 609

The prior criminal records of both Rob and Tim include convictions that are within the 10 year period and are admissible *per se* if they are *crimen falsi*. Rule 609 does not grant the court discretion on the admission of the witness’s conviction for impeachment purposes when fewer than ten (10) years have passed since the conviction or release from confinement, whichever is later. The criminal offense of receiving stolen property is *crimen falsi* because it implicates dishonesty. *Commonwealth v. Kaster*, 300 Pa.Super. 174, 179, 446 A.2d 286, 289 (1982). Rob’s conviction 8 years ago for receiving stolen property is a *crimen falsi* offense within the *per se* time period for admissibility as provided in Rule 609. Accordingly, the Court should rule that if he testifies at trial, Rob may be impeached by his prior conviction for receiving stolen property.


Tim’s conviction for assault via a plea of *nolo contendere* is not admissible for impeachment purposes after he testifies. A conviction, whether by plea of guilty or by *nolo contendere*, if it is *crimen falsi* is admissible for impeachment purposes under Rule 609 (a), if the conviction or release from confinement (whichever is later) are within the past 10 years. Tim’s conviction for misdemeanor assault is a final conviction on which he has been sentenced. The crime of assault, however, does not involve dishonesty or false statement. *Commonwealth v. Williams*, 524 Pa. 404, 573 A.2d 536 (1990). Therefore, Tim’s conviction is not *crimen falsi*, and the Court should rule that it is not admissible for impeachment purposes under Rule 609.
Question No. 2: Grading Guidelines

1. False Imprisonment – Intentional Infliction of Emotional Distress

Comments: The candidate should discuss the elements of false imprisonment and intentional infliction of emotional distress and properly conclude that Rob’s action against Tim on these claims will succeed.

10 points

2. Discovery of Financial Information of Tim and His Business Will Be Permitted

Comments: The candidate should conclude that Tim’s personal and business financial information are discoverable upon order of court because the information could lead to relevant evidence for punitive damages which are recoverable for the outrageous conduct supporting the intentional tort claims.

4 points

3. Conversion

Comments: The candidate should discuss the elements of conversion which Tim could assert in the counterclaim against Rob.

3 points

4. Prior Criminal Conviction – Admissible to Impeach

Comments: The candidate should recognize that a prior criminal conviction is admissible for impeachment purposes per se if the conviction involves a crimen falsi offense within the past 10 years and conclude that Rob’s receiving stolen property conviction may be introduced for impeachment purposes but his drug possession conviction and Tim’s assault conviction are not admissible for impeachment purposes.

3 points
Question No. 3

On June 15, 2005, Monique and Andre married and moved into 215 Mockingbird Lane in Pleasant City, Pennsylvania. The two story home was valued at $250,000, exclusive of the land value, on the date of marriage and was owned by Andre, only. The home remained titled in Andre’s name throughout the marriage. Shortly after the marriage, Monique moved her personal property into the home, including an antique table she received as a gift years earlier, which was valued at $15,000 at the time of the marriage. Throughout the marriage the parties had a housekeeper, Connie, who lived in a spare bedroom on the first floor of the home.

On May 15, 2015, Andre and Monique had yet another in a long series of marital battles. Both parties agreed that the marriage was over, and Monique decided to go to her sister’s house in Florida. Monique departed on her trip in the late afternoon hours of May 15, 2015.

On May 16, 2015, at about 2 a.m., Andre and Connie were asleep in their respective bedrooms. Connie was awakened by a sound outside the house and looked out her bedroom window. She saw Homer, who was well known to both Connie and Andre as a mild mannered derelict in Pleasant City. She picked up her cell phone and called upstairs to Andre and calmly told him that Homer was breaking into the home through the kitchen door and that she would just handle Homer herself. She left her bedroom and proceeded to the kitchen where she encountered Homer. When Connie approached Homer, he pushed her away so he could flee but this caused her to come in contact with a lit candle which immediately ignited her clothing, and she was burned to death. The ensuing fire burned down the home and its contents, including Monique’s antique table which had increased in value to $50,000. Fortunately, Andre was able to escape the inferno and call for help.
As soon as the police arrived at the scene Andre told them about the call from Connie and that Homer was apparently involved in this tragic event. The police located Homer an hour later. After properly informing Homer of his Miranda rights, Homer admitted to breaking into the home to steal money and admitted to pushing Connie which caused her to be set on fire but said he did not intend to hurt her. The police call you as the on-duty assistant district attorney and relate the above facts and want to know if they support the charge of burglary and what the most serious homicide charge, if any, is supported by the facts.

1. As the on-duty assistant district attorney, how would you respond to the questions raised by the officer regarding the potential criminal charges?

Assume that the criminal charges against Homer proceed to trial and the prosecutor calls Andre to testify to Connie’s cell phone call wherein she identified Homer as the person who was breaking into the home. The defense objects to Connie’s statement being introduced on the grounds of hearsay.

2. How should the prosecutor respond to the defense objection, and how should the Court rule?

Assume that Monique files for divorce and equitable distribution of property in the appropriate court in Pennsylvania and the insurance company pays the full value of the home, which was still $250,000 at the time of the fire, and the full value of Monique’s antique table which was valued at $50,000 at the time of the fire. There is no issue between the parties as to who paid for the insurance coverage for the home and the table. Rather, they are only looking for direction as to who would be entitled to share in the insurance proceeds for the home and antique table.

3. What portion, if any, of the insurance proceeds for the home and antique table would be considered marital property for purposes of equitable distribution in the divorce action between Monique and Andre?
Question No. 3: Examiner’s Analysis

1. The police officer should be advised that the charge of burglary would likely be supported by the facts and that second degree murder, sometimes referred to as felony murder, would likely be the most serious homicide offense applicable to this scenario.

Initially, the charge of burglary is likely supported by the facts. "A person commits the offense of burglary if, with the intent to commit a crime therein, the person enters a building or occupied structure, or separately secured or occupied portion thereof that is adapted for overnight accommodations in which at the time of the offense any person is present." 18 Pa. C.S.A. § 3502 (a)(1). It is a defense to the prosecution for burglary if at the time of the commission of the offense the building or structure was abandoned, the premises was open to the public, or the actor was licensed or privileged to enter. 18 Pa. C.S.A.§ 3502 (b).

As applied here, Homer has admitted to breaking into the subject home and has expressly told the investigating officer that it was his intention to steal money. Connie also informed Andre that Homer was the person breaking into the home. The facts make clear that this was a two story home and at the time of the commission of the offense two people were occupying the premises. In particular, Andre and Connie were sleeping in their respective bedrooms and it is clear from these facts that the structure was adapted for overnight accommodations. There is no evidence in the facts that the home was abandoned or that it was open to the public. There is also no evidence that Homer was licensed or privileged to enter the home. On the contrary, the facts indicate that he broke into the home through the kitchen door. In summary, it appears that the charge of burglary is likely supported by the facts.

Next, the police officer should be advised that the most serious homicide offense which could be charged on the underlying facts would be second degree murder, sometimes referred to as felony murder. "A criminal homicide constitutes murder of the second degree when it is committed while the defendant was engaged as a principal or an accomplice in the perpetration of a felony." 18 Pa. C.S.A. § 2502 (b). A principal is a person who is the actor or perpetrator of the crime. 18 Pa. C.S.A. § 2502 (d). Perpetration of a felony is defined for the purposes of second degree murder as the act of the defendant in engaging in or being an accomplice in the commission of, or in an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping. 18 Pa. C.S.A. § 2502 (d).

"The malice or intent to commit the underlying crime is imputed to the killing to make it second-degree murder, regardless of whether the defendant actually intended to physically harm the victim." Commonwealth v. Lambert, 795 A.2d 1010, 1022 (Pa. Super. 2002) citing Commonwealth v. Mikell, 729 A.2d 566 (Pa. 1999). "The statute defining second degree murder does not require that a homicide be foreseeable; rather, it
is only necessary that the accused engaged in conduct as a principal or an accomplice in
the perpetration of a felony."

Lambert, supra, at 1023, citing Commonwealth v. Laudenerger, 715 A.2d 1156 (Pa. Super. 1998). Also see, Commonwealth v. Rice, 383 A.2d 903 (Pa. 1978) where a felony murder conviction was supported by the fact that the
defendant grabbed the purse of the victim which caused her to fall resulting in fatal
injuries.

As applied here, it is clear that Homer was the principal involved in the
underlying felony of burglary and that during the course of fleeing after committing the
felony he pushed Connie which caused her to come in contact with the lit candle which
led to her death. As stated in Lambert, supra, it does not matter that Homer did not
intend to kill Connie as the malice or intent to commit the burglary of the home is
imputed to the killing of Connie. By pushing her away in order to help effectuate his
escape after committing the burglary, he caused her to come in contact with the candle
which led to her being burned to death. Accordingly, second degree murder is likely
supported by these facts.

"A criminal homicide constitutes murder of the first degree when it is committed
by an intentional killing.” 18 Pa. C.S.A. § 2502 (a). An intentional killing is defined as a
killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate
and premeditated killing. 18 Pa. C.S.A. § 2502 (d). Since there does not appear to be
any evidence whatsoever on these facts to support the conclusion that Homer
intentionally killed Connie, this charge would likely not be applicable. Accordingly, the
most serious homicide offense which could be brought against Homer would likely be
second degree murder as set forth above.

2. The prosecution should respond by stating that although Connie’s statement is
hearsay, it would fall under the present sense impression exception to the hearsay
rule and should be admitted on that basis.

Pennsylvania Rule of Evidence 801(c) defines hearsay as a statement that “(1) the
declarant does not make while testifying at the current trial or hearing and (2) a party
offers in evidence to prove the truth of the matter asserted in the statement.” This Rule
further defines in pertinent part a statement as “a person’s oral assertion” and defines
declarant as the “person who made the statement.” See Pa.R.E. 801 (a)-(b). “Hearsay is
not admissible except as provided by the [Pennsylvania Rules of Evidence], by other
rules prescribed by the Pennsylvania Supreme Court, or by statute.” Pa.R.E. 802. Rule
803 provides for certain exceptions to the Rule against hearsay, regardless of whether the
declarant is available as a witness. Pa.R.E. 803. These exceptions include what is known
as “[a] present sense impression which is defined as a statement describing or explaining
an event or condition, made while or immediately after the declarant perceived it.”
denied, 657 A.2d 1244 (Pa. 1996), the Superior Court affirmed a conviction which
involved the admission of testimony based on the present sense impression exception to
the hearsay rule where a witness for the prosecution testified about a statement made by
the victim, during a telephone conversation about one and one-half hours before she was
found dead, in which the victim said that her doorbell was ringing, left the phone briefly, then came back and whispered that it was the Defendant at her door.

As applied here, Connie’s phone call to Andre would fall under the definition of hearsay as it would be considered to be a statement, namely an oral assertion, which is not being made by Connie while testifying at the current trial and is clearly being offered for the truth of the matter asserted. Namely, the statement is being offered to corroborate the fact that Homer was the one who entered the home during the early morning hours. However, the prosecution should be able to successfully argue that the statement should be permitted to be introduced at trial under the present sense impression exception to the hearsay rule. Namely, Connie was making a statement describing Homer breaking into the home in the early morning hours and this statement was being made while Connie was actually observing what was taking place. This would likely qualify as being a statement which describes or explains an event made while the declarant was perceiving it. Thus, this statement by Connie as related by Andre would likely fall within the present sense exception to the hearsay rule and should be admitted by the Trial Court.

Rule 803(2) also provides an exception for excited utterances. Pa.R.E. 803(2). Under this exception, a statement relating to a startling event or condition, made while a declarant was under the stress of excitement that it caused, can come in as an exception. There is no direct evidence under these facts that Connie was actually under the stress of excitement at the time that she made the statement. On the contrary, the facts indicate that Connie calmly relayed her observations to Andre and was going to take care of the situation herself. Although a nighttime break-in would normally constitute a startling event that would cause stress of excitement, it does not appear that this was the case in this factual scenario due to Connie’s familiarity with Homer. Thus, the excited utterance exception to the hearsay rule would arguably not apply here.

3. The $250,000 in proceeds relative to the value of the home would be considered non-marital property. With regard to the antique table, the $35,000 increase in value would be marital property subject to equitable distribution between Andre and Monique.

Marital property is defined as all property acquired by either party during the marriage and the increase in value of any non-marital property acquired prior to marriage or property acquired by gift, except between spouses, bequests, devise or descent or property acquired in exchange for such property. 23 Pa. C.S.A. § 3501 (a)(1) and (3). “The increase in value of any non-marital property acquired pursuant to subsections (a)(1) and (3) shall be measured from the date of marriage or later acquisition date to either the date of final separation or the date as close to the hearing on equitable distribution as possible, whichever date results in a lesser increase.” 23 Pa. C.S.A. § 3501(a.1). Marital property does not include property acquired in exchange for property acquired prior to marriage. 23 Pa. C.S.A. § 3501 (a)(1).

As applied here, the facts indicate that Andre was the owner of the marital home on the date of the marriage and that the home itself was valued at that time at $250,000.
As of the date of separation, the property had neither increased nor decreased in value. Accordingly, the proceeds from the home should go to Andre as this would fall within the exception to marital property under 23 Pa. C.S.A. § 3501(a)(1) as set forth above. In particular, Andre would be recovering the $250,000 in proceeds from the insurance in lieu of receiving the home itself which would be classified as non-marital property.

With regard to the antique table, this asset was Monique’s and was valued at $15,000 on the date of marriage. The property appreciated to $50,000 as of the date of separation. This asset was acquired prior to marriage and was acquired by gift and the $15,000 value as of the date of marriage would be non-marital property. Similar to the situation with Andre, Monique would receive the $15,000 in insurance proceeds to cover the $15,000 non-marital component of this asset. However, in applying 23 Pa. C.S.A. § 3501(a.1) to determine the increase in value of this non-marital property, when you deduct the $15,000 non-marital component from the $50,000 value as of the date of separation it results in $35,000 worth of proceeds which would likely be deemed to be marital property and subject to equitable distribution by the Court.
Question No. 3: Grading Guidelines

1. **Criminal Law**

Comments: The Candidate is expected to recognize that the crime of burglary is likely supported by these facts and that the most serious homicide charge that can be filed is likely second degree murder. The candidate should discuss the applicable law and apply the applicable facts in order to reach a correct conclusion as to each crime.

10 Points

2. **Evidence**

Comments: The Candidate should recognize that although the statement at issue is hearsay, the present sense impression exception to the hearsay rule would likely apply, and the statement would likely be admitted. The Candidate should discuss the relevant legal principles and apply the pertinent facts.

5 Points

3. **Family Law**

Comments: The Candidate should demonstrate an understanding of the rules governing what is determined to be marital and non-marital property and how increases in value of relevant non-marital property are handled in the equitable distribution scheme. The relevant legal principles should be discussed and the pertinent facts applied with regard to the two pieces of property at issue.

5 Points
Question No. 4

The School Board (Board), pursuant to authority delegated by State Y statute, is the entity charged with the supervision of the public schools in the School District (District). In 2014, the Board established a requirement that in order to graduate, all students attending public high school in the District must participate in 50 hours of community service as part of the high school curriculum. The rationale for the requirement is to teach students the values and habits of good citizenship, and to introduce them to their social responsibilities as citizens. The public high school in the District provides an extensive list of suggested organizations with which to volunteer, but students are free to find their own service opportunity. The parents of tenth grader James Elwood, a student in the public high school, disagree with the mandatory community service requirement based on their secular values and have precluded James from participating.

1. Attorney Pamela, on behalf of James’ parents, filed suit against appropriate defendants in the federal district court to enjoin enforcement of the community service requirement, claiming that it violates the Elwoods’ right to raise and educate their child under the substantive due process clause of the Fourteenth Amendment. How should the Court analyze and rule on the constitutional claim?

During litigation of the case in the federal district court, the Board's attorney (Attorney) filed a motion to add 28 witnesses, who would provide cumulative testimony, to the trial witness list six weeks after the list was due. He also filed a baseless motion for leave to certify an interlocutory appeal from a minor procedural matter and a frivolous motion to disqualify the federal district court judge based on allegations that the court’s law clerk wrinkled up her nose and shrugged her shoulders during his arguments to the court. Attorney informed the law clerk that he “wanted the matter to take as long as possible to be decided,” because he “wasn’t looking forward to his next assignment.”

2. Based on Attorney's conduct, Pamela, after complying with requisite procedural requirements, filed a Motion for Sanctions in the district court pursuant to Federal
Rule of Civil Procedure 11. How should the Court analyze and rule on the Motion?

Since 2014, Bella worked on the sales floor at Big Furniture, Inc., which employs 100 people. Two of her acquaintances, Jane and Lola, had worked there, but they quit in 2014 after working for only one year with Henry, the sales floor supervisor. Jane and Lola quit when their complaints that Henry frequently tiptoed behind them on the sales floor and groped their backsides were not taken seriously. In January of this year Henry began repeatedly commenting that Bella had a sexy voice, calling out her name and winking at her, and attempting to massage her shoulders against her wishes. In March of this year, Henry daily began asking Bella why a person with a body like hers always covered it up, and whether she ever got lonely.

Bella reported Henry’s conduct by following procedures in the employees’ manual for making claims of discrimination and notified the human resources director who told her “to chill out.” The HR Director did nothing further concerning Bella’s complaint against her supervisor. Henry’s conduct continued, and on one occasion he pushed Bella down on a bed on the sales floor and threatened to “make her life miserable” if she continued to refuse his advances. As a result, Bella resigned and filed a complaint against Big Furniture for sexual harassment under Title VII of the Civil Rights Act of 1964 with the appropriate administrative agency. After receiving a right to sue letter, Bella filed suit against Big Furniture in federal district court.

3. (a) What would Bella be required to prove to establish a claim for sexual harassment? (b) What would Big Furniture be required to prove to support an affirmative defense to the claim, and what is its likelihood of success?

4. Prior to trial in the district court Bella’s attorney listed Jane and Lola as witnesses to testify concerning Henry’s behavior toward them at Big Furniture, to support the claim that the company should have been aware of Henry’s conduct. Big Furniture filed a motion in limine to preclude the evidence, claiming it was irrelevant to the case and unduly prejudicial. How should the court analyze Big Furniture’s motion, and with what likelihood of success?
1. The court will first determine whether the Elwoods have a protected liberty interest in the raising and education of their child, and, if so, whether it is a fundamental interest. The court would conclude that the Elwoods’ right to raise and educate their child is a recognized liberty interest within the substantive due process clause of the Fourteenth Amendment, but would likely conclude that the claimed right to exempt their son from state imposed educational requirements to which they object on secular grounds is not a fundamental right. As a result, the court will apply the rational basis test and likely find that the Board had a legitimate basis for requiring community service in the District's high school curriculum as a means of fostering values and habits of good citizenship.

The Fourteenth Amendment of the United States Constitution states in relevant part that “No State … shall deprive any person of life, liberty, or property, without due process of law.” Here, the state action requirement is satisfied because the Board is charged with its supervision of public schools in the District pursuant to State Y statute. Where a fundamental liberty interest is involved, the infringement must be narrowly tailored to serve a compelling state interest. Reno v. Flores, 507 U.S. 292 (1993). However, where the claimed right is not fundamental, the government regulation only needs to be reasonably related to a legitimate government objective. 507 U.S. at 303-06. In this case, the court must first determine whether the Elwoods have a protected liberty interest in the raising and education of their child, and, if so, whether that interest is fundamental.

One of the liberty interests that the Supreme Court has recognized under the Fourteenth Amendment is the parental right to direct the upbringing and education of children. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of the Sisters of the Holy Names, 268 U.S. 510 (1925). The Meyer Court held that the state may not interfere with individual liberties “under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect” and found that the State exceeded its authority by enacting an unreasonable law that infringed on the rights of teachers and parents concerning the language that could be taught to students. Meyer, 262 U.S. at 399, 400.

In Pierce, supra, the State of Oregon enacted a law that mandated parents send their children to public school. Relying on Meyer, the Court overturned the Oregon statute on the grounds that the statute “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.” Id. at 534-35. The Court held that this parental liberty interest may not be abridged by state legislation “which has no reasonable relation to some purpose within the competency of the state” Id. However, the Court also recognized the important state interest in providing public education, stating: “No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them . . . , to require that all children of proper age attend some school.” Id. at 534.
Fifty years later, the Supreme Court decided Wisconsin v. Yoder, 406 U.S. 205 (1972), a case wherein a Wisconsin statute required children to attend a public or private school until the age of sixteen. The Plaintiffs, who were Amish, held religious beliefs that forbade them from permitting their children to attend school beyond the eighth grade, and claimed that application of the compulsory attendance law violated their rights under the First and Fourteenth Amendments. Id. at 209-10. While the Court again recognized the substantial state interest and “high responsibility” in providing and regulating a public educational system, Id. at 213, the Court also recognized that parents' right to guide their children's religious upbringing and education has “a high place in our society.” Id. at 213-14. In holding that the Wisconsin compulsory education law was unconstitutional as applied to the Amish children, the Court employed more than a rational basis standard, stating, “When the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State's requirement under the First Amendment.” Id. at 233. In applying this standard, the Court focused on the religious nature of the claim and noted that, "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations." Id. at 215.

In this case, the court should conclude that the Elwoods have a protected liberty interest in the upbringing and education of their son; however, where, as here, their interest in exempting their son from state imposed educational requirements is solely secular, the court would likely find that the interest was not fundamental in nature and apply the rational basis standard of review. By way of example, similar secular-based objections to mandatory high school community service requirements by parents claiming an interest in the upbringing and education of their children have been rejected. Courts addressing these claims have held that the schools’ requirements were rationally related to a legitimate state interest in education which included instructing high school students about the values and habits of good citizenship and exposing them to their social responsibilities as citizens. See Immediato v. Rye Neck School District, 73 F.3d 454 (2d Cir. 1996), cert. denied, 519 U.S. 813 (1996); Herndon v. Chapel Hill-Carrboro City Board of Education, 89 F.3d 174 (4th Cir. 1996), cert. denied, 519 U.S. 1111 (1997).

Likewise, rational basis review has been applied with respect to other state-imposed educational requirements that were challenged by parents as a violation of their right to direct the education of their children. In these cases, various federal courts ruled that the right to direct the upbringing and education of children does not include a right to exempt one's child from public school requirements. See Leebaert ex rel. Leebaert v. Harrington, 193 F. Supp. 2d 491, 501 (D. Conn. 2002), aff’d sub nom., Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003) (rejecting parent's claim of a right to excuse child from certain mandatory public school classes because the mandatory health curriculum served a legitimate state interest and was reasonably related to serving legitimate educational objectives of obtaining and understanding basic health information and services); Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525 (1st Cir.1995), cert. denied, 516 U.S. 1159 (1996) (rejecting plaintiff parents' claim that mandatory attendance at sexually explicit AIDS awareness student assembly violated right to direct the upbringing and control of their child and holding that a parent's right to direct the upbringing and education of children does not include a fundamental constitutional right to dictate the curriculum at the public school attended by their children); Swanson v. Guthrie Independent School District No. 1-
L, 135 F.3d 694 (10th Cir. 1998) (public school's policy against part-time attendance upheld because parents' constitutional right to direct their children's education does not include the right to pick and choose which mandatory classes will be attended). In all of these cases, it was held that the state had a rational basis for its school-based actions, and the actions were found to advance legitimate educational objectives.

Therefore, if the claimed right to exempt their son from state imposed educational requirements was found to not be a fundamental right, the court will employ rational basis scrutiny to review the Elwoods’ claim. The Board's mandatory community service requirement will likely be seen as rationally related to its stated educational objectives in teaching students the values and habits of good citizenship and introducing them to their social responsibilities as citizens. This interest will not be outweighed by the Elwoods’ unspecified secular values-based objection to the community service program, and the Elwoods likely will not prevail.

2. Pamela’s motion will likely be granted since Attorney’s conduct violated Federal Rule of Civil Procedure 11. By presenting motions without any valid factual or legal basis and for frivolous or improper purposes such as delay as described in the question, Attorney has violated Rule 11. The Court likely will award sanctions pursuant to Rule 11(c) based on Pamela’s motion.

Attorney improperly filed a series of motions based on invalid or frivolous assertions, including a motion filed six weeks after the deadline requesting to add 28 more witnesses to the witness list, a motion seeking the grant of an interlocutory appeal from a minor procedural ruling, and a motion without proof of any kind alleging that the court’s law clerk was biased against him, warranting disqualification of the judge. Attorney's motivation in filing the pleadings does not appear to be to advance a legitimate claim, but rather to delay the proceedings. His conduct violated Federal Rule of Civil Procedure 11(b), Representations to the Court, which provides:

By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the
evidence or, if specifically so identified, are reasonably based on
belief or a lack of information.


As a result of his conduct, the district court, upon motion by the Elwoods’
counsel, may impose sanctions and/or reasonable expenses including attorney’s
fees. Federal Rule of Civil Procedure 11(c), Sanctions, provides:

(1) In General. If, after notice and a reasonable opportunity to
respond, the court determines that Rule 11(b) has been violated,
the court may impose an appropriate sanction on any attorney, law
firm, or party that violated the rule or is responsible for the
violation. Absent exceptional circumstances, a law firm must be
held jointly responsible for a violation committed by its partner,
associate, or employee.

(2) Motion for Sanctions. A motion for sanctions must be made
separately from any other motion and must describe the specific
conduct that allegedly violates Rule 11(b). The motion must be
served under Rule 5, but it must not be filed or be presented to the
court if the challenged paper, claim, defense, contention, or denial
is withdrawn or appropriately corrected within 21 days after
service or within another time the court sets. If warranted, the
court may award to the prevailing party the reasonable expenses,
including attorney's fees, incurred for the motion.

(3) On the Court's Initiative. On its own, the court may order an
attorney, law firm, or party to show cause why conduct specifically
described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must
be limited to what suffices to deter repetition of the conduct or
comparable conduct by others similarly situated. The sanction
may include nonmonetary directives; an order to pay a penalty into
court; or, if imposed on motion and warranted for effective
deterrence, an order directing payment to the movant of part or all
of the reasonable attorney's fees and other expenses directly
resulting from the violation.


The facts state that Pamela complied with all procedural requirements prior to filing the
motion, therefore the "safe harbor" provision of subsection (c)(2) has been satisfied. Attorney's
motion to add 28 witnesses to the trial witness list was filed six weeks after the list was due and
listed witnesses who would provide cumulative testimony. His motion for leave to certify an interlocutory appeal from a minor procedural matter was baseless, and the motion to disqualify the district court judge was frivolous and based on groundless allegations that the court’s law clerk wrinkled up her nose and shrugged her shoulders during his arguments to the court. Attorney informed the law clerk that he “wanted the matter to take as long as possible to be decided” because he “wasn’t looking forward to his next assignment.”

A motion for sanctions is appropriate under the factual circumstances in the question and would likely be successful. The Supreme Court has affirmed an award of sanctions when an attorney neglected to conduct a reasonable investigation into a complaint filed in court. The Court held that “Rule 11 imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded in fact, legally tenable, and ‘not interposed for any improper purpose.’” Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990). The Cooter Court further held that the central purpose of Rule 11 was to deter baseless filings in the district court. Id. See also Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533 (1991). Pamela’s Motion likely will be granted, and the Court may award attorney fees that resulted from litigating the frivolous motions.

3. (a) Bella will be able to establish a Title VII claim for sexual harassment by her supervisor that created a hostile work environment by showing that Henry’s harassing conduct was unwelcome and sufficiently severe and pervasive so that her working conditions became intolerable.

Under Title VII of the Civil Rights Act of 1964, “It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.” 42 U.S.C.A. 2000e-2(a). "When a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986). Generally, sexual harassment claims are in one of two forms: harassment that does not result in a tangible employment action (traditionally referred to as “hostile work environment” harassment), and harassment that does result in a tangible employment action (traditionally referred to as “quid pro quo” harassment). See generally, Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 760-63 (1998). Pursuant to the facts in the question, Bella could file a sex discrimination claim based on hostile work environment.

To establish a hostile work environment, a plaintiff must show that there was unwelcome, gender-based, harassing behavior “sufficiently severe or pervasive to alter the conditions of [their] employment and create an abusive working environment.” Meritor Savings Bank, FSB, 477 U.S. at 67, 68. The environment must be objectively hostile or abusive – one that a reasonable person would find hostile or abusive – as well as subjectively perceived by the plaintiff to be abusive. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). In determining whether an environment is hostile or abusive, a court looks at all of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or
humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance. *Harris*, 510 U.S. at 23.

Bella should be able to establish that Henry’s harassing conduct was both unwelcome and based on her sex. There is nothing in the facts to indicate that Bella encouraged Henry’s behavior as she protested it through existing HR procedures. Additionally, it is reasonable to presume that the harassment was based on Bella’s status as a female based on the sexually charged comments and behavior exhibited by Henry. Since there was no adverse employment action, Bella would be required to establish that Henry’s conduct was sufficiently “severe or pervasive” as to alter the conditions of her employment. From the facts describing Henry’s egregious conduct, it is likely Bella can meet her burden. The facts indicate that Henry’s unwelcome harassing conduct was frequent and offensive, having occurred on a daily basis, and was humiliating and offensive as well. The escalating nature of Henry’s unwelcome harassing conduct is also evident, in that Henry ultimately pushed Bella onto a bed and threatened her if she did not comply with his advances. Henry’s actions created an environment that a reasonable person would find hostile or abusive and was subjectively perceived by Bella to be abusive.

Bella will be able to establish a claim for hostile work environment sexual harassment, and she will also likely be able to prove that Henry’s harassment forced her resignation from Big Furniture. In order to establish such a “constructive discharge,” Bella must establish that her working environment was so intolerable that resignation was an appropriate response, or, as the Supreme Court has held, the working conditions were so intolerable that a reasonable person would have felt compelled to resign. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 147 (2004). Given the referenced facts in the question, it is likely that Bella will be able to establish that the Big Furniture working environment was so hostile and offensive that a reasonable person would have felt compelled to resign.

3. **(b) To raise an affirmative defense, Big Furniture will be required to show that it took reasonable care to prevent and correct sexually harassing behavior, and that Bella failed to avail herself of such corrective action. Since Bella did follow procedures, to no avail, Big Furniture is unlikely to succeed in its defense and Bella will prevail on her claim.**

An employer is vicariously liable for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998). However, where, as here, there is no tangible adverse employment action taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The affirmative defense is comprised of two elements: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.* at 807.

Big Furniture may seek to avoid vicarious liability for Henry’s acts by attempting to assert an affirmative defense as described in *Faragher*, 524 U.S. at 807. This affirmative defense is available unless a supervisor’s official act precipitated the constructive discharge,
thereby constituting a tangible employment action. *Suders*, 542 U.S. at 147. In this case there was no official act of Bella's supervisor that precipitated the constructive discharge, so the defense is available to Big Furniture. An employer can defend against an action based on a hostile work environment by showing (1) that the employer had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff employee unreasonably failed to take advantage of the corrective opportunities offered by the employer. *Id.* Viewed according to the facts in the question, while it is true that Big Furniture had procedures in its employee manual for making complaints about discriminatory conduct in the workplace, when Bella followed these procedures and reported sexual harassment to the human resources director, nothing was done. Accordingly, Bella likely would be found to have availed herself of the corrective opportunities offered, and Big Furniture will not be able to avail itself of the affirmative defense.

4. The court should first determine whether Bella’s coworkers' testimony that they were sexually harassed by Henry and that nothing was done about their complaints was relevant to show Big Furniture had notice of the hostile and abusive work atmosphere, and, if so, whether its probative value is not outweighed by the danger of undue prejudice in Bella’s action against Big Furniture. Big Furniture will likely not succeed in precluding the admission of this evidence.

Pursuant to Federal Rule of Evidence 401, *Test for Relevant Evidence*, "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Pursuant to Federal Rule of Evidence 402, *General Admissibility of Relevant Evidence*, “[r]elevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; the [Rules of Evidence]; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.”

A limitation on the admissibility of relevant evidence is set forth in Federal Rule of Evidence 403, *Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons*, which provides that, “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” *See also* Pa.R.E. 403.

Pursuant to the facts in the question, Bella’s suit is taking place currently, while the evidence of Jane and Lola’s testimony would be based on recent events from last year. This evidence is relevant to show notice to Big Furniture of the sexual harassment that was present in the workplace. *See e.g. E.E.O.C. v. Federal Express Corp.*, 537 F.Supp.2d 700 (M.D. Pa. 2005) (in gender discrimination action, female former employee's testimony describing her own experience of hostile work environment and intentional discrimination while working as the only female in the same job for the same supervisor as plaintiff was highly relevant to establish that employer was on notice regarding conditions of significant sexual harassment present in the workplace, and admission of that testimony was not unfairly prejudicial to employer). The evidence could also be relevant to show the totality of the circumstances existing in the workplace and that Plaintiff's experience was not unique and her reaction not unwarranted. *See

The evidence would be relevant for the above stated purposes and likely be admissible as long as the other incidents are not too remote in time or too dissimilar from plaintiff's situation. See Tennison v. Circus Circus Enterprises, Inc., 244 F.3d 684 (9th Cir. 2001) (probative value of coworkers' testimony that they were sexually harassed by supervisor at point in time five years beyond statute of limitations was outweighed by danger of undue prejudice in employees' action against employer under Title VII); Stair, 813 F. Supp. at 1120 (acts of harassment occurring 4 years prior to plaintiff's harassment is relevant but its probative value is substantially outweighed by the danger of unfair prejudice because of the remoteness in time).

In the question, Jane and Lola’s experience at Big Furniture occurred one year prior to Bella’s experience of sexual harassment. Their experience was also very similar to Bella’s, insofar as Henry harassed all of them, they all complained, and no corrective action was taken. Their testimony is therefore relevant to Bella’s case to show both notice to the employer and the working conditions existing at Big Furniture. Pursuant to the balancing test from Rule 403, this testimony is highly relevant to a hostile work environment claim, and due to its closeness in time and circumstances, its probative value is not substantially outweighed by the danger of prejudice. Therefore, the Court will likely deny the motion in limine. Additionally, the court easily can provide a limiting instruction to the effect that Jane and Lola’s testimony should only be considered concerning notice, thus preventing undue prejudice. See Hurley, 933 F. Supp. at 411. Big Furniture’s motion to preclude the evidence likely will be unsuccessful.
Question No. 4: Grading Guidelines

1. **Substantive Due Process**

   Comments: Applicants should discuss the requirements of a substantive due process claim based on a parental liberty interest in the upbringing and education of children, analyze the facts and apply the law to the facts to reach a well-reasoned conclusion.

   6 Points

2. **Civil Procedure**

   Comments: Applicants should recognize the impropriety of an attorney making motions based on invalid legal theories, false statements, frivolous reasons and for an improper motive pursuant to Federal Rule of Civil Procedure 11, and analyze the facts and apply the Rule to arrive at a well-reasoned conclusion.

   3 Points

3. **Sexual Harassment**

   Comments: Applicants should discuss the elements of Title VII as it applies to claims for sexual harassment and the defenses to such claims, and apply the law to the facts to reach a well-reasoned conclusion.

   6 Points

4. **Evidence**

   Comments: Applicants should recognize that the court will need to evaluate whether the evidence is relevant and unduly prejudicial pursuant to Federal Rule of Evidence 403 and analyze the facts and apply the Rule to arrive at a well-reasoned conclusion.

   5 Points
Question No. 5

Bob, a professional jazz pianist, validly conveyed Blackacre, his house in Big City, Pennsylvania, to his friend, Carol, a professional “scat singing” vocalist with whom he frequently performed. Shortly thereafter, Bob agreed to buy Whiteacre, a new house being constructed in Big City by What-A-Mess Construction (“Mess”), a local builder-vendor. The properly executed sales agreement between the parties contained the following provision:

_Caveat Emptor_- After settlement is made, Bob agrees that Mess shall not be liable for any and all injuries, loss, or damage resulting from any cause whatsoever, including causes not specifically recited herein, negligence and latent or undiscovered defects. All warranties of merchantability and fitness for a particular purpose are disclaimed.

Mess subcontracted Ted, a skilled carpenter, to finish the last task in the construction of Whiteacre: the making and installation of specialty woodwork. Ted timely finished the job and sent Mess a final bill for $5,000. Mess refused to pay the bill claiming that Ted failed to make and install custom wood cabinets in Whiteacre. Ted replied that such work was not part of the subcontract. After several heated arguments, Mess offered that if Ted would drop his $5,000 claim against Mess, then Mess would give Ted a set of antique woodworking tools valued at $3,000. Ted agreed to accept Mess’s offer, but told Mess that he would consider his claim satisfied in full only when Mess delivered the tools to him. Ted later discovered that Mess sold the tools to a collector.

In August 2014, Charlie hired Bob and Carol to perform at Birdland, his Big City jazz club, for three months at $1,000/week. The valid written contract between the parties contained an express condition that Charlie could immediately terminate the contract if he was not personally satisfied with the performances of Bob and Carol. Bob and Carol’s initial performances earned unanimous praise from Big City’s entertainment critics and a number of
influential entertainment bloggers. Despite universal critical acclaim and steadily increasing attendance at their shows, Charlie said to Bob and Carol at the end of the second week of performances, “Sorry, but I’m just not diggin’ it from you cats! You’re fired.”

In January 2015, several months after moving into Whiteacre, Bob reported a sickening gas odor emanating from the basement to the gas company which “red-tagged” his furnace from being used due to insufficient access to combustible air. The gas company told Bob that the basement room where the furnace was located was defectively designed because it was too small to allow adequate ventilation. Despite Bob’s frequent demands that Mess remedy the problem with the furnace room, Mess refused to act. Bob then paid $10,000 to another contractor to reconstruct the furnace room to correct the ventilation problem.

1. Carol received a tax sale notice for Blackacre from Big City based upon an old tax lien filed against the property that predated Bob’s ownership and incurred $2,500 in out-of-pocket costs to satisfy the tax lien. Discuss whether Carol would be successful in recovering these costs from Bob if Bob’s deed which stated, “I hereby grant and convey Blackacre to Carol,” also stated either (a): “The Grantor generally warrants the property hereby conveyed;” or (b) “The Grantor specially warrants the property hereby conveyed.”

2. Ted filed suit against Mess for breach of contract seeking $5,000 in damages. Mess contends that if it is liable to Ted, the damages cannot exceed the value of the antique woodworking tools that Ted had agreed to accept. Will this defense be successful?

3. Bob and Carol sued Charlie for breach of contract. Charlie defended the suit based upon the condition in their contract. At trial, Bob and Carol presented evidence that the agent for Alice, the recent winner of the hit TV show, “America’s Most Idolized Voice,” had contacted Charlie just before he fired them and promised Charlie that she would guarantee Charlie sell-out attendance at triple the normal cost of admission if he would hire Alice to perform at Birdland during the period of Bob and Carol’s contract. Discuss the merits of Charlie’s defense.

4. What contract theory under Pennsylvania common law should Bob use in an action against Mess to recover the $10,000 paid to remedy the ventilation problem resulting from the defective design of Whiteacre’s furnace room, and what is his likelihood of success?
Question No. 5: Examiner’s Analysis

1. Carol will be able to recover her out-of-pocket expenses incurred in satisfying Big City’s tax lien if her deed to Blackacre is a deed of general warranty. Carol will not be able to recover her out-of-pocket expenses if her deed to Blackacre is a deed of special warranty.

Traditionally, a purchaser of property is protected against defects in title by six warranties or covenants. Three of these “covenants of title” are present covenants: seisin, right to convey and freedom from encumbrances; the other three covenants of title are future covenants: warranty, quiet enjoyment and future assurances. Juniata Valley Bank v. Martin Oil Co., 736 A.2d 650, 660-61 (Pa. Super. 1999). By operation of statute, these warranties survive today as the covenant of warranty. The covenant of warranty is put into effect by the use of the phrase “grant and convey” in a deed. 1 Ladner, Pennsylvania Real Estate Law, § 16.06 (c) (5th ed. R. Friedman 2006); Pa. Stat. Ann. tit. 21, §§ 4, 8 (2001).


When conveying a general warranty deed, a grantor is obliged to deliver a deed free from liens for taxes. Zurich General Accident & Liability Insurance Co. v. Klein, supra. If a grantee who receives a general warranty deed is required to pay off this claim, then the grantee is entitled to reimbursement. Id. A covenant of special warranty protects title and is not breached by liens or encumbrances on the property. Leh v. Burke, supra, 231 Pa. Super. at 110; 331 A.2d at 762. However, where the words "grant and convey" are used in a deed, unless limited by other express words in the deed, a covenant that the grantor has indefeasible fee simple title freed from encumbrances done or suffered from the grantor is created. Pa. Stat. Ann. tit. 21, § 8 (2001). In such a case, the existence of a tax lien or other encumbrance on a property conveyed by a special warranty deed does not automatically give the grantee a right of recovery. Leh v. Burke, supra. Rather, the grantee must show that the actions of the grantor caused the lien or encumbrance to burden the land at the time of transfer. Id.; Bloshinski v. Falaz, 168 Pa. Super. 565, 79 A.2d 798 (1951).

In the situation described in (a), Bob’s deed granting and conveying Blackacre to Carol stated that the grantor “will warrant generally the property hereby conveyed.” By statute, this language is considered to have the effect of creating a covenant of general warranty. See, Pa. Stat. Ann. tit. 21, § 5 (2001). Therefore, even though the Big City tax lien predated Bob’s ownership, Carol can recover her out-of-pocket expenses incurred in satisfying Big City’s tax
lien from Bob because the general warranty deed obligates Bob to defend the property against “the lawful claims and demands of all persons whomsoever.” *Id.*, § 5.

In the situation described in (b), Bob’s deed granting and conveying Blackacre to Carol stated that the grantor “will warrant specially the property hereby conveyed.” Also, by statute, this language is considered to have the effect of creating a covenant of special warranty. *Id.*, § 6. Because the Big City tax lien predated Bob’s ownership and did not arise under or through any action taken by him, Carol would not be able to recover out-of-pocket expenses incurred in satisfying the tax lien from Bob.

2. **Mess’s defense will not be successful because its obligation to pay Ted’s bill was not discharged because the accord between Mess and Ted was not satisfied due to Mess’s failure to turn over the antique woodworking tools to Ted.**

Mess’s defense that Ted’s damages are limited because of his agreement to accept the set of antique woodworking tools instead of the $5,000 that Mess owed him would be based upon the existence of an accord. The Restatement (Second) of Contracts defines an accord as “a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor’s existing duty.” RESTATEMENT (SECOND) OF CONTRACTS, § 281(1). Because an accord is a contract, the elements necessary to establish the existence of an accord are the same as those required to show the existence of a contract. *Brunswick Corp. v. Levin*, 442 Pa. 488, 491, 276 A.2d 532, 534 (1971). There must be an unequivocal offer of payment or performance in satisfaction of the underlying claim, an acceptance and consideration. *PNC Bank, Nat. Ass ’n v. Balsamo*, 430 Pa. Super. 360, 634 A.2d 645 (1993), appeal denied, 538 Pa. 659, 648 A.2d 790 (1994). Consideration to support an accord exists when the parties have a legitimately disputed claim and the creditor accepts less than the creditor claims to be due. *Nowicki Construction Co., Inc. v. Panar Corp., N.V.*, 342 Pa. Super. 8, 16, 492 A.2d 36, 40 (1985).

The facts here clearly support the existence of an accord between the parties. There was a legitimate dispute between the parties about Ted’s bill for his work performed at Whiteacre and Ted accepted Mess’s offer of the antique woodworking tools valued at $3,000 to satisfy his $5,000 bill.

The existence of an accord, however, does not operate as a substituted contract that extinguishes an obligor’s existing duty by substituting the promise of another duty in its place. *Nowicki Construction Co., Inc. v. Panar Corp., N.V.*, supra. Instead, an accord suspends the obligee’s right to enforce the original duty and provides the obligor with a chance to render a substituted performance of a new promise in satisfaction of the original duty. RESTATEMENT (SECOND) OF CONTRACTS, § 281, cmt. b. Only actual payment or performance of the promise in the accord can discharge the original duty. *Lazzarotti v. Juliano*, 322 Pa. Super. 129, 138, 469 A.2d 216, 221 (1983). Here, the facts state that Ted agreed to accept the tools in satisfaction of his claim only when Mess delivered the tools to him. Thus, Mess’s original duty to pay Ted for his work on Whiteacre was not discharged because Mess failed to provide the substituted performance (i.e. the antique woodworking tools) required by the accord.
When an accord is breached by the obligor’s failure to perform, the law gives the obligee the choice of enforcing the original duty in the underlying agreement or the duty in the accord. Restatement (Second) of Contracts, § 281, cmt b; Zager v. Gubernick, 205 Pa. Super. 168, 173-74, 208 A.2d 45, 49 (1965). Because Mess breached the accord by selling the antique woodworking tools to a collector, Ted’s claim for damages is not limited to the value of the tools. He is free to seek higher damages by enforcing his original $5,000 claim against Mess. Therefore, the defense of Mess to Ted’s suit will not be successful because there was not an accord and satisfaction.

3. Although Charlie’s duty to pay was based upon an express condition requiring his subjective satisfaction, his defense may not be successful because Bob and Carol have a strong argument that Charlie’s dissatisfaction with their musical performance was not honest or in good faith.

Parties to a contract are free to make one party’s duty to perform expressly conditional upon that party’s satisfaction with the performance of the other party. The essential problem with a condition of satisfaction is what standard should be used in determining a party’s satisfaction with the other party’s performance. A satisfaction clause may refer either to a subjective standard involving the actual satisfaction of a promisor or to an objective standard involving whether a reasonable person would be satisfied with the performance regardless of whether the promisor was actually satisfied. J. M. Perillo, Calamari & Perillo on Contracts, § 11.37 (a) (6th ed. 2009).

“A condition of personal satisfaction will not be implied. If the language of a contract clearly and convincingly states that the duty of one of the parties is conditioned on subjective satisfaction of that party, however, courts will apply the subjective test because it is the announced intention of the parties.” J. E. Murray, Jr., Murray on Contracts, § 104 (A), at 632 (5th ed.). If there is doubt or ambiguity as to which standard that the parties intended to apply when a condition of satisfaction is stated in a contract, the preferred interpretation under the Restatement (Second) of Contracts is for the application of an objective test of reasonable satisfaction. Restatement (Second) of Contracts, § 228, cmt. b (1982). See also, Calamari & Perillo on Contracts, supra.

Nonetheless, the preference for an objective standard in interpreting a satisfaction clause may be overcome depending upon the nature of the subject matter of the contract. Where satisfaction regarding the performance of a contractual duty relates to matters involving commercial value, mechanical utility or operative fitness, the contract generally will be construed to require satisfaction based upon the objective standard of a reasonable man. Where the satisfaction regarding the performance of a contractual duty relates to matters involving aesthetic qualities or personal fancy, taste or judgment, the contract generally will be construed to require satisfaction based upon the actual subjective satisfaction of the promisor. In such instances, the application of an objective test for satisfaction with the performance is not considered to be “practicable.” Restatement (Second) of Contracts, § 228, cmt. b. In this case, Charlie’s agreement with Bob and Carol provides that Charlie’s personal satisfaction is required; however, even if the agreement is considered ambiguous regarding the standard of satisfaction to be used, the subject matter of the agreement concerned music, an area necessarily
involving personal taste and judgment where it would not be practical to apply an objective
standard of satisfaction. RESTATEMENT (SECOND) OF CONTRACTS, § 228, illus. 5.

In Pennsylvania, the courts have consistently held that where a contract provides for
performance by one party to the satisfaction of the other party, “the test of adequate performance
is not whether the person for whom the service was rendered ought to be satisfied, but whether
he is satisfied, there being, however, this limitation, that any dissatisfaction on his part must be
genuine and not prompted by caprice or bad faith.” Jenkins Towel Service v. Tidewater Oil
Company, 422 Pa. 601, 606, 223 A.2d 84, 86 (1966). Thus, if the condition in the agreement is
clear that only honest satisfaction with the performance is required, the condition will not occur
as long as the promisor is honestly dissatisfied with the performance, even though the
dissatisfaction may be unreasonable. RESTATEMENT (SECOND) OF CONTRACTS, § 228, cmt. a.

Whether there is a bona fide dissatisfaction is properly a question for the finder of fact.
Pennsylvania Department of Property & Supplies v. Berger, 11 Pa. Cmwlth. 332, 312 A.2d 100
(1973). Although a subjective standard of satisfaction would apply in this case, Bob and Carol
have a strong argument that Charlie’s stated personal dissatisfaction with the performances of
Bob and Carol prompting their firing was neither honest nor in good faith. The facts state that
the agent for another singer had contacted Charlie just before he fired Bob and Carol and
promised Charlie that she would guarantee Charlie sell-out attendance at triple the normal cost of
admission if he would hire Alice to perform at Birdland during the period of Bob and Carol’s
contract. The fact-finder thus will have to decide whether Charlie’s subjective personal
dissatisfaction with the musical performances, though unreasonable in the face of the unanimous
critical acclaim, is genuine or prompted by bad faith. If it is found that Charlie's dissatisfaction
was prompted by bad faith, his defense will not be successful.

4. Bob has a likelihood of succeeding in an action against Mess based upon the implied
warranty of habitability/reasonable workmanship for new residential construction.

To recover the $10,000 that he paid to remedy the ventilation problem resulting from the
defective design of Whiteacre’s furnace room, Bob should file an action against Mess for breach
of the warranty of habitability/reasonable workmanship for new residential construction. Since
1972, Pennsylvania law has recognized a warranty of habitability and a warranty of reasonable
workmanship “rooted in the existence of a contract - an agreement of sale - between the builder-vendor of a residence and the purchaser-resident.” Conway v. Cutler Group, Inc., 99 A.3d 67, 70
warranties are not created by representations of the builder-vendor but rather are implied in law
into every contract for the sale of a new home. As such, these warranties exist independent of
A.2d 1021 (1987). These implied warranties apply to structural defects in homes purchased prior
to construction, during construction, or after the dwelling has been constructed but not yet
occupied. They also apply to defects in the land underlying the residence sold to the purchaser
of the new home by the builder-vendor. Elderkin v. Gaster, supra. The implied warranty of
habitability/reasonable workmanship extends only from the builder-vendor to the original
purchaser-user of a new residence. Conway, 99 A.3d at 73.
These implied warranties were judicially recognized to avoid the unjust results of the doctrines of caveat emptor and merger\(^1\) in the area of residential construction contracts. *Elderkin v. Gaster*, *supra*. As explained by the Pennsylvania Supreme Court in the seminal case of *Elderkin v. Gaster*, the theory behind the implied warranty of habitability is not fault or wrongdoing. “As between the builder-vendor and the vendee, the position of the former, even though he exercises reasonable care, dictates that he bear the risk that a home which he has built will be functional and habitable.” *Id.* at 128, 288 A.2d at 777.

The Pennsylvania courts have not established a specific standard for determining habitability other than a home must “be functional and habitable in accordance with contemporary community standards.” *Id.* Moreover, reasonable workmanship is not the equivalent of building perfection, but must be viewed as meaning reasonable under the circumstances. *Id.* at 126 n. 13, 288 A.2d at 776 n.13. In *Pontiere v. James Dinert, Inc.*, 426 Pa. Super. 576, 627 A.2d 1204 (1993), *appeal denied*, 537 Pa. 623, 641 A.2d 588 (1994), the Pennsylvania Superior Court found a violation of the implied warranty of habitability in a new home construction based upon facts similar to those in this case. In *Pontiere*, the furnaces in a newly constructed condominium complex emitted fumes making them unusable because the rooms in which the furnaces were located did not allow adequate access to outside air. Based upon *Pontiere*, Bob has a strong claim that Mess breached the implied warranty of habitability by its defective design of the basement room in Whiteacre where the furnace was located.

Because of the important consumer protection afforded by the implied warranties of habitability and reasonable workmanship in new residential construction, Pennsylvania case law holds that such warranties can be disclaimed “only by clear and unambiguous language in the written contract between the builder-vendor and the home purchaser.” *Tyus v. Resta*, 328 Pa.Super. 11, 20, 476 A.2d 427, 432 (1984). To create clear and unambiguous language of disclaimer, the parties' contract not only must contain language which is both understandable and sufficiently particular to provide the new home purchaser adequate notice of the implied warranty protections that he is waiving by signing the contract, but also must refer to its effect on specifically designated, potential latent defects. *Id.* at 20, 476 A.2d at 432.

In this case, the disclaimer language in the contract between Mess and Bob, which is entitled “Caveat Emptor,” the concept deemed by the Pennsylvania courts to be anachronistic in the context of residential real estate transactions, *see, Conway v. Cutler Group, Inc.*, *supra*, is ineffective because it only refers to the warranties of merchantability and fitness for a particular purpose and does not specifically mention the warranty of habitability. *See, Pontiere v. James Dinert, Inc.*, *supra*. (disclaimer of warranties of merchantability and fitness for a particular purpose does not waive implied warranty of habitability). Furthermore, the disclaimer here does not specifically identify the particular latent or undiscovered defects in the construction of Whiteacre that Mess wanted Bob to waive. *See, Tyus v. Resta, supra*. Given these deficiencies, the provision in the sales agreement between Mess and Bob would more than likely be determined to be legally insufficient to waive the implied warranties of habitability and reasonable workmanship.

\(^1\) The merger doctrine holds that all warranties and representations in connection with the sale of real property made prior to or contemporaneous with a deed are merged into the deed and are lost forever unless specifically preserved. *Elderkin v. Gaster*, *supra*, 447 Pa. at 124 n.11, 288 A.2d at 774 n.11.
In short, Bob has a likelihood of succeeding in an action against Mess based upon the common law theory of breach of the warranty of habitability/reasonable workmanship grounded in the contract between Bob and Mess for the construction of Bob’s new home.
Question No. 5: Grading Guidelines

1. General Warranty and Special Warranty Deeds

Comments: Candidates should recognize that Pennsylvania law provides that the use of certain language in a deed indicates whether a deed is a deed of general or special warranty. Candidates should discuss the difference between a general and special warranty made in a deed and reach a well-stated conclusion concerning what obligation a grantor has to defend grantee’s title against an encumbrance depending on the type of warranty.

6 Points

2. Accord and Satisfaction

Comments: Candidates should recognize the basis for the asserted defense as an attempted accord and satisfaction. Candidates should note that the elements necessary to establish the existence of an accord are the same as those required to show the existence of a contract. Candidates should recognize that the original obligation is not discharged if the accord is not satisfied by performance. Candidates should conclude that the defense of accord and satisfaction will not be successful because the accord was not satisfied by performance and that a claim based upon the original obligation can be asserted.

4 Points

3. Contract Condition Requiring Personal Satisfaction with Performance

Comments: Candidates should recognize that a duty to perform under a contract can be conditioned upon a party’s satisfaction with the other party’s performance. Candidates should discuss the proper standard for judging satisfaction with a performance and reach a well-reasoned conclusion based upon the stated facts.

5 Points

4. Implied Warranties of Habitability/Reasonable Workmanship in New Residential Construction

Comments: Candidates should recognize the judicial recognition in Pennsylvania law of a warranty of habitability/reasonable workmanship implied in the contract between a builder-vendor and the purchaser of a new residential construction. Candidates should discuss the rationale for the development of this concept and apply the concept to reach a well-stated conclusion concerning its applicability based upon the stated facts.

5 Points
Electronics, Inc. (“EI”), is a Pennsylvania corporation with its offices and operations in Pennsylvania. EI has five shareholders. Al, Bee, and Chris are all shareholders and are the sole directors of EI. Al is EI’s president, and Bee is its secretary/treasurer and chief financial officer. EI manufactures electronic components for military and civilian aircraft. On March 1, 2015, EI was awarded a contract to supply components for a military aircraft. The contract included detailed specifications and a strict deadline of August 31, 2015 for delivery of the components. On March 15, 2015, EI subcontracted with Circuits, Inc. (“Circuits”), to manufacture and supply certain circuit boards that EI needed to make the components for the military contract. EI had never worked with Circuits. The subcontract required Circuits to meet the strict specifications of the military contract, pass sample testing during manufacture, and deliver the required circuit boards by July 31, 2015.

In early April, Al learned that Circuits was having financial difficulties, had several judgments entered against it, and was running late on making deliveries under its existing contracts with other customers. Also, the first circuit board that EI received for testing from Circuits failed the test. Al immediately wrote to the president of Circuits and asked for an updated financial statement from Circuits and written verification that it would be able to deliver circuit boards complying with the contract specifications on time. He also asked that Circuits provide another circuit board for testing. In early May, having received no response to his earlier demand, Al repeated his request in writing to Circuits' president. As of today, Al has received no response from Circuits.

Concerned about Circuits’ ability to perform, Al has found another supplier for the circuit boards, Boards, Inc. (“Boards”), which has the required circuit boards in its inventory. A
purchase of the circuit boards from Boards will cost EI $20,000 more (inclusive of shipping costs) than the contract price with Circuits.

Last week, Al learned that EI’s largest customer planned to file for bankruptcy protection and would be unable to make any payments to EI for at least six months. The customer, who had always paid its bills within 20 days of invoice, currently owes EI $250,000. Al has not shared this information with Bee or Chris.

Concerned about the impact that the bankruptcy of EI’s customer would have on Al’s ability to receive his annual dividend from EI, two days ago, at the EI board meeting, Al made a motion to declare a dividend of $20,000 to each EI shareholder. Bee, unaware of the pending bankruptcy and expected non-payment by EI’s customer, accurately reported that EI was profitable, had good cash flow, was current with its creditors, and had cash on hand of $100,000. The board unanimously approved the dividend, and Bee cut and issued the five checks that day.

Yesterday, Bee and Chris learned of their customer’s bankruptcy filing and inability to pay EI. Bee immediately advised the other directors and shareholders that, even if the dividend had not been approved, the expected nonpayment by EI’s customer will prevent EI from being able to pay its debts as they come due in the usual course.

1. Could EI successfully sue any or all of the members of the EI board of directors to recover the dividend that was distributed?

2. Was EI within its rights to demand verification from Circuits that it would be able to fulfill its obligations under the subcontract, and what is the effect of Circuits’ failure to respond?

3. Can EI buy the circuit boards it needs from Boards, and, if so, is there any basis for EI to recover the $20,000 excess cost from Circuits?
Question No. 6: Examiner’s Analysis

1. EI would be successful in a suit filed against Al to recover the dividend that was improperly made by the directors but would be unsuccessful in recovering the dividend from Bee or Chris.

Generally speaking, a corporation’s board of directors may authorize, and a corporation may make, distributions unless the bylaws otherwise restrict this authority. 15 Pa. C.S.A. § 1551(a). “Distributions” are “transfers of money or other property to or for the benefit of its [the corporation’s] shareholders” which would include a cash dividend. 15 Pa. C.S.A. § 1103. Accordingly, unless EI’s bylaws provide otherwise or certain statutory limitations apply, its board would be permitted to make a distribution in the form of a cash dividend.

The Pennsylvania Business Corporation Law of 1988 (the “BCL”) imposes restrictions upon the general authorization granted boards of directors to make distributions. Section 1551(b) of the BCL provides:

A distribution may not be made if, after giving effect thereto:

(1) the corporation would be unable to pay its debts as they become due in the usual course of its business; or

(2) the total assets of the corporation would be less than the sum of its total liabilities plus (unless otherwise provided in the articles) the amount that would be needed, if the corporation were to be dissolved at the time as of which the distribution is measured, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

15 Pa. C.S.A. § 1551(b). The two basic limitations on the ability to make distributions are often referred to as the “Equity Insolvency Test” (section 1 above) and the “Balance Sheet Test” (section 2 above). See, McLamb and Shiba, Pennsylvania Corporate Law & Practice, § 8.2(b)(1994). The facts do not provide sufficient information to make a definitive determination under the Balance Sheet Test; however, it appears clear that the Equity Insolvency Test has been violated.

“The equity insolvency test provides that a corporation may not legally make a distribution if, after giving effect thereto, ‘the corporation would be unable to pay its debts as they become due in the usual course of its business;’ that is, if the corporation would be insolvent in the equity sense.” McLamb and Shiba, supra, § 8.2(b)(1)(1994). Bee has advised the directors and shareholders that given the bankruptcy of its customer and the fact that payment will not be forthcoming from its customer, that EI will be unable to pay its debts as they come due. The distribution that was approved based upon Al’s motion will only exacerbate the problem. If the directors had been advised by Al of the pending bankruptcy of EI’s customer and the effect that the filing would have on cash flow they would have known prior to voting for the dividend that
EI would not be receiving the $250,000 it was owed by its customer. Applying, the Equity Insolvency Test, if the directors knew of the customer’s bankruptcy and the effect it would have on EI’s cash flow then the EI directors should not have voted unanimously to declare and pay any part of the dividend. Thus, the dividend was not a legal dividend under the Equity Insolvency Test.

Once it is determined that the dividend was improper, one must address the liability of the board members who voted for the dividend to repay it back to the corporation. Section 1553 of the BCL provides, inter alia:

(a) Directors.--Except as otherwise provided pursuant to section 1713 (relating to personal liability of directors), a director who votes for or assents to any dividend or other distribution contrary to the provisions of this subpart or contrary to any restrictions contained in the bylaws shall, if he has not complied with the standard provided in or pursuant to section 1712 (relating to standard of care and justifiable reliance), be liable to the corporation, jointly and severally with all other directors so voting or assenting, for the amount of the dividend that is paid or the value of the other distribution in excess of the amount of the dividend or other distribution that could have been made without a violation of the provisions of this subpart or the restrictions in the bylaws.

(c) Contribution by other directors.--Any director against whom a claim is asserted under or pursuant to this section shall be entitled to contribution from any other director who voted for or assented to the action upon which the claim is asserted and who did not comply with the standard provided by or pursuant to this subpart for the performance of the duties of directors.

15 Pa. C.S.A. § 1553(a) and (c). Generally, a director who votes for an improper distribution has personal liability to the corporation to repay the distribution unless section 1713, which is inapplicable here, exempts the director or unless the director can show that he or she has complied with the standard set forth in section 1712. EI’s directors will have joint and several liability for the improper dividend unless they can find shelter under section 1712.

The BCL indicates that, absent a breach of fiduciary duty, lack of good faith or self-dealing, any act of a director shall be presumed to be in the best interests of the corporation. 15 Pa. C.S.A. § 1715(d). Section 1712 states that directors have a fiduciary duty to the corporation that they serve. This duty mandates that a director perform in good faith and in a manner reasonably believed to be in the best interests of the corporation and includes a duty of reasonable inquiry and prudence. See, Sell and Clark, Pennsylvania Business Corporations, § 1712.3. “In discharging their duties, directors are entitled to rely in good faith on the reports or other information, including financial data, presented by officers or employees of the corporation, board committees, or experts such as counsel or public accountants, provided the director reasonably believes these sources of information are competent, reliable and merit confidence.” McLamb and Shiba, supra, § 4.4(c); 15 Pa. C.S.A. § 1712(a)(1). “In each case, a director’s claim of good faith reliance will be measured by reasonable belief in the completeness and accuracy of information, the reliability and competency of the individual, or the committee’s
performance within its designated authority and in a way that the director believes merits confidence.” Sell and Clark, supra, § 1712.4. Accordingly, if a director reasonably believes that the information the director has received is from a reliable source and is accurate the director may make his or her decision based upon that information.

In the case of EI, the directors can be segregated based upon their knowledge of the customer’s pending bankruptcy or lack thereof. On one hand, Al was fully aware of the customer’s pending bankruptcy and the effect it would have on EI’s cash flow situation. Al also believed that the customer’s bankruptcy would have an impact on EI and prevent it from declaring its annual dividend. Nevertheless, Al intentionally withheld this information from his fellow board members and moved for the declaration of the dividend. On the other hand, Bee, and Chris based on Bee’s representations, believed that the corporation was solvent, were unaware of the customer’s impending bankruptcy, and reasonably believed when they voted for the dividend that it would not impact EI or its ability to pay debts as they come due.

Al cannot avail himself of the protection provided by section 1712. He intentionally withheld material information from the board which if disclosed would have resulted in a different decision by the board. In withholding the information Al breached his fiduciary duty to EI. The entire dividend was improper, and EI should be able to recover the dividend from Al. In contrast, Bee and Chris appear to have acted reasonably and should be protected by section 1712. They had no reason to know of the customer’s impending bankruptcy. Finally, Al should not be able to look to Bee or Chris for contribution.

2. An agreement for the sale of goods imposes an obligation on each party that the other party’s expectation of due performance will not be impaired. If reasonable grounds for insecurity exist, a party may demand adequate assurances of due performance and may suspend performance until adequate assurances are made. Failure to provide adequate assurance within a reasonable time is a repudiation of the contract.

The subcontract between EI and Circuits is a transaction involving the sale of goods and is, therefore, covered by Article II of the Pennsylvania Uniform Commercial Code (the “Code”) dealing with sales of goods. “Goods” is defined in relevant part as “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale.” 13 Pa. C.S.A. § 2105. The Code provides:

(a) General rule.—A contract for sale imposes an obligation on each party that the expectation of the other of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

* * *

(d) Effect of failure to provide assurance.—After receipt of a justified demand failure to provide within a reasonable time not exceeding 30 days such assurance
of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

13 Pa. C.S.A. § 2609(a) and (d).

When a party to a contract learns of financial difficulty on the part of the other party, of late deliveries where a strict delivery deadline has been established, and of failure of the other party to meet defined manufacturing specifications as shown by testing, it is reasonable for the party receiving this information to become insecure about the ability of the other party to meet their contractual obligations. Between merchants, the reasonableness of the party’s concerns is determined by commercial standards. 13 Pa.C.S.A. § 2609(b). EI and Circuits are each merchants under the Code as they deal in goods of the kind that are the subject of the agreement. See 13 Pa.C.S.A. § 2104. EI has reasonable grounds for insecurity and it is, therefore, proper for EI to seek reasonable assurance from Circuits that it has the financial ability to complete the contract and that it will be able to deliver circuit boards that meet the strict military specifications on time. EI had a reasonable basis to believe that Circuits was having financial problems and might not be capable of delivering the required product in a timely manner under the subcontract. A reasonable party in EI’s position would have legitimate concerns over the ability of Circuits to perform and the request for assurances made by EI is reasonably calculated to assure EI that Circuits will be able to perform.

The failure of Circuits to respond to EI’s reasonable demands for adequate assurance within 30 days is a repudiation of the subcontract allowing EI to pursue its remedies under the Code. 13 Pa.C.S.A. § 2609(d). EI has a strict deadline in its contract with the military and has imposed a strict delivery deadline in its subcontract with Circuits. Waiting to see if Circuits will perform does not appear to be an option. Section 2610 of the Code provides that when a party repudiates the contract the aggrieved party may await performance for a commercially reasonable time or resort to any remedy for breach provided for in the Code. 13 Pa.C.S.A. § 2610. EI would, therefore, be justified in considering Circuit’s failure to provide adequate assurance as a repudiation and pursue the remedies available under the Code to protect its interests vis-à-vis the military contract.

3. **EI should be able to purchase circuit boards from Boards. If EI purchases the circuit boards from Boards it would be entitled to recover the $20,000 excess price from Circuits.**

Once a seller repudiates or fails to make delivery a buyer may resort to the remedies identified in section 2711 of the Code. 13 Pa.C.S.A. § 2711(a). “Chief among those, and a remedy that enables the buyer ‘to obtain the goods’ and thus meet its ‘essential need’, is the right to cover embodied in 2-712.” White and Summers, Uniform Commercial Code, 4th Ed., § 6-3. Section 2712 provides, “After a breach within section 2711 . . . the buyer may ‘cover’ by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller. The buyer may recover from the seller as damages the difference between the cost of cover and the contract price, together with any incidental or consequential damages as defined in section 2715 (relating to incidental and
consequential damages of buyer) but less expenses saved in consequence of the breach by the seller.” 13 Pa.C.S.A. § 2712(a) and (b).

EI is faced with the question of effecting cover today (several days before delivery is due) or waiting until the delivery deadline to see if Circuits can perform and, if Circuits does not perform, immediately effecting cover thereafter. Based upon the discussion in 2 above it appears clear that Circuits has repudiated the contract. It has not responded to Al’s demands for adequate assurance and more than 30 days has clearly passed. In fact, EI made the demand twice and never received a response. If a repudiation has occurred, as appears to be the case, then cover is proper. EI should be able to recover the cost differential of $20,000. See, White and Summers, supra § 6-3. There is nothing in the facts to support a claim of incidental or consequential damages.
Question No. 6: Grading Guidelines

1. Corporations—Duty of Care with Respect to Distributions

Comments: The candidates should recognize the limitations on distributions such as the equity insolvency test, the duty of care owed by directors authorizing a distribution, and the liability of directors who improperly vote for an improper distribution.

10 points

2. Uniform Commercial Code—Sales—Adequate Assurance and Effect of Failure to Provide

Comments: The candidates should recognize that where expectation of due performance is impaired, a party may seek adequate assurance of performance and that failure to timely provide adequate assurance results in repudiation.

5 points

3. Uniform Commercial Code—Sales—Cover and Damages

Comments: The candidates should recognize that the buyer has a right of cover upon breach by seller and that any difference in the price of the contract may be recovered as damages.

5 points
# TABLE OF CONTENTS

## File
- Memorandum to applicant outlining the task .................................................................1
- Complaint......................................................................................................................2
- Answer & New Matter.................................................................................................3
- Reply to New Matter..................................................................................................5

## Library

### Caselaw
- *Ithier v. City of Philadelphia* ....................................................................................6
- *Brown v. City of Pittsburgh v. East Liberty Presbyterian Church* ..........................8
- *Hanover Construction Company v. Fehr* ...............................................................10
- *Gillian v. Consolidated Foods Corp.* ........................................................................12

### Rules of Civil Procedure
- Pa.R.C.P. No. 1017 ....................................................................................................15
- Pa.R.C.P. No. 1029 ....................................................................................................15
FILE
MEMORANDUM

TO: Applicant
FROM: Joseph Fendick, Managing Partner
RE: Brief concerning Judgment on the Pleadings
DATE: July 28, 2015

We represent Rees Electric Services, Inc. (hereinafter “RES”), in an action involving a breach of contract claim filed by their former customer Aaron Plastics, Inc. (hereinafter “Aaron”), in Kathryn County, Pennsylvania. All pleadings for each party have been filed, but no discovery has been exchanged.

Aaron has filed a Motion for Judgment on the Pleadings and a brief in support thereof in which it argued that the motion should be granted because RES breached its contract with Aaron by discontinuing its electric service. In support thereof, Aaron argued that RES’s “Accounting Manager” had the authority to make a waiver of payment terms and rights under their Agreement; and that RES either expressly or impliedly waived the contractual time for payment from Aaron and its right to discontinue providing electric services for breach of contract by its September 23, 2013 e-mail correspondence from its Accounting Manager to Aaron. In its brief in support of the motion, Aaron relied on the decisions of the Pennsylvania Supreme Court in Hanover Construction Company v. Fehr and Gillian v. Consolidated Foods Corp. to support its arguments.

I have begun drafting a Brief in Opposition to Plaintiff’s Motion for Judgment on the Pleadings and want you to draft the section of the Brief entitled Legal Argument, which addresses the arguments made by Aaron. In drafting this section, you should reference the applicable requirements for granting a motion for judgment on the pleadings and provide a reasoned legal analysis for the arguments that can be made to support our position in opposition to the above-referenced arguments advanced by Aaron. Be sure your arguments apply the applicable law to the relevant facts derived from the pleadings, and distinguish any points from the cases relied upon by Aaron that could be construed against RES. I have not included Aaron’s brief in support of its motion, as its arguments, which are summarized above, are straightforward.

You should cite the legal authority relied upon in your analysis. Bluebook citations are not required, as I will have my paralegal insert complete citations after the Brief is completed; however, you must sufficiently identify each case or rule such that I will know to what authority you are referring in your section of the brief.

The File contains the relevant pleadings in this matter. For the sake of brevity, I have not included the Notice to Plead, Verification, or Certificate of Service that were attached to the pleadings, or the documents referenced in and attached to the Complaint. I have also enclosed a Library that includes the only legal authority upon which you should base your analysis and argument.
IN THE COURT OF COMMON PLEAS OF KATHRYN COUNTY

Aaron Plastics, Inc.    :  
:  
v.  :  CIVIL ACTION – LAW  
:  
Rees Electric Services, Inc.    :  NO. 23 of 2015

COMPLAINT

NOW COMES, the Plaintiff, Aaron Plastics, Inc., and for its Complaint avers as follows:

1. Aaron Plastics, Inc. (hereinafter “Aaron”) is a Pennsylvania corporation with its principal place of business at 1 Flickinger Lane, Big City, Kathryn County, Pennsylvania.

2. Rees Electric Services, Inc. (hereinafter “RES”) is a Pennsylvania corporation with its principal place of business at 1 Main Street, Big City, Kathryn County, Pennsylvania.

3. Aaron and RES are parties to an Electric Services Agreement, a copy of which is attached hereto, dated September 2, 2010, with a term of ten years, and wherein RES agreed to supply electric services to Aaron at a discounted rate, and Aaron agreed to pay for those discounted electric services.

4. The Agreement required Aaron to pay to RES any amounts due within 20 days of invoice.

5. As a result of a change in accounting department personnel, Aaron neglected to make timely payment of the invoice for July 2013 electric service, which was due by August 21, 2013 and totaled $2,500.00.

6. On September 23, 2013, an employee of RES who was authorized to waive payment due dates by virtue of being the Accounting Manager of RES, sent to Aaron an e-mail communication that expressly or impliedly waived the time for payment, as well as remedies under the Agreement.

7. On September 25, 2013, RES sent to Aaron a notice that it was discontinuing services being provided under the Agreement; and RES stopped providing electricity to Aaron.

8. The aforementioned conduct of RES constitutes a breach of the Agreement, causing RES to be liable to Aaron for the damages provided in the Agreement.

WHEREFORE, Aaron demands judgment in its favor and against RES in an amount equal to the difference between the discounted rate charged by RES pursuant to the Agreement and the market rate Aaron was forced to pay for its electricity after RES discontinued services, the lost revenue from operations for the time electricity was unavailable to Aaron, plus interest, attorney fees, costs, and such other relief as the Court deems just and proper, the total of which exceeds the jurisdictional arbitration limits for Kathryn County.

Respectfully Submitted,

Mark Myers
Mark Myers, Esq.
Counsel to Aaron Plastics, Inc.
IN THE COURT OF COMMON PLEAS OF KATHRYN COUNTY

Aaron Plastics, Inc. : 

v. : CIVIL ACTION – LAW 

Rees Electric Services, Inc. : NO. 23 of 2015

ANSWER & NEW MATTER

NOW COMES, the Defendant, Rees Electric Services, Inc., (hereinafter RES) and for its Answer to Aaron Plastics, Inc.’s Complaint, and for its New Matter, avers as follows:

1. ADMITTED.
2. ADMITTED.
3. ADMITTED.
4. ADMITTED.
5. ADMITTED in part and DENIED in part. It is admitted that Aaron failed to make timely payment of the invoice for July 2013 electric service, and that payment was due on August 21, 2013 in the amount of $2,500.00. After reasonable investigation, RES is without sufficient facts to form a belief concerning the reason for Aaron’s failure to pay and the same is specifically denied and strict proof thereof is demanded at the time of trial.
6. ADMITTED in part and DENIED in part. It is admitted that on September 23, 2013, an employee of RES, who was its “Accounting Manager,” sent to Aaron an e-mail communication. However, it is specifically denied that the e-mail was an express or implied waiver of the time for payment or remedies under the Agreement. Further it is specifically denied that the RES employee who sent the e-mail correspondence had any authority whatsoever to make a waiver of the time for payment or contractual remedies. Strict proof of the allegations contained in Paragraph 6 of Aaron’s Complaint is demanded.
7. DENIED as stated. On September 25, 2013, RES sent a letter to Aaron advising that, as a result of Aaron’s failure to make timely payment of amounts due and owing, RES was terminating services pursuant to the Agreement; and RES stopped providing electricity to Aaron. Strict proof of the averments in Paragraph 7 of Aaron’s Complaint are demanded.
8. DENIED. Paragraph 8 of Aaron’s Complaint is a legal conclusion to which no responsive pleading is required. In the event a responsive pleading is deemed required by the Court, it is specifically denied that RES breached the Agreement, and strict proof thereof is demanded at the time of trial. Further, because RES did not breach the Agreement, Aaron is not entitled to damages and strict proof thereof is demanded.

WHEREFORE, RES demands judgment in its favor and against Aaron, along with an award of any damages this Court deems just and proper.
NEW MATTER

9. Each paragraph of RES’ Answer is incorporated herein as if set forth at length.

10. The Agreement gave RES certain rights in paragraph 18.1, which provides:

   18.1 Upon the failure of Aaron to pay any amount when due under this Agreement and which remains unpaid for twenty (20) days, RES shall have the following rights, which may be exercised without any prior written notice to Aaron:

   a. Charge a late fee;
   b. The right to discontinue service being provided to Aaron;
   c. The right to initiate legal action against Aaron for all amounts due by Aaron to RES hereunder; and
   d. Any or all of the remedies provided in subparagraphs a, b or c above may be exercised by RES at any time and from time to time.

11. Aaron failed to make timely payment of amounts due under the Agreement for the July 2013 electric service, which was due under the Agreement by August 21, 2013.

12. On September 23, 2013, after still not receiving the July payment, Ann David, sent to the appropriate person at Aaron an e-mail stating: “Our records indicate that we never received payment for electricity for the month of July 2013. If you have a cancelled check for this payment, please send me a copy or send payment as soon as possible to avoid late charges.”

13. Ms. David was a junior-level employee of RES who had been given the title of “Accounting Manager” because she was the only person at RES who did day to day accounting, such as paying bills and receiving payments from customers. However, Ms. David had no authority whatsoever to waive any contract terms on behalf of RES or to make any decision with regard to the exercise or waiver of contractual rights on behalf of RES.

14. The aforementioned e-mail correspondence did not mention extending the time for payment; did not mention waiving RES’s right to discontinue providing services; and did not mention RES’s right to file an action against Aaron. It simply advised that RES would not impose a late charge if Aaron paid its past due amounts as soon as possible.

15. On September 25, 2013, management at RES learned of the untimely payment and sent to Aaron notice that RES was discontinuing providing services under the Agreement.

WHEREFORE, RES demands judgment in its favor and against Aaron, along with an award of any damages this Court deems just and proper.

Respectfully Submitted,

Joseph Fendick
Joseph Fendick, Esq.
Counsel to Rees Electric Services, Inc.
IN THE COURT OF COMMON PLEAS OF KATHRYN COUNTY
Aaron Plastics, Inc.   :

v.   :

Rees Electric Services, Inc.   :

CIVIL ACTION – LAW

REPLY TO NEW MATTER

9. Each paragraph of Aaron’s Complaint is incorporated herein as if set forth at length.

10. ADMITTED.

11. DENIED as stated. Although the payment for July 2013 electric service was not paid when due by August 21, 2013, the payment was not untimely because RES waived the time for payment via its September 23, 2013 e-mail correspondence to Aaron.

12. ADMITTED.

13. DENIED. Aaron lacks sufficient facts or information to form a belief as to the reason why Ms. David was given the title of “Accounting Manager” and, therefore, the same is denied and strict proof is demanded. It is denied that Ms. David was a junior-level employee and that she lacked the authority to waive the time for payment and penalties for paying late on behalf of RES and strict proof thereof is demanded. By way of further response, an “Accounting Manager” has the authority to waive the time for payment, Aaron always believed Ms. David had such authority, and the e-mail impliedly evidenced such authority.

14. DENIED. The aforementioned e-mail correspondence asked for payment to be made; and asking for payment in the future is inherently an extension of the time for payment. Further, the e-mail offered to waive the penalty for late payment, meaning that if payment was made, RES would not take action to enforce its remedies. Strict proof to the contrary is demanded.

15. DENIED. After reasonable investigation, Aaron is without sufficient information to form a belief as to the averments contained within Paragraph 15 of RES’ New Matter and, therefore, the same are specifically denied and strict proof thereof is demanded.

WHEREFORE, Aaron demands judgment in its favor and against RES in an amount equal to the difference between the discounted rate charged by RES pursuant to the Agreement and the market rate Aaron was forced to pay for its electricity after RES discontinued services, the lost revenue from operations for the time electricity was unavailable to Aaron, plus interest, attorney fees, costs, and such other relief as the Court deems just and proper.

Respectfully Submitted,

Mark Myers
Mark Myers, Esq.
Counsel to Aaron Plastics, Inc.
LIBRARY
Rodney ITHIER, a minor and Elsie Geraghy,  
Appellants, 

v. 

CITY OF PHILADELPHIA, Appellee. 

Rodney Ithier, a minor, and his mother, Elsie Geraghy (Appellants) appeal from an order of the Court of Common Pleas of Philadelphia County (trial court) which granted the motion of the City of Philadelphia (City) for judgment on the pleadings. The trial court found that the City was immune from suit pursuant to the Recreation Use of Land and Water Act. (citation omitted).

On July 29, 1987, Rodney Ithier (Rodney) suffered lacerations and contusions to his left foot while swimming in an outdoor swimming pool, known as Felton Recreation Center, owned and maintained by the City. Rodney "pushed off from the wall of the swimming pool" and came in contact with an alleged "broken or misshapen swimming pool filter vent and its metal cover." Complaint, dated May 4, 1989, paragraphs 6 and 8(b). On May 4, 1989, Appellants filed a civil action for damages alleging that the City was negligent in knowingly allowing a dangerous condition to exist at the swimming pool and failing to take any measures to protect children from possible injury.

After the close of the pleadings, the City filed a motion for judgment on the pleadings asserting that it was immune from suit under the Recreation Act. The trial court granted the City's motion.

* * *

In reviewing a grant of judgment on the pleadings, our scope of review is limited to determining whether the trial court committed an error of law or abused its discretion. (citation omitted) A motion for judgment on the pleadings is in the nature of a demurrer in which all of the opposing parties' well-pleaded allegations are viewed as true, but only those facts specifically admitted by the objecting party may be considered against him. (citation omitted). Such a motion may only be granted in cases where no material facts are at issue and the law is so clear that a trial would be a fruitless exercise. (citation omitted).

The City is afforded governmental immunity pursuant to Sections 8541 and 8542 of the Judicial Code (Code), 42 Pa. C.S. §§ 8541 and 8542. The immunity provisions of the Recreation Act are set forth in Sections 3 and 6. Section 1 of the Recreation Act relevantly provides that "[t]he purpose of this act is to encourage owners of land to make land and water areas available to the public for
recreational purposes by limiting their liability." 68 P.S. § 477-1.

***

Initially, Appellants argue that the Recreation Act applies to recreational swimming conducted on largely unimproved land in lakes and ponds but not when it is conducted in enclosed, supervised urban pools.

***

The City argues to the contrary that it is immune from liability for damages because an outdoor swimming pool is part of a recreational area similar to an outdoor playground, and that an indoor swimming pool, . . ., is a closed recreational area, not surrounded by other recreational land.

***

In the present controversy, Rodney was injured in an outdoor pool located in a city playground. The pool is open to the public and no admission is charged for its use. Section 2(1) of the Recreation Act defines "land" as "land, roads, water, watercourses, private ways and building, structures and machinery or equipment when attached to the realty." 68 P.S. § 477-2(1). "Recreational purposes" is defined in Section 2(3) as "includ[ing], but ... not limited to, any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, water sports and viewing or enjoying historical, archaeological, scenic, or scientific sites." 68 P.S. § 477-2(3) (emphasis added). Although swimming is a recreational activity, the term "swimming pool" is not expressly included in the Recreation Act.

***

Although the factual record is limited, we are able to conclude that an outdoor swimming pool is an improvement on the land, not covered by the Recreation Act.

***

The Recreation Act is intended to protect owners of largely unimproved land, upon which lakes, ponds and similar bodies of water are located. But a municipally maintained and operated swimming pool, filled and emptied as the City desires, and which can be monitored and supervised with relative ease, is not water which is so attached to the realty as to be considered "land" encompassed under the Recreation Act.

Accordingly, we reverse the decision of the trial court and remand for proceedings consistent with this opinion.

***
The Church filed an answer to the City's complaint asserting nonliability by reason of the immunity accorded eleemosynary institutions and also because of the release from liability given by the plaintiffs to the Church as hereinbefore described.

The Church subsequently filed a motion for judgment on the pleadings on the ground that it was immune from tort liability. The City then filed a motion for judgment on the pleadings contending that the release given by the plaintiffs to the Church, also released the City from liability. It further asserted that the Church in making a monetary settlement with the plaintiffs, and in accepting the release in return, waived any right to assert its immunity. The lower court entered judgment for the Church and dismissed the City's motion. From this order and judgment, the City appealed.

Did the Church by the acts described waive its right to assert the defense of charitable immunity in this action?

A waiver in law is the act of intentionally relinquishing or abandoning some known right, claim or privilege. (citations omitted). To constitute a waiver of legal right, there must be a clear, unequivocal and decisive act of the party with knowledge of such right and an evident purpose to surrender it.

On January 25, 1961, the plaintiffs, claiming that the fall described above was caused by a dangerous accumulation of ice and snow, existing on the sidewalk for an unreasonable length of time, instituted this action for damages against the City of Pittsburgh (City). The City filed a complaint to join, on the record, the Church as an additional defendant.
Waiver is essentially a matter of intention. It may be expressed or implied. 'In the absence of an express agreement a waiver will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to.' In short, the doctrine of implied waiver in Pennsylvania applies only to situations involving circumstances equivalent to an estoppel, and the person claiming the waiver to prevail must show that he was misled and prejudiced thereby.

In the instant case, there are no facts from which an implied waiver as to the City may be found. There must be an 'inducement to prejudice' present. This is not such a case. The City was not misled to its prejudice. There was no change in the City's position as a result of any act of the Church. If the plaintiffs gained a judgment against the City, absent other facts, the City could not prevail in an action for indemnity against the Church. (citation omitted). The conduct of the Church in no way changed this position.

* * *

Order and Judgment affirmed.
These two appeals challenge the propriety of the ruling of the court below in a replevin action, after a jury verdict in plaintiff's favor, granting a new trial to defendants and refusing judgment n.o.v. in favor of defendants.

In August 1953 Warren Holland, doing business as Hanover Construction Company, orally agreed to purchase from Clayton Fehr and Roy Hahn a Galion roller and an Allis Chalmers grader for the sum of $5,100. On August 12, 1953 (plaintiff) and Fehr and Hahn (defendants) entered into a written bailment lease under the terms of which plaintiff was to pay defendants as rental for the grader and roller the sum of $5,100, $2,100 of which was to be paid upon execution of the lease and the balance of $3,000 to be paid in twelve monthly installments of $250 each. The lease did not set forth the date of each month when the monthly installments were to be paid by plaintiff. . . .[T]he lease did recite that a note was to be executed and delivered by the plaintiff to the defendants "upon the execution of [the] lease as evidence of and collateral security for the obligation to pay the rental ...". On the same date plaintiff executed and delivered to defendants both the lease and the note and paid $2,100, the down payment required under the terms of the lease. The note, signed by plaintiff, was payable to the order of the defendants in the amount of $3,000 and provided, inter alia, for payment by plaintiff of the $3,000 in twelve monthly installments $250 of each, "the first payment on September 12, 1953 - interest in advance $180 and on the same date of each month thereafter until fully paid ..."

On the same day the defendants, in writing, assigned both the lease and note to the Second National Bank of Nazareth, Pa., at the same time endorsing the note. Defendants then received $3,000 from the bank. Plaintiff received possession of the grader and roller and paid the bank $180, one year's interest in advance on the note.

On September 28, 1953 plaintiff paid the first monthly installment of $250 to the bank. On October 19, 1953 the bank mailed the following notice to the plaintiff: "According to our records your Consumer Credit Loan payment for $250 was due 10/12. Possibly this was an oversight on your part, and if so, we will appreciate your remittance by mail. If payment has been sent please accept our thanks and disregard this notice". Plaintiff received this notice in the early evening of October 20, 1953. Copies of this notice were sent by the bank to both defendants. On
October 20, 1953 - prior to receipt of the notice by the plaintiff - at the bank's direction - defendants seized and repossessed both the grader and roller. The next day - October 21, 1953 - defendants repurchased from the bank the lease and note which were then reassigned to defendants.

On November 7, 1953 plaintiff instituted this replevin action. . . . [T]he action was tried before . . . a jury . . . . At defendant's request, the jury was instructed to render, in addition to a general verdict, a special verdict on each of two issues: (a) whether the bank's notice of October 19, 1953 to plaintiff constituted a waiver of any default in payment of the monthly installment on October 12th, 1953 and (b) whether under the terms of the lease and note plaintiff was required to make monthly payments on the 12th day of each month. The jury returned three verdicts: (1) a general verdict for plaintiff and against defendants for $5,028.75; (2) a special verdict finding that the bank's notice to plaintiff did not constitute a waiver and (3) that the plaintiff was not required to make the monthly payment on the 12th day of each month. Defendants filed motions both for a new trial and for judgment n.o.v. . . . [T]he court . . . granted defendants' motion for a new trial . . . Plaintiff appeals from the grant of a new trial.

Assuming, arguendo, that the defendants' position in respect to the due date of the October payment was correct, the question arises whether the notice sent by the bank to plaintiff on October 19, 1953 constituted a waiver of the date of payment. The only evidence concerning a waiver was the writing contained in the bank's notice to the plaintiff. The trial judge submitted to the jury for its determination the question whether such writing constituted a waiver.

While ordinarily the question of waiver is a question of fact for a jury (citations omitted), yet, where the only evidence as to waiver is a writing, its construction and interpretation and whether or not it constitutes a waiver is a question of law for the court. (citations omitted). . . . The submission to the jury of the interpretation of this writing and whether it constituted a waiver was clearly erroneous.

An examination of this writing - the notice of October 19th - indicates that it constituted a waiver of the time of payment due by the plaintiff on October 12, 1953. Such being the case, the failure of the plaintiff to pay to the bank this installment due under the lease and the note on October 12, 1953 was waived and there was no justification for the repossession of the roller and the grader on October 20, 1953.

Our construction and interpretation of the notice as a waiver clearly establishes the plaintiff's right to the entry of a judgment on the verdict.
David Gillian (Gillian), the sole owner of a business concern engaged in the sale of detergents under the name of 'Uni-Clean Products' (Uni-Clean), on January 3, 1964, entered the employment of Consolidated Foods Corporation, (Consolidated), pursuant to an oral agreement which he had negotiated with James R. Tyson (Tyson), Vice-President and General Manager of Consolidated. This oral agreement provided that Consolidated would purchase Uni-Clean's inventory for $2,500, assume certain of Uni-Clean's outstanding obligations and employ Gillian in a supervisory capacity in the L. H. Parke Division of Consolidated at a salary of $15,000 per year plus $3,000 expenses and 3% Commissions on certain sales and certain fringe benefits.

After entering upon such employment, Gillian became concerned that he did not have a fixed term of employment, it being his desire to secure a five-year term of employment. On February 17, 1964, Gillian entered into an agreement in writing with Consolidated, this agreement being signed by Tyson on behalf of Consolidated. This agreement recited that in consideration of 'annual remuneration . . . in the amount of $15,000 salary and $3,000 expenses plus a 3% Commission of all Uni-Clean detergent sales', Gillian would cease any activity in the name of Uni-Clean and give to Consolidated unlimited use of the brand name 'Uni-Clean'. The agreement contained no mention of any fixed term of employment. Gillian bases his claim on this written agreement as well as an oral agreement with Tyson.

On September 11, 1964, Consolidated, acting through Tyson, discharged Gillian from its employment assigning as the reason therefor the necessity of reducing business operation costs. Gillian then instituted an equity action in the Court of Common Pleas of Philadelphia County against Consolidated seeking (a) restraint of Consolidated from using the name 'Uni-Clean', (b) an accounting by Consolidated of all profits arising from its use of the name 'Uni-Clean' and a direction that Consolidated pay over to Gillian any amount found to be due, (c) that Consolidated pay over $7,615.30 with interest to Gillian and (d) such other relief as might be deemed proper. Upon issue joined, the matter was heard by Judge James T. McDermott. After hearing, the chancellor found (1) that Gillian was employed, under an oral and written contract, for one year commencing February 17, 1964, (2) that Gillian was wrongfully discharged on September 11, 1964, and (3) that Gillian sought to mitigate the damages but such efforts were unsuccessful. Upon such findings, the chancellor awarded
Gillian damages from September 11, 1964 to February 17, 1965 in the amount of salary Gillian would have received during such period plus interest--$6,863.77--and directed Consolidated to account to Gillian for all sales under the written contract during the period from February 17, 1964 to February 17, 1965. Exceptions to the chancellor's adjudication having been dismissed by the court en banc and a final decree entered, an appeal was taken to the Superior Court which certified the appeal to this Court.

Consolidated presents six questions on this appeal: (a) whether Gillian has shown Tyson's authority to bind Consolidated to the alleged contract of employment? * * *

The burden of proving the authority of Tyson to act for Consolidated was upon Gillian. (citations omitted). While the question of the extent of an agent's authority is for the court to determine where the fact of agency depends on a written agreement (citation omitted), yet where the 'authority is to be implied from the conduct of the parties, or where the agency is to be established by witnesses, the fact (of agency) and scope of the agency are for the (trier of facts)'. (citations omitted).

Tyson was not only a vice-president but the general manager of the Parke division of Consolidated. 'The term 'manager', as applied to an officer of a corporation, conveys the idea that the management of the affairs of the company has been committed to the one thus named, and one dealing with a person so held out may assume his acts are authorized so long as they pertain to the ordinary business of the company. (citation omitted). In Kelly, Murray, Inc. v. Lansdowne Bank & Trust Co., 299 Pa. 236, 242, 149 A. 190 (1930), we quoted with approval the following statement in 14A, C.J., 359, 360: 'The fact that he occupies the position of general or managing agent implies, without further proof, his authority to do anything that the corporation itself may do so long as the act done pertains to the ordinary business of the corporation'. (citations omitted)

'The powers of an agent are particularly broad in the case of one acting as a general agent or manager; such a position presupposes a degree of confidence reposed and investiture with liberal powers for the exercise of judgment and discretion in transactions and concerns which are incidental or appurtenant to the business entrusted to his care and management. In the absence of an agreement to the contrary, a managing agent may enter into any contracts that he deems reasonably necessary or requisite for the protection of the interests of his principal entrusted to his management. He may engage and supervise such employees as may be required and he may direct the ordinary operations of the business . . . ': 3 Am.Jur.2d Agency, § 86, p. 489. [FN1] * * *
By virtue of his title and corporate position, Tyson had, at least, the apparent authority to enter into a one-year contract of employment. That he had the authority to employ and discharge the personnel in his division of Consolidated is uncontradicted; in fact, it was he who discharged Gillian from employment and his authority to do so is unquestioned. That Tyson had the authority to purchase a business and its assets and to assume liability for its outstanding obligations is undisputed. True it is that Tyson disclaimed the authority to enter into a contract of employment of a year's duration; however, the credibility of Tyson was for the fact finder, i.e., the chancellor in this instance, (citations omitted) and the chancellor, having seen and heard Tyson, characterized his testimony as 'most unsatisfactory' and his 'manner and demeanor evasive'.

From this record, we are satisfied that Gillian has shown, under the circumstances, that Tyson had authority to make a one-year contract of employment. The employment and discharge of personnel certainly falls within the ordinary and commonplace business of a corporation and within the normal and natural competency of a general manager. Particularly is this so when the general manager, concededly, has the authority to purchase other businesses, assume their liabilities and employ their personnel as well as fixing the remuneration of even top level personnel. Our review of this record reveals evidence sufficient in nature to justify a finding of authority in Tyson to employ Gillian for one year.

* * *

Lastly, it is urged that the chancellor failed to take into consideration any profits which might have been realized by Gillian, . . . in mitigation of damages. . . . Gillian's own testimony revealed he did earn money after his discharge . . . and that any profits from the sales of detergents should have been taken into consideration in arriving at the amount of an appropriate award. For this reason the decree must be vacated and the matter remanded to the court below . . . . Decree vacated and the matter remanded to the court below for proceedings consistent with the views expressed in this opinion. Consolidated pay costs.

[FN1] In this connection, it must be noted that Consolidated did not present any evidence by way of corporate memoranda to show any limitation on Tyson's authority as manager to enter into a one-year or any fixed term contract of employment.
Pennsylvania Rules of Civil Procedure

Rule 1017. Pleadings Allowed.

(a) . . . , the pleadings in an action are limited to:

(1) a complaint and an answer thereto,

(2) a reply if the answer contains new matter, a counterclaim or a cross-claim,

(3) a counter-reply if the reply to a counterclaim or cross-claim contains new matter,

(4) a preliminary objection and a response thereto.

Rule 1029. Denials. Effect of Failure to Deny.

(a) A responsive pleading shall admit or deny each averment of fact in the preceding pleading or any part thereof to which it is responsive. A party denying only a part of an averment shall specify so much of it as is admitted and shall deny the remainder. Admissions and denials in a responsive pleading shall refer specifically to the paragraph in which the averment admitted or denied is set forth.

(b) Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand for proof, except as provided by subdivision (c) and (e) of this rule, shall have the effect of an admission.

(c) A statement by a party that after reasonable investigation the party is without knowledge or information sufficient to form a belief as to the truth of an averment shall have the effect of a denial.

(d) Averments in a pleading to which no responsive pleading is required shall be deemed to be denied.
**Instructions**

The performance test is designed to test an applicant’s ability to perform the legal task that has been assigned using the factual information contained in the File and legal principles that are provided in the Library.

The File contains the only factual information that you should consider in performing the assigned task. The task to be completed is set forth in the first document in the File in the form of a memorandum to the applicant. The Library contains the only legal principles that you should consider to complete the assigned task. Although your general knowledge of the law may provide some background for analyzing the problem, the factual information contained in the File and the legal principles contained in the Library are the only materials that you should use in formulating your answer to the assigned task.

Your response should be written in the gray answer book or typed in answer screen number 3 of SofTest. Be sure to allow sufficient time for reading the materials, organizing your answer and completing the task assigned. Your answer should demonstrate an understanding of the relevant facts, recognition of the issues and the applicable principles of law and the reasoning that supports your answer. Your grade will be based on the content of your response and your ability to follow instructions in performing the assigned task.

The events depicted and the persons portrayed by the information in the File are fictitious and such information does not depict nor is it intended to depict or portray any actual person, company or occurrence. Any similarity to any person, living or dead, or any occurrence is purely coincidental.
Question No. PT: Examiner’s Analysis

The applicant is assigned to draft the legal argument section of a brief addressing the issues raised in relation to a Motion for Judgment on the Pleadings that has been filed by the Plaintiff.

In addressing the issues, the applicant must identify the relevant facts from the pleadings, along with the necessary law from cases and Rules provided, in order to argue that the grant of judgment on the pleadings is inappropriate. The applicant must apply the standards for granting a Motion for Judgment on the Pleadings in addressing the opposing party’s arguments that the client waived the time for payment in the contract, or contractual rights or remedies arising due to late payment; and that the client’s agent had the authority to waive the provisions.

Format

Following directions concerning formatting is an important skill of every lawyer. The applicant is expected to follow the directions provided concerning the format of the sections of the Brief (ie – put the answer in the form of a section of a brief, and call it “Legal Argument.”)

The applicant is also expected to provide citations to cases and rules, although formal Bluebook citations are not required.

Standards for Judgment on the Pleadings

"A motion for judgment on the pleadings is in the nature of a demurrer in which all of the opposing parties' well-pleaded allegations are viewed as true, but only those facts specifically admitted by the objecting party may be considered against him." Ithier v. City of Philadelphia.

"Such a motion may only be granted in cases where no material facts are at issue and the law is so clear that a trial would be a fruitless exercise." Ithier v. City of Philadelphia.

I. Waiver of the Time for Payment or Rights Under the Agreement

A waiver “is the act of intentionally relinquishing or abandoning some known right, claim or privilege.” Brown v. City of Pittsburgh

“To constitute a waiver of legal right, there must be a clear, unequivocal and decisive act of the party with knowledge of such right and an evident purpose to surrender it.” Brown v. City of Pittsburgh

Where the evidence as to waiver is a writing, its construction and interpretation and whether or not it constitutes a waiver is a question of law for the court. Hanover Construction Co v. Fehr

Here, the evidence as to a waiver is set forth in writing in the September 23, 2013, e-mail, and therefore the determination of whether there was a waiver by the language in the e-mail is a question of law for the court.

Despite Aaron’s assertion that RES expressly waived the time for payment, there exists no evidence in the language in the e-mail that RES intentionally relinquished or abandoned a known right, claim or privilege with respect to the time for payment or its right to discontinue service as a result of the breach.
The language of the e-mail Aaron claims constitutes a waiver provides: "Our records indicate that we never received payment for electricity for the month of July 2013. If you have a cancelled check for this payment, please send me a copy or send payment as soon as possible to avoid late charges."

As a matter of law, this language should not be construed as a waiver of either the time of payment or the right to terminate electric service for a breach of the agreement because there is no clear and unequivocal language in the e-mail concerning a surrender of any rights related to the time of payment or the ability to terminate electric services for a breach of the agreement.

At most, the text of the e-mail could lead to a conclusion that RES waived the right to impose a late fee for the late payment, if the sender of the e-mail had the authority to make such a waiver (see authority section below indicating that no such authority existed).

The case of Hanover Construction Company v. Fehr, on which Aaron relies to support its claim of waiver, is distinguishable from the instant matter. In Hanover, the communication requested payment if it had not yet been made, while in the instant matter, the communication (e-mail) - if it could be construed as a request for payment in the future - was limited in that regard to an offer to refrain from charging a late fee if payment was made as soon as possible.

Aaron also argues that the September 23, 2013, e-mail constitutes an implied waiver of the time for payment and the right to discontinue service as a result of a breach.

A question of waiver not based on a writing is a question of fact for the jury. Hanover Construction Co v. Fehr.

“In the absence of an express agreement, a waiver will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to.” The doctrine of implied waiver in Pennsylvania applies only to situations involving circumstances equivalent to an estoppel, and the person claiming the waiver to prevail must show that he was misled and prejudiced thereby.” Brown v. City of Pittsburgh

The Complaint filed by Aaron did not make any averments that it was misled to its prejudice by the language in the e-mail, and there was no evidence of any change in Aaron's position as a result of the e-mail from RES. The determination of a waiver based on a claim of being misled and prejudiced by the conduct of RES involves a material question of fact that is in dispute, as it was not averred much less admitted in the pleadings, and as such the issue of an implied waiver is not properly addressed by the court in a Motion for Judgment on the Pleadings. Ithier v. City of Philadelphia; Brown v. City of Pittsburgh.

II. Authority to Waive the Time for Payment or the Right to Discontinue Service for a Breach 8 points

The burden of proving the authority of an agent is upon the party asserting the authority existed. Gillian v. Consolidated Foods Corp.
Although Aaron claims Ms. David had the authority to make a waiver of the time for payment and right
to discontinue services, in its Answer and New Matter RES specifically denied that Ms. David had the
authority to make a waiver of any contract terms or rights.

Only those facts specifically admitted by the objecting party may be considered against him in deciding
a Motion for Judgment on the Pleadings.  *Ithier v. City of Philadelphia.*

All of the averments in the Complaint related to the authority of Ms. David to waive the terms or rights
under the agreement were specifically denied by RES and cannot be construed as an admission that
could be considered against it.  *Rule 1029*

Furthermore, in its Answer and New Matter, RES stated that Ms. David had no authority to waive any
contractual provision on behalf or RES, nor did she have the authority to make any decision with regard
to the exercise or waiver of contractual rights on behalf of RES.

For purposes of deciding a Motion for Judgment on the Pleadings, well pleaded allegations of the
opposing party are treated as true.  *Ithier v. City of Philadelphia.*

Whether or not Ms. David had the proper authority to make a waiver is, at a minimum, a disputed
material fact that requires the court to deny the Motion for Judgment on the Pleadings.  *Ithier v. City of
Philadelphia.*

The fact that the allegations in Aaron's Reply to New Matter allege that Ms. David had authority to
waive the terms of the Agreement and the rights for breach does not provide support for granting the
Motion for Judgment on the Pleadings because no response was permitted to the Reply and at best the
allegations in the Reply demonstrate that there is a dispute of a material fact.  *Rule 1017.*

"While the question of the extent of an agent's authority is for the court to determine where the fact of
agency depends on a written agreement, where the ‘authority is to be implied from the conduct of the
parties, or where the agency is to be established by witnesses, the fact (of agency) and scope of the
agency are for the (trier of facts).’”  *Gillian v. Consolidated Foods Corp.*

Because there is no written agreement concerning Ms. David’s authority to act with respect to granting a
waiver (which a court could decide), Ms. David’s authority, which is in dispute, will have to be
determined by the trier of fact.  As the facts on this issue are in dispute, the court should deny the
motion.  *Ithier v. City of Philadelphia*

The court's decision in *Gillian,* on which Aaron relies, is distinguishable from the instant matter.  In the
instant matter, Ms. David holds the position of “Accounting Manager,” whereas the agent in the Gillian
case was both a Vice President and General Manager of the company.  While the title of General
Manager carries with it a connotation of having broad authority to act for a company (*Gillian,* the title
“Accounting Manager” does not necessarily have the same connotation.  *Gillian* is also distinguished by
the fact that the agent therein was an officer of the corporation, which was noted by the *Gillian* court.  In
the instant matter, Ms. David is not.  Any apparent authority of Ms. David to waive the terms of the
agreement based on her title or status with the corporation is a disputed question of fact that precludes
granting Plaintiff's Motion for Judgment on the Pleadings.