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PENNSYLVANIA BAR EXAMINATION

Essay Questions and Examiners’ Analyses and Performance Test
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Question No. 1

Roger was a recently retired, financially successful man living in E County, Pennsylvania, who had been married for ten years to Meg. He was the father of John, a self-supporting adult born of Roger’s first wife, who had died several years before he married Meg. Roger and Meg began having difficulties in the first few years of the marriage, and Roger began spending a lot of time at the nearby Shoreline Casino, where he developed an interest in gambling. During 2013, Roger had gambling winnings of $10,000 but also had $50,000 of gambling losses. He struck up a friendship with Sherry, a casino waitress, who listened to Roger and confided in him about her own problems with her unemployed, alcoholic husband, Barney. Sherry wanted a divorce, but couldn’t afford a lawyer as she was the sole support of her family.

During the year 2013, Roger’s relationship with Meg continued to worsen, and he told Meg that he was going to name “a good friend” as his power of attorney in case he became incapacitated. In November of 2013, he met with Larry, a Pennsylvania licensed attorney who had known Roger and done legal work for him for many years. Roger instructed Larry to revise his Last Will and Testament, which had provided equally for Meg and John, for a new distribution providing that all of his individually-owned assets, which were nearly $1 million in value, would be divided as follows: “40% to my son John, 20% to the E County Charity Foundation, 20% to my loyal friend Sherry to make a better life for her children, and 20% to my wife Meg.” Roger was concerned that John or Meg might challenge the other bequests, so Larry added to the will a provision stating that “should any beneficiary contest this will or attempt to vacate, alter or change any provision thereof, he or she shall forfeit any interest given hereunder.” The will was properly signed and witnessed. Larry kept a fully-executed photocopy and gave the original will to Roger, who subsequently gave the original will to John, whom he had named Executor.
At the same time, Roger instructed Larry to draft a general power of attorney naming Sherry as his agent in the event of his incapacity. He had not asked Sherry if she was willing, but insisted that the document be drawn right away for his signature, which Larry accomplished. Roger signed it and left it with Larry, saying he would get Sherry to acknowledge acceptance.

A few days later, Roger suffered a massive stroke which hospitalized him for weeks until he died in December of 2013, never having regained consciousness. At one point, Sherry came to the hospital to visit Roger while John was present, and she introduced herself as a good friend of Roger’s. Several days before Roger’s death, John’s house caught fire, and Roger’s original will was destroyed.

Soon after Roger’s death, Sherry contacted Larry to handle her divorce, having been told by Roger that Larry would do a good job for her. She was surprised and pleased when Larry informed her of the bequest to her in Roger’s will. Several years before, Barney had once consulted with Larry about the possibility of Sherry divorcing him, saying he might need a lawyer. He did not tell Larry anything of significance with respect to the divorce. Larry told him to make another appointment to discuss a divorce in more detail if necessary, but Barney did not return.

1. John contacted Larry after Roger’s death to tell him the original will had been destroyed by the fire in his home. If Larry presents a copy of the will for probate, should it be admitted by the court to probate?

2. Assume for purposes of this question, that Roger’s will can be probated and that John wants to challenge the bequest to Sherry on the basis of undue influence. What effect, if any, would the challenge have on John's right to take under Roger's will?

3. How should Roger’s gambling winnings and losses be treated by the Executor filing Roger’s final federal income tax return, as a cash-basis taxpayer who could itemize his deductions for the year 2013?

4. If Barney objects after Larry filed a divorce action for Sherry, would Larry’s continued representation of Sherry violate the Pennsylvania Rules of Professional Conduct?
Question No. 1: Examiner’s Analysis

1. The photocopy of Roger’s will should be probated because any presumption that the original will was destroyed by the testator can be overcome by the testimony of John, so long as John’s testimony is credible.

Pennsylvania law has long held that when a will known to have been in the testator’s possession cannot be found after his death, it is presumed that the testator revoked or destroyed it. In Re Estate of Murray, 404 Pa. 120, 171 A.2d 171 (1961). The presumption can be overcome by evidence which is “positive, clear and satisfactory.” In Re Estate of Janosky, 827 A.2d 512 (Pa. Super 2003). In this narrative, Roger was given possession of his original will. Roger then gave the will to John, and it was destroyed by the fire in John’s home, rather than by any act or intention of Roger.

In order for the proponent of a missing will to overcome the presumption that a will, which was in the custody of the testator prior to his death, was revoked or purposefully destroyed by the testator, the proponent of a copy of the will must prove: “1) that testatrix duly and properly executed the original will; 2) that the contents of the will were substantially as appears on the copy of the will presented for probate; and 3) that when the testatrix died, the will remained undestroyed or unrevoked by her.” Estate of Mammana, 388 Pa. Super. 12, 564 A.2d 978 (1989).

In Estate of Mammana, the Superior Court permitted the probate of a fully-executed copy of a decedent’s will because the original had been retained and mistakenly destroyed by the attorney who had drafted it years earlier. The court determined that there was no evidence to show that the will was in the testator's possession or to support an inference that the testator had known or agreed to its destruction. The court found that the presumption, that a will was revoked or destroyed by the testator when a will in testator's possession cannot be found after his death, is rebutted by proof that after execution of the will it was deposited by the testator with a custodian and that the testator did not thereafter have the will in his possession or have access to it. Id.

Here, the facts establish that the will was originally given to Roger by his attorney, Larry, and that Larry kept a fully-executed photocopy of the will. Larry will be able to establish that Roger properly executed the original will and that the contents of the original will were the same as the contents of the copy that is being offered for probate. Although Roger subsequently gave the will to John, it is unclear whether anyone other than John knew that the original of Roger’s will was in his possession rather than Roger's possession. Since the will had been in Roger's possession, in order for the photocopy of the will to be accepted to probate, it must be established that at the time of Roger's death, the original executed will was not intentionally destroyed or otherwise revoked by Roger. John will be able to testify that Roger gave him the original will and that the will was destroyed in a fire at John's home. The fact that John was named Executor lends credibility to John's testimony supporting the presentation for probate of the fully-executed photocopy of the will held by Larry because testators often give their original will to the named Executor. John might have had some motivation to have falsified his possession of the will and its accidental destruction if he was aware his 40% share of his father’s
estate set forth in the will was less than his 50% share under the Pennsylvania Probate Estates and Fiduciary (PEF) Code regarding intestate distribution. 20 Pa. C.S.A. 2102 (4) and 2103 (1). Such considerations could support the credibility of John's testimony that he had possession of the will which would support the rebuttal of the presumption that Roger destroyed the will.

2. **John would forfeit his share under the will if he challenged it on the basis of undue influence.**

   Roger included in his will a provision intended to discourage any challenge to it by imposing a forfeiture of the challenger’s interest in the will. This is known as an “in terrorem” or “no-contest” clause, which Pennsylvania law generally regards as valid. *In Re Friend’s Estate*, 209 Pa. 442, 58 A. 853 (1904). These provisions are favored by public policy so long as they do not violate a rule of law or other public policy because they protect an estate from costly, time-consuming and vexatious litigation, when such litigation is not founded upon probable cause. See, *In Re Estate of Simpson*, 407 Pa. Super. 1, 595 A.2d 94 (1991), appeal denied, 529 Pa. 622, 600 A.2d 538 (1991).

   A provision of the PEF Code added in 1994 at 20 Pa. C.S.A. 2521, states that such a provision “is unenforceable if probable cause exists for instituting the proceeding.” This was a codification of previous case law. See, *Estate of Keller*, 427 Pa. Super. 616, 629 A. 2d 1040 (1993).

   Under Pennsylvania law, when a will has been accepted to probate, it is presumed valid, and a person challenging it must prove its invalidity on recognized grounds including undue influence. *In Re Estate of Jakiela*, 353 Pa. Super. 581, 510 A. 2d 815 (1986). In order to establish a claim of undue influence, the contestant must prove by clear and convincing evidence that: (1) the testator was of weakened intellect at the time the will was executed; (2) a beneficiary of the will stood in a confidential relationship with the testator; and (3) the beneficiary received a substantial benefit under the will. *Id.* at 510 A.2d 817. If this burden is met by the contestant, the burden shifts to the proponent of the will to show the absence of undue influence. *Burns v. Kabboul*, 407 Pa. Super. 289, 595 A.2d 1153 (1991), appeal denied, 529 Pa. 655, 604 A.2d 247 (1992).

   The 20% share of Roger’s estate given to Sherry is arguably a substantial benefit, as no hard and fast rule defining a threshold exists, and whether a substantial benefit exists must be determined on a case-by-case basis. *In re Estate of Levin*, 419 Pa. Super. 89, 615 A.2d 38 (1992), appeal denied, 534 Pa. 639, 626 A.2d 1158 (1993). With no spousal or family relationship to Roger, Sherry is not among the persons who would inherit anything from Roger without a will provision, and it is likely that her 20% share of Roger's one million dollar estate would be considered to be a substantial benefit.

   The existence of the other elements necessary to demonstrate undue influence is very doubtful. A relationship of principal and agent, such as exists with a power of attorney, has been recognized as a “confidential relationship” under Pennsylvania law. “[N]o clearer indication of a confidential relationship [can] exist than giving another person the power of attorney over one’s entire life savings. *Estate of Lakatosh*, 441 Pa. Super. 133, 656 A.2d. 1378 (1995), citing, *Estate of Bankovich*, 344 Pa. Super. 520, 496 A.2d 1227 (1985). The facts, however, state that Roger only executed the power of attorney at the time he signed his will, and had not even told Sherry...
he was doing so. She had not signed the acknowledgment of agent required by the power of attorney statute at 20 Pa. C.S.A. 5601 (d) for the power to be effective, and apparently was not even aware that Roger had appointed her as his agent. While it is not necessary that a formal arrangement such as a power of attorney exist to establish a “confidential relationship,” the facts establish only a friendship between Roger and Sherry at the time he executed the will.

The final requirement of “weakened intellect” is even more problematic. In the context of a challenge of undue influence, the determination of “weakened intellect” does not need to amount to a finding of testamentary incapacity. The Superior Court in *Owens v. Mazzei*, 2004 Pa. Super. 106, 847 A. 2d 700, 707 (2004) noted that “[a]lthough our cases have not established a bright-line test by which weakened intellect can be identified to a legal certainty, they have recognized that it is typically accompanied by persistent confusion, forgetfulness and disorientation.” The Supreme Court has stated that “undue influence is generally accomplished by a gradual, progressive inculcation of a receptive mind.” *In Re Clark’s Estate*, 461 Pa. 52, 334 A.2d 628 (1975). The facts indicate nothing to establish that Roger was of weakened intellect.

John’s objection to the 20% portion of Roger’s estate bequeathed to Sherry based on undue influence is not supported by probable cause in the facts, therefore he would lose both the challenge to Sherry’s bequest and the 40% share bequeathed to him in the will.

3. **Roger’s winnings must be reported as income on his final return, but his executor can deduct the losses to the extent of the winnings.**

   Gross income generally includes all income from whatever source derived. 26 U.S.C.A. §61. Income from gambling is included within the broad definition of “gross income” under Section 61 of the Internal Revenue Code. *U.S. v Maginnis*, 356 F.3d 1179 (9th Cir. 2004); *Hamilton v. C.I.R.* (U.S. Tax Ct. 2004, 2004 WL 1551274). The $10,000 Roger won in 2013 should be reported on his final 2013 federal income tax return by the Executor as ordinary income.

   Losses from gambling for persons who are not professional gamblers are referenced under Section 165 (d) of the IRC as part of the itemized deductions from income for individuals. This subsection explicitly states that “[l]osses from wagering transactions shall be allowed only to the extent of the gains from such transactions.” Roger had $50,000 of losses, but only $10,000 of winnings. Therefore, only $10,000 of the losses is allowed as an itemized personal deduction to offset the gain.

4. **Larry would be able to represent Sherry because Barney was merely a prospective client, and since Barney revealed no confidential information, Larry is able to represent Sherry in the divorce.**

   The facts state that Barney had briefly met with Larry and mentioned to Larry his possible need for divorce representation several years before Sherry requested Larry to represent her in a divorce. Barney would be considered a “Prospective Client” of Larry. Rule of Professional Conduct 1.18 Duties to Prospective Clients states in parts (a) and (b):
(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information which may be significantly harmful to that person learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

The fact that Barney only consulted Larry once, several years before Sherry’s visit, and did not tell Larry anything of significance with respect to the divorce, is an important factor in determining whether Larry may continue to represent Sherry in a divorce action he has filed on her behalf. The remaining portions of Rule 1.18 prohibiting or conditioning the subsequent representation of another party adverse to the prospective client apply only to lawyers who have received “disqualifying information.” Subsection (c) provides:

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). . . .

Barney did not consent to Larry’s representation of Sherry, however, Larry would be permitted to continue to represent Sherry in the divorce action if he had not received information from Barney that could be significantly harmful to Barney in the divorce action. The facts state that no significant information was provided to Larry with respect to the divorce, and as a result Larry will be able to represent Sherry without violating the Rules of Professional Conduct.
Question No. 1: Grading Guidelines

1. **Lost Original Will**
   
   Comments: Candidates should recognize the rebuttable presumption of purposeful destruction of a missing will that had been in possession of the testator, and the ability to probate the verified copy based on the testimony of John establishing that the will was not in the testator's possession.

   5 points

2. **No Contest Clause - Undue Influence**
   
   Comments: Candidates should recognize the general validity of a no-contest clause in a will, the exception for probable cause for a challenge to the will, discuss why the elements of undue influence are not established by facts, and reach the proper conclusion as to the effect the challenge would have on John's right to take under the will.

   7 points

3. **Federal Income Tax - Gambling Winnings and Losses**
   
   Comments: Candidates should recognize that gambling winnings are income, and that losses are deductible as an itemized deduction to extent of winnings.

   3 points

4. **Professional Responsibility - Duty To Prospective Client**
   
   Comments: Candidates should identify the potential client relationship, the rule relating to a conflict of interest with a prospective client and apply the law to the facts to conclude that Larry is not precluded from representing Sherry.

   5 points
Question No. 2

Peg is a licensed Pennsylvania attorney. Tony, a former client of Peg’s, was not happy with the legal representation he received from Peg in his recent divorce case because she did not present evidence he had provided to her to show that his wife committed adultery during the marriage, which he believed should have barred her from a claim for equitable property division and alimony. During the time Peg represented Tony in 2013, she was a judicial candidate for a position on the Court of Common Pleas of M County, Pennsylvania.

Peg’s home in M County, Pennsylvania, was surrounded by ten-foot-high hedges in front and an eight-foot-high wooden fence around the rest of her yard to ensure her privacy. In June 2013, to celebrate her recent primary election victory, Peg held an invitation-only party at her home. Peg hoped the party would generate campaign funds for the upcoming general election so she invited a small number of potential contributors. Tony found out about the party and planned to appear to express his complaints about Peg’s representation in his divorce case.

Tony entered Peg’s property through a locked side gate in the fence by picking the lock without breaking it. Once inside, Tony began yelling loudly and claiming that Peg was not a good attorney, that she had represented him poorly in his divorce action, and was not qualified to be a judge. After ten minutes of a loud tirade against Peg, Tony picked up a brick and threw it at Peg who was standing ten feet away. In fear for her safety, Peg instinctively ducked. The brick missed Peg and hit her sister, Sue, who was standing behind Peg but facing away from Tony, causing Sue physical injuries. To avoid adverse publicity, neither Peg nor Sue filed criminal charges against Tony. Many of the party guests were visibly upset and left the party without making a financial contribution or a commitment to support Peg in the general election. Peg narrowly lost the judicial election in November 2013.
Peg consulted Attorney Wiley regarding a civil lawsuit against Tony, since she felt it was important that the public know that she was aggressively contesting Tony’s allegations.

1. Other than potential claims for the intentional infliction of emotional distress, defamation and tortious interference with prospective business or economic relations, what causes of action should Attorney Wiley include in the lawsuit filed by Peg against Tony?

At the trial on the civil lawsuit that Peg filed against Tony, Attorney Wiley intended to introduce evidence which showed a 75% decline in campaign contributions after the party, which was relevant to the issue of damages. The information Attorney Wiley wished to enter into evidence was contained in campaign finance reports showing the receipt and disbursement of funds by the campaign. The reports were prepared during the campaign by Judy, who operated a bookkeeping business. As part of her business, Judy was hired to be the Treasurer for various election campaign committees. As Treasurer for Peg's campaign, Judy was responsible for all of Peg's campaign finances, including the receipt, deposit, and disbursement of funds. Judy prepared and maintained finance reports documenting all such transactions for Peg’s campaign at the time they occurred, and had performed similar services for many other election campaigns.

Judy was on vacation on the date of trial, and her office manager, who was familiar with the operation of the office and responsible for maintaining its records, was called as a witness by Attorney Wiley to introduce the financial reports into evidence. A hearsay objection was made by Tony’s attorney because Judy was not in court to testify about the financial transactions.

2. What cause of action, if any, could Sue bring in a civil action against Tony?

3. What will Attorney Wiley need to establish in response to the hearsay objection to successfully admit the campaign finance reports at the civil trial?

4. How would the Court have ruled if Peg had attempted to introduce Tony’s evidence regarding his wife's marital misconduct at a hearing for equitable property division and alimony?
Question No. 2: Examiner’s Analysis

1. Attorney Wiley should include the intentional torts of trespass, invasion of privacy, and assault in his lawsuit filed on behalf of Peg against Tony.

In Pennsylvania, “one who intentionally enters land in the possession of another without a privilege to do so is liable…to the possessor of the land as a trespasser thereon.” *Kopka v. Bell Telephone Company of Pennsylvania*, 371 Pa. 444, 91 A.2d 232 (1952). A trespass is any intentional infringement of another’s real property without authorization or privilege by law to do so. *Waschak v. Moffat*, 379 Pa. 441, 109 A.2d 310 (1954). Therefore, the entry onto Peg’s real property which was enclosed in the front by a ten-foot hedge and in the rest of her yard by an eight-foot wooden fence was a trespass. The real estate was shielded from the public by a hedge and a fence whose gate was kept locked. This was a private party by invitation only. The intrusion by Tony into Peg's real property was without legal authorization or privilege, and a cause of action for trespass should be included in Peg's complaint against Tony.

Attorney Wiley should also include a cause of action for an invasion of privacy in Peg’s complaint against Tony. The law of privacy is not one tort but four distinctive torts with nothing in common but the theoretical right of a plaintiff “to be left alone.” Prosser and Keaton, *Law of Torts*, §117 Right of Privacy (5th Edition). One of the four privacy invasion torts is an intrusion upon plaintiff’s physical and mental solitude or seclusion. The invasion of privacy applicable to this case is the intrusion upon Peg’s right to have a private party in her secluded home without interference by uninvited third parties. The gist of the privacy tort is the invasion of a person’s seclusion and his or her right to be left alone to associate with others he or she chooses. See, *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959).

The Superior Court in *Harris v. Easton Publishing Co.*, 335 Pa. Super. 141, 483 A.2d 1377 (1984), cited with approval the Restatement (Second) of Torts §652B for support in defining the elements of invasion of privacy in Pennsylvania. This section provides the following definition:

Section 652B. Intrusion upon seclusion
One who intentionally intrudes, physically or otherwise upon the solitude or seclusion of another or his private affairs or concerns is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

The invasion may be by physical intrusion into a place where the plaintiff has secluded himself. *Harris, supra.*

Even though an argument can be made that Peg may be classified as a public figure, she still has, in her private residence, an absolute right to be left alone and/or associate on whatever basis she chooses with third parties. The invasion of privacy occurred by virtue of a trespass onto her property and the loud and continuous tirade engaged in by Tony at the private party in Peg’s backyard. The invasion of privacy interfered to a substantial degree with her right to be
left alone with the invited guests. Even though Peg is an attorney and judicial candidate and thus arguably a public figure, this would have nothing to do with the right to be left alone or associate with those Peg chooses while on her own property in her backyard. Tony’s actions at Peg’s house would be highly offensive to a reasonable person, and a cause of action for invasion of privacy should be included in Peg's complaint against Tony.

Attorney Wiley should also include a cause of action for assault in Peg's civil suit against Tony. An assault occurs when an actor intends to cause imminent apprehension of a harmful or offensive bodily contact. Sides v. Cleland, 436 Pa. Super. 618, 648 A.2d 793 (1994), appeal denied, 540 Pa. 613, 656 A.2d 119 (1995). Intent is established when the actor desired to cause the consequences of his act or acted knowing that the consequences were substantially certain to result. Nationwide Mutual Insurance Company v. Hassinger, 473 A.2d 171 (Pa Super. 1984).

As applied here, Tony threw a brick at Peg who was standing 10 feet away. Tony's act caused apprehension in Peg of a pending battery because Peg was placed in fear for her safety causing her instinctively to duck. By his actions it is clear that Tony intended to place Peg in fear of an immediate battery, and that Tony would have been substantially certain that his actions would result in his intended victim being placed in fear of harmful contact.

2. Sue would have a cause of action against Tony for battery.


As applied here, there is no question that Tony intentionally threw a brick at Peg, which struck Sue, causing harmful and offensive contact resulting in injuries to Sue. It is also clear that Tony intended to hit Peg with the brick or at least was substantially certain that this result would follow. Tony’s intent to cause such contact with Peg, will be transferred from Peg to Sue, and as a result of Tony's actions Sue was injured. A cause of action for battery should be brought in Sue's complaint against Tony.

3. Attorney Wiley would need to establish the requirements for a business record exception to the hearsay objection.

Hearsay is an out of court statement offered to prove the truth of the matter asserted in the statement. Pa.R.E.801(c). The campaign reports were prepared by Judy who was the bookkeeper for Peg's campaign, and are being offered to show the receipt of funds by the campaign. The reports are hearsay as they contain the out of court written assertions by Judy as to the receipt and disbursements of funds by the campaign and are being offered to prove the truth of such funds being received. Since the reports constitute hearsay, Attorney Wiley would need to establish that the reports were business records and an exception to the hearsay rule.
Hearsay is generally inadmissible unless it falls within an exception to the hearsay rule. Pa.R.E. 802. Attorney Wiley would answer the objection with the argument that although the information in the reports as to the decline in contributions is hearsay, it would fall under the business records exception to hearsay, Pa.R.E. 803(6).

This exception at Pa.R.E. 803 states as follows:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(6) **Records of Regularly Conducted Activity.** A record (which includes a memorandum, report, or data compilation in any form) of an act, event or condition if,

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a “business”, which term includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor other circumstances indicate a lack of trustworthiness.

Attorney Wiley would need to have the office manager, who was familiar with the routine operation of Judy’s office and responsible for maintaining its records, testify about the reports. For the reports to be admissible, the testimony must establish that the reports were made at or near the time of receipt of the contributions, by or based upon information from a person with knowledge of the contributions, and kept in the course of a regularly conducted business activity pursuant to the regular practice of the business. Centennial Station Condominium v. Schaefer, 800 A.2d 379 (2002). Additionally, it must be shown that the report was not prepared or compiled in anticipation of litigation but for the requisite business purpose, that being recording campaign financial transactions. Commonwealth v. McEnamy, 1999 PA Super. 112, 732 A.2d 1263 (1999). The office manager will have to be able to show that the reports were prepared by Judy as part of a regular practice of her bookkeeping business at or near the time of the receipt of the contributions. Judy was responsible for the campaign receipts and expenditures and prepared the reports as part of her bookkeeping duties performed for the campaign at or near the time of the receipt or disbursement of funds. The reports were maintained by her business as part of its regularly conducted activities of documenting such transactions for political campaigns for which it was hired as Treasurer.
Even though the preparer of the report was not available, since it was prepared in the ordinary course of work being done for the campaign by Judy's company, Attorney Wiley could have the office manager from Judy’s office testify to qualify the report as a business record to support the admissibility of the report.

Attorney Wiley could also rely upon 42 Pa.C.S.A. 6108 to support the admission of the report in this matter. This statute is similar to Rule 803(6) of the Pennsylvania Rules of Evidence except that it addresses somewhat differently how the trustworthiness of the information is evaluated. Since the trustworthiness of the information does not appear to be an issue in this matter, both the statute and the pertinent section of the Pennsylvania Rules of Evidence would be supportive of the conclusion reached above.

4. At Tony’s hearing on equitable property division and alimony, Peg would not have been successful had she attempted to introduce misconduct evidence as it pertains to equitable property division, but such evidence would have been admissible relating to alimony.

Tony was unhappy with the representation rendered by Peg in his divorce case. He maintained that he had evidence that indicated his spouse engaged in marital misconduct by engaging in adulterous behavior while they were living together. Further, Tony maintains that he made this evidence available to Peg but she failed to introduce it at the hearing on equitable property division and alimony. He maintains the outcome would have been different if Peg had presented that evidence to the court.

The court is not permitted to consider marital misconduct in arriving at an award of equitable division of marital property. 23 Pa.C.S.A. 3502. The court must confine itself to the factors set forth in the statute, and whether one party or both committed marital misconduct is not admissible before the court. In Perlberger v. Perlberger, 426 Pa. Super. 245, 626 A.2d 1186 (1993), appeal denied, 536 Pa. 628, 637 A.2d 289 (1993), the court clearly stated that pursuant to 23 Pa.C.S.A. 3502(a,) marital misconduct may not be considered by a court in determining an order of equitable division of marital property.

However, marital misconduct is admissible as one factor for the court to consider along with a number of other factors in determining whether to award alimony and to what extent. 23 Pa.C.S.A. 3701. The marital misconduct must have occurred during the parties’ marriage and prior to separation. The court in Perlberger, supra., found consistent with the alimony statute that marital misconduct was one of numerous factors that the court would consider in determining whether alimony was appropriate. Thus it would appear that Peg erred in failing to present the evidence she had regarding Tony’s wife having engaged in marital misconduct. Peg could have argued that marital misconduct was a key factor in destroying the parties’ marriage and should be factored into any determination of alimony.
1. **Torts – Trespass, Invasion of Privacy, and Assault**

Comments: The candidate should discuss and apply the elements of trespass, invasion of privacy, and assault to the facts and conclude that all torts should be included in the civil lawsuit filed against Tony by Peg.

9 points

2. **Torts - Battery**

Comments: The candidate should discuss and apply the elements of battery to the facts, discuss the applicability of transferred intent, and conclude that an action for battery should be brought by Sue against Tony.

4 points

3. **Evidence – Business Record Exception to Hearsay**

Comments: The candidate should recognize that the document offered by Attorney Wiley is hearsay but would be admissible as a business record exception at trial, and discuss the elements that must be established for the exception to apply.

4 points

4. **Family Law – Marital Misconduct**

Comments: The candidate should recognize that marital misconduct (adultery) is not admissible as a factor to be considered in equitably dividing marital property but may be considered by the court as one of the factors in awarding alimony.

3 points
Question No. 3

Mary and Luke were married in 2008 but have not lived together since they separated on February 5, 2012. Since separation, Mary has operated a drug enterprise from her home in Big City, Pennsylvania, where she brings in about $100,000 a month. Under her business model, she buys heroin in large quantities from a major overseas supplier and sells the heroin to lower level drug dealers. On March 15, 2013, Mary sold a large quantity of heroin to John, who paid her $50,000 in cash for the transaction. Three days after the transaction, Mary learned that $20,000 of the cash that was given to her by John was counterfeit.

On March 19, 2013, Mary drove to John’s apartment intending to send a message about shorting her on drug deals. She took her 9mm semi-automatic gun with her which she loaded with nine bullets before approaching John’s apartment. When she arrived at John’s apartment, she was invited in by John who was watching a ball game with Vick and Frank, two of his fellow drug dealers. After some small talk, Mary pulled out her 9mm and shot John five times in the head. John immediately slumped over on the couch where he was seated. Mary turned to Vick and Frank and told them to get the word out that “the money better be real in the future.” She then left the apartment.

Vick immediately called the police and told them what happened. The police properly processed the scene which included taking photographs of the gunshot wounds to John’s head and the bloody area on the couch where John was sitting when he was shot. They also located five shell casings. The subsequent autopsy of John confirmed that the cause of death was multiple gunshot wounds to his head, and the manner of death was homicide.
The police arrested Mary on March 20, 2013, and lawfully recovered a 9mm gun from the jacket she was wearing. Subsequent ballistics tests showed the casings found at the murder scene matched the gun seized from Mary’s person.

1. What is the most serious degree of murder supported by the facts that should be filed against Mary for the shooting that resulted in the death of John?

A charge for the most serious degree of murder supported by the facts was brought against Mary, and the criminal case against her proceeded to trial. At trial, the prosecution sought to admit the photograph of the gunshot wounds to John's head to show the wounds he sustained, and the photograph of John on the bloody couch to show that John was sitting when he was shot, both of which are gruesome photographs.

2. If the defense, at trial, objects to the introduction of the photographs on the grounds that they are inflammatory and unnecessary to describe the injuries or scene, what arguments should the prosecution make to support the introduction of the photographs?

3. If the prosecutor, at trial, and after having given proper notice, attempts to introduce facts about Mary’s involvement in the drug trade and the specific transaction involving the transfer of counterfeit money, and the defense objects on the grounds that these are prior bad acts and should not be admissible in the murder prosecution, what arguments should the prosecutor make to support the introduction of the evidence, and how should the Court rule?

Assume that last week the jury returned a verdict of guilty against Mary on the charge of murder and the Judge immediately sentenced Mary to a term of imprisonment in excess of two years. Yesterday, Luke went to his attorney's office for a consultation regarding his potential options for a divorce. Luke told his attorney that the marriage was over, that there was no hope for reconciliation, and that he knows that Mary will not agree to the divorce.

4. Based on the facts presented, what grounds for divorce does Luke have available to him?
Question No. 3: Examiner’s Analysis

1. The most serious degree of murder supported by the facts is first degree murder as the facts establish that Mary killed John, and that Mary acted with premeditation and had the specific intent to kill when she committed the murder.

"A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing." 18 Pa. C.S.A. § 2502(a). The phrase “intentional killing” is defined in Section 2502(d) as a “willful, deliberate, and premeditated killing.” Pennsylvania courts interpreting Section 2502(d) have held that a willful, deliberate and premeditated killing is one where the actor has a specific intent to bring about the death of the victim. Commonwealth v. Nelson, 514 Pa. 262, 523 A.2d 728 (1987). As stated by the Pennsylvania Supreme Court, a killing is “willful, deliberate, and premeditated if it is committed by one who is conscious of his own purpose and intends to end the life of his victim.” Commonwealth v. Stewart, 461 Pa. 274, 279, 336 A.2d 282, 285 (1975). The period of premeditation necessary to form the specific intent to kill may be very brief. Commonwealth v. Chimenti, 362 Pa. Super 350, 524 A.2d 913 (1987). One of the most commonly recognized circumstances from which a jury can infer a specific intent to kill is the use by the defendant of a deadly weapon on a vital part of the victim’s body. Commonwealth v. Carbone, 524 Pa. 551, 574 A.2d 584 (1990); Commonwealth v. Pronkoskie, 498 Pa. 245, 445 A.2d 1203 (1982). "In order to sustain a verdict of first-degree murder, the Commonwealth must prove that a human being was unlawfully killed, that the defendant did the killing, that the killing was willful, deliberate, premeditated, and that the defendant acted with specific intent to kill." Commonwealth v. Fiebiger, 570 Pa. 583, 810 A.2d 1233 (2002)

As applied here, the facts establish that John is dead, as the coroner has concluded that the five gunshot wounds to the head caused his death and the manner of death was homicide. The facts also establish that Mary is the one who committed the killing, as there were two eyewitnesses to the shooting. In addition, there is evidence that the shell casings from the scene were fired from the gun possessed by Mary. Finally, the facts support a finding that Mary had the specific intent to kill and clearly premeditated the killing. Mary traveled to John's apartment, and shortly after arriving proceeded to fire a series of five shots into his head. As indicated above, the law is clear that the intent to kill can be formed in an instant and that the specific intent to kill can be inferred from firing a weapon at a vital part of a person's body. John’s head would be deemed to be a vital part of his body.

In summary, the facts likely support a charge of first degree murder.

2. The prosecution should argue that although the photographs may have inflammatory characteristics, their evidentiary value outweighs the likelihood of inflaming the passions of the jurors.

"The Court may exclude relevant evidence if its probative value is 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." Pa. R.E. 403
"A determination of whether photographic evidence alleged to be inflammatory is admissible involves a two-step analysis. “First, the court must decide whether a photograph is inflammatory by its very nature. If the photograph is deemed inflammatory, the court must determine whether the essential evidentiary value of the photograph outweighs the likelihood that the photograph will improperly inflame the minds and passions of the jury.” Commonwealth v. Sanchez, 614 Pa. 1, 36 A.3d 24 (2011), citing, Commonwealth v. Malloy, 579 Pa. 425, 856 A.2d 767 (Pa. 2004) (quoting Commonwealth v. Baez, 554 Pa. 66, 720 A.2d 711 (1998)).

Photographs of a deceased victim are not inflammatory per se. "The admission into evidence of photographs depicting the corpse of the homicide victim or the location and scene of the crime lies within the sound discretion of the trial judge. A photograph which is judged not inflammatory is admissible if 'it is relevant and can assist the jury in understanding the facts.' A gruesome or potentially inflammatory photograph is admissible if it is 'of such essential evidentiary value that its need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.'" (citations omitted) Commonwealth v. Garcia, 505 Pa. 304, 313, 479 A.2d 473, 478 (1984).

"A criminal homicide trial is, by its very nature, unpleasant, and the photographic images of the injuries inflicted are merely consonant with the brutality of the subject of inquiry. To permit the disturbing nature of the images of the victim to rule the question of admissibility would result in exclusion of all photographs of the homicide victim, and would defeat one of the essential functions of a criminal trial, inquiry into the intent of the actor." Commonwealth v. McCutchen, 499 Pa. 597, 454 A.2d 547 (1982).

The prosecution should argue that the photographs have essential evidentiary value in establishing the elements required to prove the first degree murder charge, which outweighs the likelihood of inflaming the minds of the jurors. In order to prove this charge, the prosecution needs to show, among other things, that Mary had the specific intent to kill. The five bullet holes to John's head, which would be deemed to be a vital part of John’s body, would clearly be evidence upon which a jury could infer that Mary had the specific intent to kill John when she shot him. Thus, even if these photographs are deemed to be inflammatory they are highly relevant and have essential evidentiary value in establishing Mary's intent by showing the location and nature of John's injuries. The availability of alternate evidence, such as testimony of a technical nature from a medical examiner, does not obviate the admissibility of the photographs. McCutchen, 454 A.2d at 550. As indicated above, a homicide trial by its very nature is unpleasant and the law does not require that the jury be insulated from the brutality of the subject of inquiry. The other photograph shows John in the seated position on the couch with significant blood in the area of the couch. The prosecution should argue that this provides the jury with a better understanding of the crime scene and supports the fact that John was sitting at the time he was shot which would support the inference that he was in a defenseless position when the shots were fired. For the reasons stated, the prosecution would have a strong argument that both of these photographs should be admitted.
3. The Prosecutor should argue that the evidence is admissible to show motive, intent, absence of mistake or accident, and the chain of events in the case; and the evidence will likely be admissible.

The Pennsylvania Rules of Evidence, specifically Rule 404(b) which deals with admissibility of other crimes, wrongs, or acts, states:

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(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

(3) Notice in a Criminal Case. In a criminal case, the prosecutor must provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence the prosecutor intends to introduce at trial.

Pa.R.E. 404(b) is considered a rule of both exclusion and inclusion. It is exclusionary because the other misconduct is inadmissible to show criminal propensity or simply to show bad character of the defendant. Commonwealth v. Tedford, 598 Pa. 639, 960 A.2d 1 (2008). Courts have considered it a rule of inclusion as evidence of “other crimes, wrongs, or acts” may be admitted under this rule for purposes other than demonstrating criminal propensity, including but not limited to proving a defendant’s motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Commonwealth v. Dillon, 592 Pa. 351, 925 A.2d 131 (2007). Evidence of prior bad acts is admissible for such purposes in a criminal case only if the probative value of such evidence outweighs its potential for unfair prejudice. Pa. R.E. 404(b)(2).

In Commonwealth v. Romero, 595 Pa. 275, 938 A.2d 362 (2007), testimony concerning prior bad acts provided the motive for the crime, was probative of intent and gave the background of the planning of the murder. Evidence that the victim cheated the defendant in a drug deal was held admissible to show defendant's motive for killing him, where an instruction was given to the jury as to the proper consideration to be given to the prior bad act evidence. Commonwealth v. Fisher, 564 Pa. 505, 769 A.2d 1116 (2001). Prior bad act evidence is also relevant and admissible to show the chain of events in the case. Commonwealth v. Sherwood, 603 Pa. 92, 982 A.2d 483 (2009); Commonwealth v. Chandler, 554 Pa. 401, 721 A.2d 1040 (1998).
In this case, there are a number of arguments to support the introduction of evidence showing that Mary was involved in the drug trade and specifically the drug transaction where she was partially paid with counterfeit money. First, the fact that John paid Mary in counterfeit money provided a motive for her to kill John and send a message out to the drug community that she would not tolerate these actions. This could be further supported if Vick or Frank testifies concerning Mary’s statement that “the money better be real in the future.” Second, the evidence would support the argument that Mary intended to kill John. She meant to fire the five shots at John’s head because she had a reason for doing so. This argument ties into the motive argument. Third, it could also be argued that this evidence would tend to show that this killing was not a mistake or an accident, but rather was an intended killing. Fourth, this evidence is part of the sequence of events which led up to the murder. The evidence establishes the story of how and why this murder occurred and should be admitted on this basis as well.

The prosecution will likely be able to successfully argue that the probative value of this evidence clearly outweighs its potential for prejudice especially if a proper cautionary instruction is given by the court, and it would likely be admitted at trial.

4. **Luke will have grounds for divorce under either 3301 (d)(1) or 3301(a)(5) of the Divorce Code.**

Initially, Luke could seek a divorce under 23 Pa. C.S.A. Section 3301 (d)(1). Under this provision, the Court may grant a divorce where a complaint has been filed alleging that the marriage is irretrievably broken and an affidavit has been filed alleging that the parties have lived separate and apart for a period of at least two years and that the marriage is irretrievably broken. “Separate and apart” is defined, in pertinent part, as the cessation of cohabitation, whether living in the same residence or not and “irretrievable breakdown” is defined as estrangement due to marital difficulties with no reasonable prospect of reconciliation. 23 Pa. C.S.A. Section 3103. As applied here, the parties were married in 2008 and the facts indicate that they have not lived together since February 5, 2012, when they separated. Accordingly, at the point that Luke comes to the attorney's office the parties have been separated for a period in excess of two years and, according to Luke, the marriage is over and there is no hope for reconciliation which will support the argument the marriage is irretrievably broken. Accordingly, Luke would have the option of pursuing this no fault ground for divorce upon the filing of a Complaint and the appropriate affidavit under 3301(d)(1).

Alternatively, Luke would have grounds for divorce under 23 Pa. C.S.A. Section 3301 (a)(5) which provides that the Court may grant a divorce to the innocent and injured spouse whenever it is judged that the other spouse has been sentenced to imprisonment for a term of two or more years upon conviction of having committed a crime. In the present case, Luke has come to seek legal counsel for a divorce, and his wife was recently convicted of murder and immediately sentenced to a term of imprisonment in excess of two years. Accordingly, these facts would support this fault ground for divorce for Luke.

Since the facts indicate that Luke knows that Mary will not agree to the divorce, a mutual consent divorce under 23 Pa. C.S.A. Section 3301 (c ) would not be a viable option.
Question No. 3: Grading Guideline

1. Criminal Law

Comments: The candidate should recognize that the charge of first degree murder is likely supported by the facts regarding the death of John and should discuss the elements of the crime and the applicable facts.

5 Points

2. Evidence

Comments: The candidate should recognize that the prosecution could argue that although the photographs may have inflammatory characteristics their evidentiary value outweighs the likelihood of inflaming the passions of the jury and should apply the rule to the specific photographs.

5 Points.

3. Evidence

Comments: The candidate should recognize that the prosecution could argue that the evidence is admissible to show motive, intent, absence of mistake or accident, and the chain of events in the case; apply the applicable facts to the exceptions; and conclude the evidence will likely be admissible.

6 Points

4. Family Law

Comments: The candidate should recognize that Luke will have no fault grounds under 3301(d)(1) or fault grounds under 3301(a)(5) of the Divorce Code and discuss the applicable facts that support a divorce under these sections.

4 Points
Question No. 4

The State S legislature enacted Act 66 in 2011. Act 66 provides for tolls on bridges and tunnels from the state’s mainland to its several popular shore communities. The legislative objective for Act 66 was to pay for repairs to the bridges and tunnels while compensating for the adverse impact of congestion, pollution and noise experienced by residents of the shore communities. The tolls for residents of shore communities in State S are approximately 50% of the tolls for other travelers. State S shore community residents may obtain electronic devices to attach to their cars in order to obtain the lower tolls.

Pedro is a resident of State T. He travels regularly to State S shore resorts for vacations, and following passage of Act 66, he paid approximately $10 per trip in tolls, which was double the amount charged to State S shore community residents for the same travel. Last week, Pedro filed a suit against the appropriate defendants in state court in S State challenging the constitutionality of Act 66 under the Equal Protection clause of the United States Constitution.

1. What procedural steps could defendants’ counsel take to attempt to have the matter heard in federal court, and with what likelihood of success?

2. How should the Court analyze and rule on Pedro’s Equal Protection challenge to Act 66?

Acme Trucking Company (Acme) is a large interstate trucking company employing over 100 employees. Marie worked for Acme for 25 years. She received several promotions, the last of which was in 2004 to Director of Interstate Trucking, which position she held until 2012. Her job description principally included recruiting customers and working with them to plan efficient interstate routes for their shipments. She was terminated in July 2012 at the age of 55 and replaced by her former deputy who was 40. Prior to her termination, Marie attended a meeting of the executive staff. Her boss, the company president, who was 10 years younger than Marie,
mentioned that he planned to retire when he was 50 because the company needed “young blood.” Marie said that she had no plans to retire and said that she hoped to work until age 75.

Prior to Marie's termination Acme had begun a program of computer updating, and Marie struggled to learn the new system. In contrast, her deputy mastered the new technology easily and often received praise from the company president for doing so. Computer expertise was not included as a part of Marie’s job description.

Marie was given a schedule to learn the new computer system. She told her boss that she could not meet the schedule because she had been pursuing some new business opportunities for the company. In response, she received a written warning, following which, when her deadline for learning the computer system had passed, she was terminated because of her difficulties in learning the new computer system. Other younger employees had problems with learning the new computer system, but they had not been given deadlines like Marie, and they were not disciplined. After complying with the required administrative procedures, Marie filed suit in the appropriate federal district court, alleging that Acme violated the Age Discrimination in Employment Act by terminating her employment. In her Complaint, she referenced the younger employees’ difficulty with learning the new computer system, the fact that they were not given deadlines for learning the new computer system or disciplined; and she cited her boss’ comments about retirement, and “young blood” as evidence of age discrimination.

3. (a.) What is required for Marie to establish a *prima facie* case of age discrimination?

(b.) Assume for purposes of this question that Marie established a *prima facie* case of age discrimination. What are the parties’ respective burdens with respect to the age discrimination claim, and based on the facts, what evidence, if any, exists to support each party’s burden?
Question No. 4: Examiner’s Analysis

1. Defendants’ counsel should file a notice of removal in the federal district court for State S in the district within which the action is pending, setting forth a statement of the grounds for removal. The matter will be removed to federal court.

    Defendants’ counsel should file a Notice of Removal in the appropriate federal district court. Where a federal district court would have original jurisdiction of a claim filed in state court, the claim may be removed to federal court under 28 U.S.C.A. §1441(a), which provides, in part:

    Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant…to the district court of the United States for the district and division embracing the place where such action is pending.

    “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C.A. §1331. Pedro’s complaint has alleged a violation of the Equal Protection clause of the Constitution. On its face, the Complaint raises federal questions, and the action could be removed to federal court.

    The removal procedure, outlined in 28 U.S.C. §1446(a), calls for the filing of a Notice of Removal in the district court of the United States for the district and division within which the action is pending, within 30 days after receipt of the initial pleading, containing a short and plain statement of the grounds for removal. Defendants must then, promptly and in writing, notify adverse parties of this removal, and file a notice with the clerk of the state court.

    Defendants’ counsel here should file the required Notice of Removal and provide a copy to plaintiff. The removal will have been successfully accomplished.

2. The Court will likely apply a rational basis test to Pedro’s Equal Protection challenge to Act 66, and the law will likely be found to be constitutional.

    The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits a State from denying the equal protection of the laws. Under the Fourteenth Amendment, state legislative classifications are subject to varying levels of judicial scrutiny. Classifications based on "suspect traits," such as race or national origin, or abridging a "fundamental right," protected by the Constitution are subject to strict scrutiny, and to be valid must be "narrowly tailored" to a compelling state interest. Classifications based on a quasi-suspect class such as gender or illegitimacy, are subject to "intermediate scrutiny;" and must be
"substantially related" to an important governmental interest. All other classifications, mainly those having to do with social or economic matters, are subject to a "rational basis review." Clark v. Jeter, 486 U.S. 456 (1988), City of Cleburne v. City of Cleburne Living Center, 473 U.S. 432, 440 (1985).

In Pedro’s case, there is no suspect class or quasi-suspect class involved. The Act distinguishes between in-state shore community residents and other travelers, for purposes of assessing tolls for bridges and tunnels to shore communities, and the category of “other travelers” is not a suspect or quasi-suspect class. Additionally, it is not likely that the toll differential will be viewed as deprivation of a fundamental right. The right to travel from one state to another has been held to be a fundamental right, which cannot unreasonably be burdened or restricted by a state statute or regulation. Saenz v. Roe, 526 U.S. 489, 500 (1999). “A state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right.” (citations omitted) Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 903 (1986).

However, minor restrictions on travel have been found not to amount to a deprivation of a fundamental right. See, Town of Southold, et. al., v. Town of E. Hampton, 477 F.3d 38, 54 (2d Cir. 2007), Surprenant v. Massachusetts Turnpike Authority, 2010 WL 785306 (D. Mass. 2010), Selevan v. New York Thruway Authority, 584 F.3d 82, 99 (2d Cir. 2009). To constitute a burden or penalty on the right to travel, a toll differential must have a significant effect on interstate travel or inhibit the right to travel in a meaningful sense. Surprenant, supra., Barber v. State of Hawaii, 42 F.3d 1185 (9th Cir. 1994). Here, there is no evidence that the fee differential deterred or placed an unreasonable burden on Pedro’s ability to travel to the shore communities. Nor is the primary objective of the law to impede travel, as the fee is intended in part for the repair and maintenance of tunnels and bridges that are an aid to persons travelling to the shore communities. The court would have to evaluate whether the toll differential in Act 66 will have a significant effect on interstate travel, so as to constitute a penalty. Selevan, supra at 100.

There is no evidence that the fee differential had a substantial financial impact on Pedro or prevented him from going to the shore communities, and the minimal five dollar differential could be found to be a minor restriction on Pedro's right to travel rather than a penalty. This is even more likely because the toll differential benefitted only a small subset of local shore residents and seemed to impact primarily recreational interests.

If the toll differential did not have a significant impact on travel and the court finds that no fundamental right has been impaired, Pedro’s Equal Protection challenge will be examined using the rational basis test, as opposed to the strict scrutiny test. In Janes v. Triborough Bridge and Tunnel Authority, et. al., 2013 U.S. Dist. LEXIS 148928 (S.D. N.Y., 2013), in which a differential toll structure, for residents of Staten Island and the Rockaways, was challenged, the court, in granting defendants’ motion for summary judgment, stated “[no case has been cited] within this circuit or beyond, in which a differential toll policy has been held an ‘invidious distinction’ so as to require application of strict scrutiny.” Id. at 38. Under the rational basis test, "where a group possesses 'distinguishing characteristics relevant to interests the State has the authority to implement', a State’s decision to act on the basis of those differences does not
give rise to a constitutional violation”. Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 368 (2001) (citation omitted). All that is required is that there must be a rational relationship between the disparity of treatment and some legitimate government purpose. Id. at 367.

Here, the government purpose in enacting Act 66 with the differential toll structure is to pay for repairs to the bridges and tunnels leading to its shore communities while compensating for the adverse impact of congestion, pollution and noise experienced by residents of the shore communities. This purpose is rationally related to the difference in tolls for local shore community residents and other travelers, and as a result, it is likely that Pedro’s Equal Protection challenge to Act 66 will fail. See Surpremant, supra.

3.(a.) Marie will be required to establish that she was a member of the protected class, that she was qualified for or performing the position at an acceptable level, that she received adverse treatment, and that she was replaced by someone substantially younger. She should be able to establish these elements.

The Age Discrimination in Employment Act (ADEA) prohibits discrimination in hiring, or other employment actions “because of an individual’s age.” 29 U.S.C.A. §623(a)(1). In general, the ADEA protects employees age 40 and older from adverse treatment, including discharge by their employer because of their age. Id. at §§ 623 (a)(1); 630 (f), 631(a).

To establish a prima facie case of age discrimination, Marie will be required to show the following: (1) that she was within the age group protected by the ADEA; (2) that she was discharged or demoted; (3) that, at the time of her discharge, she was qualified for the position or performing her job at a level that met her employer’s legitimate expectations; (4) following her discharge, she was replaced by someone sufficiently younger to permit an inference of discrimination. Duffy v. Paper Magic Group, Inc., 265 F.3d 163 (3d Cir. 2001). See also Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), O’Conner v. Consolidated Coin Caterers, 517 U.S. 308 (1996).

At age 55, Marie is clearly within the coverage of the ADEA, which generally protects workers over age 40. She was discharged from the position that she had held for many years, to which she had been promoted over her tenure with the company. It would appear that she met her employer’s “reasonable” qualifications, especially since her position description did not require computer expertise. She was terminated at age 55, and replaced by someone significantly younger who was age 40. It appears that she will be able to establish a prima facie case of age discrimination.

(b.) Once a prima facie case is established, the employer must offer a legitimate nondiscriminatory reason for the termination following which Marie must establish that the offered reason was a pretext for discrimination and that her age was the “but for” reason for her termination.

District, 357 F. 3d 366 (2004), Cross v. New York City Transit Authority, 417 F.3d 241 (2d Cir. 2005). Under this framework, the initial burden rests with a plaintiff to establish a prima facie case of age discrimination. If a prima facie case is established, the burden of production shifts to the defendant to offer a legitimate nondiscriminatory reason for the adverse employment action. If the defendant produces such a reason, the plaintiff must prove that the defendant's proffered reasons were not the true reasons for its actions but a pretext for discrimination. Id. at 248.

In this case, once a prima facie case was established, the burden shifted to the employer to offer a legitimate nondiscriminatory reason for the termination. Acme can meet this burden by stating that Marie was terminated because of her difficulties in learning the new computer system by the established deadline. Marie must then demonstrate that the employer’s reason for her termination was not the real reason and was a pretext for discrimination. She can attempt to do this by demonstrating that other younger employees struggled with the new system, and that no deadlines for mastery were established for them and they were not disciplined. Further support might come from Marie’s boss’ comments about the company needing “young blood.” See, Morse v. Southern Union Co., 174 F.3d 917, 920 (8th Cir, 1999); Roberts v. I.B.M. Corp., 733 F.3d 1306 (10th Cir. 2013).

The Supreme Court held in Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009), that mixed-motive claims are not available under the ADEA. Therefore, the plaintiff must prove, through direct and/or circumstantial evidence, that age was the but-for cause of her termination. Plaintiff bears the burden of proof on this point, and cannot recover if age was a motivating factor, but not the but-for cause of her termination.
Question No. 4: Grading Guidelines

1. **Removal to federal court**

   Comments: Applicants should demonstrate an understanding of federal question jurisdiction and removal of actions from state court to federal court, and should apply the rules to the facts to reach a well-reasoned conclusion.

   5 points

2. **Equal Protection Clause**

   Comments: Applicants should demonstrate an understanding of the Equal Protection Clause of the Fourteenth Amendment, and should apply the rules to reach a well-reasoned conclusion.

   6 points

3.(a.) **ADEA - prima facie case**

   Comments: Applicants should demonstrate an understanding of the Age Discrimination in Employment Act and establishment of a *prima facie* case and apply the rules to the facts.

   5 points

   (b.) **Proof of age discrimination**

   Comments: Applicants should demonstrate an understanding of the respective burdens in an ADEA case once a *prima facie* case has been established, and discuss the law in relation to the facts.

   4 points
Question No. 5

In 2012, Patty, a free agent basketball player, signed a five year, no-trade, no-cut contract to play for the Zephyrs, a women’s professional team located in Big City, Pennsylvania. The contract also provided for the payment of a substantial signing bonus to Patty but required the bonus to be returned in the event that Patty violated the team’s personal conduct policy.

During the off-season, Patty lived at Blackacre, a house located in Pennsylvania, ninety miles from Big City, which she owned with her sisters, Maxine and Laverne, as joint tenants with right of survivorship. Following her signing with the Zephyrs, Patty needed a residence in Big City to be close to the Zephyrs’ arena for games and practices. Al, Patty’s uncle, delivered a valid deed to Patty making a gift of his luxury condominium, Goldacre, which was a short walk from the Zephyrs’ arena. The deed conveying Goldacre to Patty contained the following clause: “Any conveyance of Goldacre by Patty while she is a member of the Zephyrs shall be null and void.”

While browsing in Big City’s airport shopping mall awaiting a flight to an out-of-town preseason game, Patty saw what she thought was an original painting of NBA superstar Michael Jordan done by Leroy Neiman, the famed sports artist, in a sports memorabilia shop owned by Bob. Without asking about its authenticity, Patty impulsively offered $5,000 for the painting. Bob, who had read about Patty’s lucrative contract with the Zephyrs in the local newspaper, knew that the painting was a copy and not an original Neiman. Although Bob did initially wonder why Patty did not inquire about the painting’s authenticity, he viewed Patty’s offer as simply the extravagance of a rich professional athlete to whom money was no object. Bob accepted the offer without mentioning to Patty that the painting was not an original.

Patty used her entire signing bonus to purchase and convert an old warehouse into a state-of-the-art dance club that had never before existed or been tried in Big City. At Patty’s request, her
agent did extensive research on the earnings of similar dance clubs established in comparable locations and estimated that Patty’s new dance club would earn an average of $5,000 per day in profits. Patty entered into a written contract with What-A-Mess (Mess), a local construction company, to renovate the warehouse. The contract provided that Mess would complete the job in time for the club to open on July 1, 2013, the start of the Zephyrs’ regular season. The contract further stated that Mess would pay a penalty of $5,000 per day for each day after July 1\textsuperscript{st} that the dance club was unable to open because the renovations were not completed. Due to Mess’ failure to finish the job on time, Patty’s dance club opened twenty days late. When the club did open, it was more successful than anticipated and earned an average of $6,000 per day in profits.

1. Patty sued Mess for her actual damages suffered when the dance club did not open on time. If Mess is found liable, what is the proper measure of damages?

After Patty’s suit against Mess was finally resolved, Patty violated the Zephyrs’ personal conduct policy but remained on the team. As a result of the violation, Patty’s dance club instantly lost popularity. The dance club was forced to close, and the property and its contents were quickly sold to satisfy the claims of secured creditors. Desperate to raise funds to pay back her signing bonus, Patty entered into a written contract to sell Goldacre to her agent. Patty also discovered that the Michael Jordan painting purchased from Bob was not an original Neiman.

2. Can Patty validly transfer Goldacre to her agent?

3. Patty sued to rescind the sale of the painting based upon a mistake regarding the painting’s authenticity. What arguments should Bob make in opposition to Patty’s claim that the sale should be rescinded due to a mistake?

4. When Patty was unable to pay back her signing bonus, the Zephyrs obtained a judgment against Patty. To partially satisfy the judgment, Patty’s interest in Blackacre was involuntarily sold at a sheriff sale to Diane. What is the state of title to Blackacre following the sheriff sale?
Question No. 5: Examiner’s Analysis

1. Patty should be precluded from receiving actual damages because the contract with Mess contains a valid liquidated damages clause.

Contracting parties may include as part of their agreement a clause specifying in advance the amount of damages that a party shall receive in the event that a breach occurs. Such a clause is known by the term of art phrase as “liquidated damages.” Pantuso Motors, Inc. v. Corestates Bank, N.A., 568 Pa. 601, 608, 798 A.2d 1277, 1282 (2002). In Pennsylvania, liquidated damages clauses are universally accepted as a necessary part of the law governing construction contracts. Sutter Corp. v. Tri-Boro Mun. Authority, 338 Pa.Super. 217, 487 A.2d 933 (1985).

A liquidated damages clause is a valid contractual provision if two requirements are met. First, the computation of actual damages for contractual breach is speculative or otherwise difficult to estimate or ascertain in advance or to prove after a breach occurs. Second, the amount agreed to as damages is a reasonable forecast or approximation of the expected loss. Brinich v. Jencka, 757 A.2d 388 (Pa. Super. 2000), appeal denied, 565 Pa. 634, 771 A.2d 1276 (2001); see also, RESTATEMENT (SECOND) OF CONTRACTS, §356 (1) (1981). Where the amount fixed in advance as damages is intended as a form of punishment, the threat of which is designed to secure contractual compliance, or is so grossly disproportionate to the amount of the probable loss in the event of a breach, it is considered a penalty, not compensation, and is unenforceable as a matter of public policy. Holt’s Cigar Co. v. 222 Liberty Associates, 404 Pa. Super. 578, 591 A.2d 743 (1991).

Parties who agree to include a liquidated damages clause in their contract cannot later claim entitlement to actual damages if the clause is found to be valid. Rather, the parties are bound to their bargain and any evidence as to the existence and extent of injury received by the court in determining the character of the provision is no longer relevant once the court has concluded that the provision is a true liquidated damages clause and not a penalty. This is true regardless of whether it is later claimed that the amount of liquidated damages is insufficient to fully compensate the aggrieved party or is excessive in light of the actual damages caused. Carlos R. Leffler, Inc. v. Hutter, 696 A.2d 157, 162 (Pa. Super. 1997). (citation omitted).

In this case, the facts support the conclusion that the contractual provision requiring Mess to pay $5,000 per day to Patty for each day that the dance club was not open due to Mess’ failure to complete the renovations on time is a valid liquidated damages clause. Because the dance club was a state-of-the-art facility that had never before existed or been tried in Big City, what Patty’s actual earnings would be for this business were less than certain at the time of the making of the contract. Additionally, the figure of an average of $5,000 per day in lost profits was not some made-up, spur-of-the-moment figure intended to punish Mess for not completing the renovations on time, but rather appears to be a thoughtful attempt, based upon the extensive research done by Patty’s agent, to reasonably forecast the expected loss that Patty would suffer if Mess breached the contract by failing to complete the renovations on time. See, e.g., Holt’s Cigar Co. v. 222 Liberty Associates, 404 Pa. Super. at 589-91; 591 A.2d at 748-49. ($500 per diem is not a reasonable estimate of damages from delayed repairs). Finally, although the actual
damages suffered by Patty are greater than the stipulated loss amount in the contract, the difference is not so grossly disproportionate as to afford any party a windfall.

While Patty and Mess called the clause at issue a penalty, the name given to this provision by the parties is not controlling. “Whether the parties have denominated the sum specified in any given case a penalty or liquidated damages is of little moment in determining its real character. The name by which [a penalty or liquidated damages clause] is called is but of slight weight, the controlling elements being the intent of the parties and the special circumstances of the case.” Commonwealth v. Musser Forests, Inc., 394 Pa. 205, 212, 146 A.2d 714, 717 (1959). (Citations omitted).

In conclusion, the damages provision in the contract between Patty and Mess satisfied the legal requirements for enforcing a claim for liquidated, not actual, damages. Therefore, the court will enforce their bargain, and Patty will be precluded from receiving her actual damages suffered as a result of Mess’ breach of the contract.

2. Patty can validly transfer Goldacre because the provision in the deed declaring null and void any conveyance of the property by Patty while she is a member of the Zephyrs is an absolute or disabling restraint on alienation.

One of the principal incidents of fee simple ownership of property is the right of the owner to convey the property. Grossman v. Hill, 384 Pa. 590, 122 A.2d 69 (1956). Any attempt to fetter a fee simple owner by placing absolute restrictions on the sale or transfer of property constitutes a disabling restraint on alienation. RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS, § 3.1. Absolute restraints on the alienation of property are against public policy and have no legal effect. Lauderbaugh v. Williams, 409 Pa. 351, 186 A.2d 39 (1962).

Section 4.1 of the Restatement (Second) of Property (Donative Transfers) states in part:

(1) A disabling restraint imposed in a donative transfer on an interest in property is invalid if the restraint, if effective, would make it impossible for any period of time from the date of the donative transfer to transfer such interest.

RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS, § 4.1 (1).

It is the impossibility of current transfer of the interest in the property for some period of time that makes the disabling restraint invalid. Id., Comment e.

In this case, Al made a donative transfer of Goldacre to Patty, but added the restriction that “[a]ny conveyance of Goldacre by Patty while she is a member of the Zephyrs shall be null and void.” This restraint will remain in effect for a definite term of at least five (5) years. Moreover, the term of the restraint cannot be shortened in any way because Patty’s contract specified that she cannot be traded or cut from the team during the term of her contract.

Because the clause in the deed to Goldacre makes it impossible for Patty to convey the property for a stated period of time, the clause is void as a disabling restraint on alienation. Therefore, Patty took Goldacre free of the disabling restraint and with full power to convey the
property at any time to another party.

3. **Bob should assert that the mistake regarding the authenticity of the painting was unilateral and does not entitle Patty to rescind the contract.**

   Pennsylvania case law holds that when a party who is adversely affected by a mistake in a written contract seeks relief through the courts, the relief granted depends on the nature and effect of that mistake. *Lanci v. Metropolitan Ins. Co.*, 388 Pa. Super. 1, 5, 564 A.2d 972, 974 (1989).

   When both parties to a contract are mistaken about a fact relating to the contract, the mistake is considered to be mutual. *Loyal Christian Ben. Assoc. v. Bender*, 342 Pa. Super. 614, 493 A.2d 760 (1985). When a mistake is mutual, it affords a possible basis for an adversely affected party to avoid a contract. *Ehrenzeller v. Chubb*, 171 Pa. Super. 460, 90 A.2d 286 (1952). For relief to be granted based on a mutual mistake, the mistake must relate to the basis of the bargain, it must materially affect the parties’ performance, and it must not be one as to which the injured party bears the risk. *Loyal Christian Ben. Assoc.*, 342 Pa. Super. at 618, 493 A.2d at 762.

   When only one of the parties has an erroneous belief at the time of formation about a fact relating to the contract, the mistake is considered to be unilateral. As a general rule, a unilateral mistake does not render a contract voidable. *Rusiski v. Pribonic*, 511 Pa. 383, 515 A.2d 507 (1986). A party who makes a unilateral mistake that relates to the basis of the bargain, and that materially affects the parties’ performance can obtain relief to the same extent as if a mutual mistake existed only when that party does not bear the risk of the mistake, and the enforcement of the contract would be unconscionable or the other party had reason to know of the mistake. *Lapio v. Robbins*, 729 A.2d 1229 (Pa. Super. 1999); see also, RESTATEMENT (SECOND) OF CONTRACTS § 153.

   In this case, the facts state that Patty was the only party who was mistaken about a basic assumption underlying the contract, namely, the authenticity of the painting. While the Uniform Commercial Code (UCC) governs transactions in goods like the sale of a painting, it does not displace or supplant common law principles of mistake. See, PA. Cons. Stat. Ann. tit. 13, § 1103 (b) (Supp. 2013). Thus, Bob can use the common law to make several arguments that Patty’s unilateral mistake does not entitle her to rescind the contract.

   First, Bob can assert that Patty bore the risk of the mistake. Section 154 of the Restatement (Second) of Contracts provides in part that a party bears the risk of a mistake if the party has limited knowledge with respect to the facts to which the mistake is made but treats the limited knowledge as adequate. RESTATEMENT (SECOND) OF CONTRACTS § 154 (b). The facts state that Patty impulsively offered to buy the painting and never asked about the painting’s authenticity. By failing to make any inquiry about whether the painting was an original Neiman, Patty arguably treated her limited knowledge about the painting as adequate and therefore assumed the risk of a mistake.

   Moreover, Pennsylvania courts have consistently held that where a mistake is unilateral and is due to the negligence of the one who acted under the mistake, relief in the form of

Bob also can assert that he had no reason to know of Patty’s mistake. The facts state that Bob had read about Patty’s lucrative contract with the Zephyrs in the local newspaper and viewed Patty’s offer to purchase the painting without making any inquiry as to its authenticity to be simply the extravagance of a rich professional athlete to whom money was no object. Thus, Bob can argue that he did not impermissibly attempt to take advantage of Patty’s mistake by snapping up her offer. See, John Edward Murray, Jr., *Murray on Contracts*, §92 E, at p. 497 (5th ed.).

Finally, the mistaken party bears the substantial burden of establishing unconscionability. RESTATEMENT (SECOND) OF CONTRACTS § 153, comment c. There are no facts presented here regarding the value of an original painting or a copy of the painting upon which Patty can assert a claim that enforcement of the contract would be unconscionable.

In summary, Bob should argue that Patty’s mistake about the authenticity of the painting was unilateral and does not provide a sufficient legal basis to rescind the contract. In opposition to Patty’s claim of mistake, Bob should argue that Patty bore the risk of loss for the unilateral mistake because she treated her limited knowledge about the painting as sufficient or, alternatively, that Patty was negligent in failing to inquire about the painting’s authenticity. Further, Bob can argue that that he had no reason to know about the mistake and that there are no stated facts supporting a claim that enforcement of the contract would be unconscionable.

4. **The sheriff sale caused an involuntary severance of Patty’s undivided interest in Blackacre as a joint tenant with right of survivorship with Maxine and Laverne.** As a result of the severance, Diane owns a one-third interest in Blackacre as a tenant in common while Maxine and Laverne own the remaining undivided two-thirds as tenants in common with Diane and between themselves as joint tenants with right of survivorship.

A joint tenancy with right of survivorship may be severed by the act of either of the parties that destroys one of the four required unities. *General Credit Co. v. Cleck*, 415 Pa. Super. 338, 609 A.2d 553 (1992). The action of one of the parties, which may be voluntary or involuntary, “must be of sufficient manifestation that the actor is unable to retreat from the position of creating a severance of the joint tenancy.” *Allison v. Powell*, 333 Pa. Super. 48, 51, 481 A.2d 1215, 1217 (1984) (citation omitted).

It has long been the law in Pennsylvania that a sale upon execution of a judgment against a joint tenant’s interest causes an involuntary severance of the joint tenancy. *In Re Estate of Larendon*, 439 Pa. 535, 266 A.2d 763 (1970). Upon severance, the incident of survivorship between the joint tenant whose actions caused the severance and the other co-tenants is terminated. The resulting interest of the tenant who caused the severance or whoever acquires his interest becomes as a tenant in common in relation to the other tenants. *American Oil Co. v. Falconer*, 136 Pa. Super. 598, 8 A.2d 418 (1939).
The facts state that Patty and her sisters, Maxine and Laverne, owned Blackacre as joint tenants with right of survivorship. When the Zephyrs had the sheriff levy upon and eventually sell Patty’s interest in Blackacre to partially satisfy the judgment that it had obtained, an involuntary severance of the joint tenancy occurred because the unities of title, time and interest previously existing between Patty, Maxine and Laverne had been shattered by the forced sale. As a result of the involuntary severance due to the execution sale initiated by the Zephyrs, Diane acquired a one-third interest in Blackacre as a tenant in common.

The execution sale of Patty’s interest in Blackacre, however, does not affect the four unities as to the remaining two-thirds interest held by Maxine and Laverne in the property. As to that remaining two-thirds interest, Maxine and Laverne would remain as joint tenants with right of survivorship. If either Maxine or Laverne would die, the survivor of those two would own the undivided two-thirds interest in Blackacre. Thus, the ownership interest of Maxine and Laverne in Blackacre must be viewed from two different perspectives. In relation to Diane, Maxine and Laverne together own a two-thirds interest in Blackacre as a tenant in common. As between themselves, their undivided two-thirds interest is held as joint tenants with right of survivorship. R. Boyer, H. Hovenkamp and S. Kurtz, The Law of Property: an Introductory Survey, Chapter 6, § 6.5, at 155-56 (4th ed.); J. Z. Krasnowiecki, Real Estate Law and Practice, §5-5.1, at 146 (2nd ed).

In summary, as a result of the severance of the joint tenancy with right of survivorship caused by the involuntary sale of Patty’s interest, Diane would own a one-third interest in Blackacre as a tenant in common. Maxine and Laverne would own the remaining undivided two-thirds interest as a tenant in common in relation to Diane and as joint tenants with right of survivorship between themselves.
Question No. 5: Grading Guidelines

1. Liquidated Damages

Comments: Candidates should recognize that the law allows parties to a contract to specify in advance the amount of damages that a party shall receive in the event that a breach occurs. Candidates should discuss the necessary elements for a “liquidated damages” clause and analyze the stated facts in determining that the damages clause is valid.

5 Points

2. Absolute or Disabling Restraints on Alienation

Comments: Candidates should recognize that absolute or disabling restraints are against public policy and have no legal effect. Candidates should discuss the legal standard under which a restraint on alienation is determined to be an invalid disabling restraint. Candidates should analyze the stated facts and reach a well-reasoned conclusion that the stated restraint is invalid.

4 Points

3. Unilateral Mistake

Comments: Candidates should discuss the general principles of law governing contractual mistake and the limited circumstances under which relief will be granted for a unilateral mistake. Based upon the applicable legal criteria, candidates should develop well-reasoned arguments to oppose a claim for rescission of a contract based upon a unilateral mistake.

6 Points

4. Involuntary Severance of a Joint Tenancy with Right of Survivorship

Comments: Candidates should recognize that a sale upon execution of a judgment against the interest of a joint tenant with right of survivorship (JTWROS) causes an involuntary severance of the JTWROS and that the resulting interest of the tenant who caused the severance or whoever acquires his interest becomes as a tenant in common in relation to the other tenants. Candidates also should recognize that where there are more than two joint tenants with right of survivorship, the other tenants will continue to hold the remaining interest between themselves as JTWROS. Candidates should apply these principles to the stated facts and reach the correct result regarding the state of title.

5 Points
Shoe, Inc. (“Shoe”), is a Pennsylvania business corporation. Shoe manufactures and sells shoes and boots on a wholesale and retail basis. Late last year, Shoe obtained a contract from the military to manufacture cold weather boots to the military’s exact specifications. The specifications require that each boot be fitted with a valve that can be opened or closed by the wearer of the boot if rapid changes in altitude are experienced.

Last month, Shoe placed an order for 1,000 valves with Valve, Inc. (“Valve”), a manufacturer of various valves, including valves for insulated boots. The order clearly stated the valves must comply with the military specifications. All of the terms of the order were set forth in a valid written contract requiring delivery by March 10, 2014. The contract was silent on limitation of remedies.

Valve had overbooked orders for the valves needed by Shoe. As a result, Valve shipped 1,000 valves to Shoe, 800 of which met the military specifications and 200 of which did not. Yesterday, when the shipment arrived, Shoe completed an inspection and discovered that only part of the shipment conformed to the specifications. Shoe has no use for the incorrect valves.

Dave is Shoe’s president. For years, Dave has struggled with how to deal with Ed, an employee of Shoe. Ed has appeared in a few of Shoe’s advertisements, and some Shoe customers identify Ed with the company. Unfortunately, problems in Ed’s personal life have caused Ed to often be late for work and have impacted his ability to work effectively with his coworkers, generating complaints and significantly impacting his and their productivity. When Dave has confronted Ed, he responds that Dave is picking on him because he is old. Ed is 63 years old.

At Shoe’s June 2013 quarterly board meeting, Dave reported on Ed’s disruptive behavior and, sensitive to Ed’s public role with Shoe, sought guidance from the board. Dave expressed concerns that if Shoe fired Ed because of his tardiness and workplace issues, Ed might file suit against Shoe, the board, and Dave alleging that he was fired due to his age. After concluding that Ed’s conduct was
significantly hurting Shoe's productivity and that his public connection with Shoe was minimal, the board asked its legal counsel if it could fire Ed. Counsel discussed the applicable law and expressed an opinion that the board was within its legal rights to fire Ed. Relying on this opinion, the board authorized Dave to fire Ed. The next day Dave fired Ed, citing his tardiness and poor job performance.

After satisfying all necessary administrative requirements, Ed filed a civil suit against Shoe, its individual board members, and Dave alleging wrongful discharge as a result of age discrimination. The suit generated negative publicity for Shoe resulting in a sudden decline in stock value. At the January shareholders' meeting, several Shoe shareholders, upset about the effects of the bad publicity generated by Ed’s suit, questioned the board’s judgment in authorizing the firing of Ed. The shareholders threatened to file a derivative suit on behalf of Shoe, unless the board could show that it had met its fiduciary duty to Shoe when it authorized Ed’s discharge.

Dave has notified Shoe’s insurance carrier of Ed’s suit. The insurer acknowledged coverage for Shoe and Shoe’s board but questioned coverage for Dave. To protect himself, Dave retained counsel. Shoe’s bylaws do not address indemnification of officers. Dave has requested that Shoe indemnify him for any judgment, fees or costs that he incurs as a result of the suit. The board is willing to indemnify Dave, but is not sure it has the authority to do so.

1. Under the Pennsylvania Uniform Commercial Code:
   
   (a) On what basis could Shoe attempt to reject the valves that were delivered by Valve, and how should Shoe proceed if it wishes to reject the valves?
   
   (b) What steps might be taken by Valve to limit Shoe’s right to reject?

2. What arguments should be made by Shoe's board to justify its actions regarding Ed?

3. Under the Pennsylvania Business Corporation Law what requirements, if any, must be met for the board of Shoe to be able to indemnify Dave, and what is the likelihood of indemnification under the facts?
1(a). Provided that Shoe does not accept the shipment, it may declare the shipment to be nonconforming and notify Valve that it is rejecting the whole or accepting any commercial unit or units and rejecting the remainder.

Valve has failed to provide perfect tender under the terms of its contract with Shoe. The contract required 1,000 valves meeting the exact specifications provided by the military. Valve only delivered 800 conforming valves. Valve has breached the terms of the contract. As a result, so long as an acceptance has not occurred on Shoe’s part, Shoe can advise Valve of the nonconformity and exercise its rights under the Pennsylvania Uniform Commercial Code (the “Code”) to reject all or part of the goods delivered.

Section 2601 of the Code provides, “Subject to the provisions of this division on breach in installment contracts (section 2612) and unless otherwise agreed under the sections on contractual limitations of remedy (sections 2718 and 2719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may: (1) reject the whole; (2) accept the whole; or (3) accept any commercial unit or units and reject the rest.” 13 Pa. C.S.A. §2601. The contract between Shoe and Valve is not an installment contract and their contract did not address limitation of remedies (i.e., there is no contract term prohibiting rejection). Therefore, it would appear that Shoe has the right of rejection set forth in Section 2601.

If, however, a buyer has accepted the goods, then the buyer cannot reject the goods. See White and Summers, Uniform Commercial Code, §8-3(a), 4th Ed. (1988). The Code provides that acceptance occurs when the buyer, after a reasonable opportunity to inspect the goods, either signifies to the seller that the goods are conforming or that the buyer will take them despite a nonconformity; or the buyer, after a reasonable time to inspect, fails to reject the goods; or the buyer does an act inconsistent with the ownership of the seller. See 13 Pa. C.S.A. §2606. Shoe has just discovered the nonconformity and has taken no action signifying acceptance. Accordingly, it can be concluded that acceptance has not occurred.

Section 2602 of the Code provides that “Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.” 13 Pa. C.S.A. §2602(a). Thus, if Shoe wishes to reject the goods, Shoe must give notice of the rejection within a reasonable time of delivery. Additionally, Section 2605 of the Code states, “The failure of the buyer to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach: (1) where the seller could have cured it if stated seasonably; or (2) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.” 13 Pa. C.S.A. §2605(a). Based on the Code, in the instant case the rejection notice by Shoe must set forth specifically the nonconformity that supports the rejection. Accordingly, if Shoe wishes to reject the valves due to nonconformity with the contract provisions and its specifications it should promptly notify Valve that it is rejecting the valves because they did not conform to the military specifications set forth in the contract.
Thus, Shoe may, provided it complies with the notice requirements of the Code, advise Valve that it is rejecting the entire shipment or accepting only the conforming valves and rejecting the remainder.

1.(b) Valve, upon receipt of the notice of rejection, has the ability to cure the nonconformity within the contract time.

Once notification of rejection is given the analysis does not end. Section 2508 of the Code provides a seller a basis to salvage the contract when nonconforming goods have been delivered. It provides, “Where any tender or delivery by the seller is rejected because nonconforming and the time of performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.” 13 Pa. C.S.A. §2508(a). Valve’s delivery is due by March 10, 2014. If notice of rejection is given to Valve today, Valve can seasonably notify Shoe that it intends to cure the nonconformity within the contract time and may within the contract time deliver 200 correct valves to replace the 200 nonconforming valves that were delivered.

2. The board should state that it has adhered to the standard of care applicable to it under the Pennsylvania Business Corporation Law (the “BCL”) and that it was justified in relying on the opinion of counsel that advised the board that a sound legal basis existed to discharge Ed.

The BCL provides, “A director of a business corporation shall stand in a fiduciary relation to the corporation and shall perform his duties as a director . . . in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence as a person of ordinary prudence would use under similar circumstances.” 15 Pa. C.S.A. §1712(a). Essentially, the director is a fiduciary who must act with good faith and with an undivided loyalty to the corporation. If a director satisfies his fiduciary duty the business judgment rule of the BCL then creates a presumption in favor of the director that he has acted in the best interests of the corporation. 15 Pa. C.S.A. §1716(b)

“Good faith” has been defined as “behavior that is honest and without fraud, delusion or deceit.” Sell and Clark, Pennsylvania Business Corporations, §1712.4 (1997). In performing their duties directors are permitted to depend on information, opinions, reports and statements provided by their officers and legal counsel. Id. Section 1712 states, “In performing his duties, a director shall be entitled to rely in good faith on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by any of the following: (1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented. (2) Counsel, public accountants or other persons as to matters which the director reasonably believes to be within the professional or expert competence of such person. (3) A committee of the board upon which he does not serve, duly designated in accordance with law, as to matters within its designated authority, which committee the director reasonably believes to merit confidence.” 15 Pa. C.S.A. §1712(a). It should be noted, however, that a director will not be considered to be acting in good faith if he has knowledge concerning the matter in question that would cause his reliance on others to be unwarranted. 15 Pa. C.S.A. §1712(b).
In the instant case, the directors received a report from the president of the corporation relative to problems with an employee and the negative impact that employee was having on corporate operations. The president explained that he would like guidance from the board before acting relative to Ed because of the public role that Ed had had with the company. The president also disclosed his concerns relative to an age discrimination claim by Ed if it was decided that Ed be fired. The board had no reason not to believe the information that the president had presented and concluded that Ed's conduct was significantly hurting Shoe's productivity and that Ed's public connection with Shoe was minimal. Upon receiving the information the board turned to legal counsel to obtain an opinion relative to whether or not the board and the corporation had a valid legal basis to discharge the employee. The board had no basis to question the validity of the opinion that was provided. Based upon the opinion the board authorized the president to discharge the employee.

The board should define the standard applicable to them and explain how and why they have adhered to that standard. They should argue that they at all times acted in good faith and were justified in relying on the report of Dave and the opinion of counsel, and their decision was in the best interest of the corporation.

3. The BCL would allow the corporation to indemnify Dave if the board obtains an opinion of independent legal counsel or a vote by the shareholders establishing that Dave's actions were taken in good faith and in the best interest of the company.

Section 1741 of the BCL provides:

Unless otherwise restricted in its bylaws, a business corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation), by reason of the fact that he is or was a representative of the corporation, or is or was serving at the request of the corporation as a representative of another domestic or foreign corporation for profit or not-for-profit, partnership, joint venture, trust or other enterprise, against expenses (including attorneys’ fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with the action or proceeding if he acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the corporation and, with respect to any criminal proceeding, had no reasonable cause to believe his conduct was unlawful. 15 Pa. C.S.A. §1741.

This section of the BCL addresses third party actions against a person who has been sued because of their role as a representative of the corporation. The standard requires the person seeking indemnification to have been acting in good faith and in a manner that he believed to be in the best interest of the corporation. The power to grant indemnification is to be exercised by the board of directors pursuant to Section 1721 of the BCL. See, Sell and Clark, Pennsylvania Business Corporations, §1741.3, 1741.4 and 1741.5 (1997).
The BCL sets forth the procedure to be followed in determining if indemnification should be granted. Under the BCL indemnification under Section 1741 should only be authorized if a determination is made that the person seeking indemnification has met the standards for indemnification required by Section 1741. This determination is to be made “(1) by the board of directors by a majority vote of a quorum consisting of directors who were not parties to the action or proceeding; (2) if such a quorum is not obtainable or if obtainable and a majority vote of a quorum of disinterested directors so directs, by independent legal counsel in a written opinion; or (3) by the shareholders. 15 Pa. C.S.A. §1744.

The Shoe board desires to indemnify Dave. It appears that Dave is qualified to be indemnified as he has acted in good faith and with the interests of the corporation in mind. Since the board members are parties to the suit they should obtain a written opinion of independent legal counsel to support their desire to indemnify Dave or, if practical, a vote of the shareholders.
Question No. 6: Grading Guidelines

1. Sale of nonconforming goods—Buyer’s right to reject and Seller’s limited right to cure

Comments: The candidates should recognize that nonconforming goods were delivered and discuss the buyer’s rights relative to those goods, how the buyer must proceed to reject the goods, and the right of the seller to effect a cure up to the required date of delivery.

10 points

2. Standard of Care of board members and justifiable reliance

Comments: The candidates should define the standard of care of the board to the corporation and discuss the board’s ability to rely on the corporation’s professionals.

5 points

3. Indemnification of officer

Comments: The candidates should discuss the availability of indemnification, the standard to be applied and the procedural requirement for approval.

5 points
Supreme Court of Pennsylvania
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FILE
Memorandum

To: Applicant
From: Suzanne Suite
Date: February 25, 2014
    Our File No. 654321

As averred in the attached complaint, our client, Victor Victim, was injured in a limousine accident. His injuries are permanent and disabling. His damages will exceed the insurance policy limits and assets of Lemon Limousine, which operated the vehicle that crashed.

After the complaint was answered, I took the deposition of Wanda Weber, excerpts from which are included in the attached File. Defense counsel for Lemon Limousine has admitted liability and tendered the insurance policy limits in exchange for dismissal as to it and a tortfeasor’s release. At this point, I am not sure that it is in our client's interest to settle for the limited policy limits, and we have not accepted Lemon Limousine's offer to settle.

We have filed a motion for summary judgment on the issue of the liability of all of the defendants for the injuries sustained by our client. I would like you to prepare a first draft of a brief in support of the motion for summary judgment, asserting all arguments that can reasonably be raised to support the motion for summary judgment against defendants Wanda Weber and Madison Limousine Service, Inc. There is no need for you to address the liability of Lemon Limousine in your brief. Liability against Lemon Limousine is clear based on its admissions in its Answer, and I will add an argument in support of summary judgment against Lemon Limousine if we do not settle with it.

In drafting your brief, it is not necessary to provide a caption. Your draft should begin with a non-argumentative statement of only the relevant facts. In accordance with local court rules, the factual statement should be followed with a statement of issues in whole sentence question form phrased so that the answer will be “Yes.” Each issue should be followed by a one word answer. The argument section should begin with a discussion of the applicable requirements for granting summary judgment and then be divided into a subsection for each issue, setting forth the reasoning that supports your conclusion on the issue. Finally, the brief should include a non-argumentative conclusion asking for the relief to which our client is entitled. It is not necessary to provide for a signature, but if you do, the signature should be mine. You should cite to relevant authority, distinguishing adverse precedent, if any. “Bluebook” format of citations is not required.

The File and Library which are provided contain the only facts and legal principles you should consider and rely upon in completing this assignment.
In the Court of Common Pleas of Madison County

Victor Victim     :

v.     :

Wanda Weber, Madison Limousine : Civil Action No. 2013-1942
Service, Inc., and Lemon Limousine, Inc. :

COMPLAINT

1. Plaintiff is Victor Victim, an individual who resides in Madison County, Pennsylvania.

2. Defendant Wanda Weber is an individual who resides in the City of Madison, Madison County, Pennsylvania, and is the sole director and president of defendants Madison Limousine Service and Lemon Limousine.

3. Defendant Madison Limousine Service, Inc., is a Pennsylvania corporation with a registered address and principal place of business at 62 State Street, Madison, Pennsylvania.

4. Defendant Lemon Limousine, Inc., is a Pennsylvania corporation with a registered address and principal place of business at 62 State Street, Madison, Pennsylvania.

5. On January 1, 2012, while plaintiff was a fare-paying passenger in a vehicle operated by defendant Lemon Limousine, the left tie rod on the limousine failed, causing the driver to lose control and causing the vehicle to crash into a fire hydrant.

6. The tie rod failed because it had been installed improperly by an apprentice mechanic then employed by defendant Lemon Limousine.

7. As a result of the crash described above, plaintiff was sorely and permanently injured, suffering contusions, broken bones, concussion and internal injuries, and has incurred medical expenses, has suffered great pain and has lost wages.

Count I

8. Plaintiff incorporates the averments of paragraphs 1 through 7 above herein.

9. Defendant Lemon Limousine, as a common carrier, was negligent and breached its enhanced duty of care to its passengers by allowing an unqualified mechanic in its employ to negligently repair the tie rod on its vehicle.

WHEREFORE, plaintiff respectfully requests judgment in his favor and against defendant Lemon Limousine in an amount in excess of $50,000.00.
Count II

10. Plaintiff incorporates the averments of paragraphs 1 through 9 above herein.

11. Defendant Wanda Weber was responsible for the negligent installation of the tie rod because it was installed at her direction and under her general supervision as President of Lemon Limousine by a mechanic whom she knew was not qualified or trained to install the tie rod.

WHEREFORE, plaintiff respectfully requests judgment in his favor and against defendant Weber in an amount in excess of $50,000.00.

Count III

12. Plaintiff incorporates the averments of paragraphs 1 through 11 above herein.

13. The corporate veil should be pierced because defendants Weber, Madison Limousine Service, and Lemon Limousine are alter egos of each other by virtue of common ownership, undercapitalization, intermingling of funds, and otherwise constitute one and the same entity.

WHEREFORE, plaintiff respectfully requests judgment in his favor and against all defendants jointly and severally in an amount in excess of $50,000,000.

Suzanne Suite
Attorney for plaintiff
In the Court of Common Pleas of Madison County

Victor Victim

: v.

: Civil Action No. 2013-1942


ANSWER

Defendants, Wanda Weber, Madison Limousine Service, Inc., and Lemon Limousine, Inc., come, by their attorney, and answer plaintiff’s complaint as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

Count I

8. Defendants incorporate their answers to paragraphs 1 through 7 as stated above herein.


WHEREFORE, defendants request that judgment be entered in favor of defendants Weber and Madison Limousine and that plaintiff’s complaint against them be dismissed with prejudice.

Count II

10. Defendants incorporate their answers to paragraphs 1 through 9 as stated above herein.

11. Denied that Defendant Weber was responsible for the negligent installation of the tie rod. On the contrary, Defendant Weber did not participate in the actual installation of the tie rod and denies any responsibility with respect to the maintenance of the vehicle operated by defendant Lemon Limousine, including, but not limited to, replacement of the tie rod.
WHEREFORE, defendants request that judgment be entered in favor of defendants and that plaintiff’s complaint be dismissed with prejudice.

Count III

12. Defendants incorporate their answers to paragraphs 1 through 11 as stated above herein.

13. Denied. On the contrary, each entity maintains a separate existence.

WHEREFORE, defendants request that judgment be entered in favor of defendants and that plaintiff’s complaint be dismissed with prejudice.

Barry Barrister
Attorney for defendants
In the Court of Common Pleas of Madison County

Victor Victim

v.


Civil Action No. 2013-1942

Excerpts of Deposition of Wanda Weber

Taken July 30, 2013

Appearances: Suzanne Suite, Esquire, for plaintiff
Barry Barrister, Esquire, for defendants

Reporter: The witness, Wanda Weber, was duly sworn and testified as follows:

By Ms. Suite:

Q. Ms. Weber, where did you grow up and go to school?

A. I grew up in Madison and went to Madison High where I was captain of the Pep Squad, and then to Madison County Community College where I majored in Business Science.

Q. Ms. Weber, are you the sole shareholder, sole director and president of Madison Limousine Service, Inc.?

A. Ever since I was divorced from Mr. Weber and received all of his interest in the businesses as a part of the settlement. Yes.

Q. How long has this business been in operation?

A. About 10 years.

Q. In what state is Madison organized?

A. Pennsylvania.

Q. Does it file a tax return?

A. As an S corporation, it files a form but it reports its income or losses on a form K-1 which is given to me, and the income or losses are reported on my personal tax form.

Q. What is the capital investment in Madison?
A. About $3,000. Basically, the cost of the sign, and the furniture, radio equipment and equipment for the mechanic, all which my ex-husband bought used.

Q. Where does Madison do business?

A. At 62 State Street in Madison.

Q. Who owns that building?

A. I do.

Q. So Madison Limousine pays rent to you and you depreciate the building and take all of the office expenses as deductions.

A. Yes.

Q. How many employees does Madison Limousine Service have?

A. I am the CEO, the day shift dispatcher and the bookkeeper. I also employ - - I mean Madison also employs - - a night shift dispatcher, an apprentice mechanic who gasses the cars, and does oil changes, tune-ups, and similar routine maintenance. The mechanic is carried on the books of each of the operating companies as a part-time employee, and his wages are allocated among them depending on which vehicle he works.

Q. How does Madison derive revenue?

A. The companies which operate the vehicles pay it a service fee.

Q. How many companies are there that operate vehicles and what are their names?


Q. And Madison is the sole shareholder, and you are the sole director and President and Secretary/Treasurer of each one?

A. Yes.

Q. And these are all Pennsylvania S Corporations which report their income and losses to Madison on K-1s, which in turn reports all of its income and losses to you, and you then pay the taxes or take the deductions on your personal tax form?

A. Yes.

Q. Each one has a registered address and place of business at 62 State Street?
A. Yes.

Q. Do the operating companies own any property?
A. No. They lease their vehicles.

Q. How many cars does each have?
A. One apiece.

Q. In whose name are they registered?
A. Each car is registered in the name of the leasing company. So, Lemon Limo has a car under lease in its name, as does Lime Limo, etc.

Q. Who provides the insurance and how much?
A. Each company has its own in the state mandated minimum amount.

Q. How much money do you have invested in each operating company?
A. About $1,000 which was used to paint the vehicles, have them fitted out for this use, and have the name and phone number put on it.

Q. What color are they?
A. They are all painted white.

Q. What names and telephone numbers are on the cars?
A. Only Madison Limousine Service and its number.

Q. Do the operating companies have their own phone numbers and web sites?
A. No, they each use Madison’s.

Q. What about bank accounts?
A. Each has its own.

Q. What kind of balances are carried?
A. Fare revenue is deposited in each company’s account. Then, if there are sufficient funds, enough is reserved to pay insurance, lease payments, drivers’ salaries, mechanic fees and gas as needed. The rest, if any, is then transferred to Madison Limo’s account as the
service fee. The companies buy their gas from Madison Limo unless they run short while on the road.

Q. What happens if there isn’t enough to pay the insurance premium or a salary when it is due?

A. Then I either write a check from another company’s or Madison Limo’s or my personal account, and if possible it is paid back later.

Q. Do the operating companies turn a profit?

A. They are designed to generate losses, as does Madison. The point is that I have other investments which are profitable, and rely on these losses, and especially depreciation on the building, to offset the other income for tax purposes.

Q. How much money does Madison maintain in its account?

A. Just what I think is sufficient to pay the night shift dispatcher, pay for gas, oil and parts, pay the electric and heating bill, and pay me my rent.

Q. Is Madison’s account used for anything else?

A. I use that account to pay the mortgage on the building, and the insurance and lease payments on my SUV.

Q. And what happens if Madison has more money than is required for these purposes?

A. Excess funds are transferred to my personal high interest money market account.

Q. And what happens if Madison has insufficient funds to pay its bills?

A. Then either I don’t get paid or I take money out of the money market account.

Q. As to your personal SUV, who pays for gas, oil and servicing?

A. Madison.

Q. Do the companies have annual meetings of shareholders and directors, and keep books of minutes of these meetings?

A. The only minutes we have are the corporate resolutions that the bank requires so we can open bank accounts and qualify for leases.

Q. So the companies don’t elect officers and directors and approve salaries annually?

A. No, why should we?
Q. How does each of the companies get its customers?

A. They call the telephone number painted on the vehicle, or listed in the print advertising or on the web site, which connects them to Madison’s dispatcher, who then assigns a vehicle to that customer.

Q. How did the tie rod on the Lemon Limo come to fail?

A. The driver claimed that the front end suspension was bad. I had our mechanic check it out, and he recommended sending the vehicle to a dealership where there are specially trained suspension specialists and equipment for replacing the tie rods and ball joints, which would have cost about $1,500.00 for this car. I then got in and drove it, and it didn’t seem so bad, so, as president of Lemon Limousine, I told our mechanic to just replace the tie rod. I mean, even though he said he was not qualified or trained to do that, how complicated could it be? The mechanic knew a lot about cars and how they worked, so even though I knew he never had training for installing tie rods, I was sure he could figure out what to do. Turns out he put it in wrong, and two days later, it broke. I want to point out that when he did this, he was on Lemon’s books as an employee.

By Ms. Suite: No more questions. Do you have any Mr. Barrister?

By Mr. Barrister: No.
LIBRARY
RULE:

Pa. R. Civ. P. No. 1035.2. Motion

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law:

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Note: Rule 1035.2 sets forth the general principle that a motion for summary judgment is based on an evidentiary record which entitles the moving party to judgment as a matter of law.

The evidentiary record may be one of two types. Under subparagraph (1), the record shows that the material facts are undisputed and, therefore, there is no issue to be submitted to a jury.

An example of a motion under subparagraph (1) is a motion supported by a record containing an admission. By virtue of the admission, no issue of fact could be established by further discovery or expert report.
Superior Court of Pennsylvania

Rhonda L. ROSENBERRY, individually and as Parent and Natural Guardian of Alexander W. Prince, a Minor, Appellant
v.
Tanya EVANS, Mitchell King and Robert Miller, Appellees
v.
Dale Cannon and Linda Cannon, Appellees

OPINION

Rhonda L. Rosenberry ("Mother"), acting individually and as parent and natural guardian of Alexander W. Prince, a minor, appeals from the trial court's order granting summary judgment in favor of Robert Miller ("Landlord") (footnote omitted) in this negligence action arising from a dog bite. After a thorough review of the record and the applicable law, we affirm.

The relevant facts underlying this appeal are as follows. On June 15, 2008, then ten-year-old Alexander accompanied his grandparents, Dale and Linda Cannon, to premises leased by Mitchell King from Landlord. The purpose of their visit was to choose a puppy from the litter of puppies born just hours before to Raven, a pit bull owned by Tanya Evans, Mr. King's girlfriend. Ms. Evans placed a newborn puppy with part of its umbilical cord still attached in Alexander's lap. First, Raven came near the child, licking his knee and hand. They were face to face, each looking down at the puppy, and then they both looked up at the same time. At that point, Raven "had a hold of his nose." Ms. Evans grabbed the dog, the child pulled back, and "there was a piece missing out of Alex's nose...."

Mother commenced a civil action against Landlord, Mr. King, and Ms. Evans, alleging that their negligence resulted in serious bodily injury to Alexander. Mother averred that the dog had dangerous propensities, that Landlord was in control of the property where the injury occurred, and that he knew or should have known of the dog's dangerous propensities. She asserted that he was negligent in permitting Mr. King and Ms. Evans to keep a vicious dog on the premises and in failing to warn others of the danger. Landlord denied that, at the time of the incident, he controlled, managed, or supervised the property. Furthermore, he denied that the dog was kept on the property or that he permitted Ms. Evans and Mr. King
to keep the dog on the premises. Finally, he denied constructive or actual knowledge that the dog had any dangerous or vicious propensities. He filed cross-claims against Ms. Evans and Mr. King seeking contribution and indemnification pursuant to Pa.R.C.P. 1031.1, and alleged that they were solely liable to Mother, or jointly and severally liable. Landlord joined Dale and Linda Cannon, the child's grandparents, as additional defendants.

...[O]n December 17, 2010, Landlord filed a motion for summary judgment. He alleged that Mother had failed to adduce evidence that the dog had dangerous propensities or that Landlord had actual knowledge of any dangerous propensities of the dog that would give rise to a duty on his part to control the animal or protect the minor child. Mother responded, filed a brief in opposition and a supplement to the record pursuant to Pa.R.C.P. 1035.1. After oral argument, the trial court granted summary judgment in favor of Landlord, finding both that the dog did not have a dangerous propensity and that Landlord had no knowledge of any alleged dangerous propensity. This appeal followed.

* * *

"In reviewing an order granting summary judgment, our scope of review is plenary, and our standard of review is the same as that applied by the trial court." (Citation omitted). We may reverse the entry of a summary judgment only where the lower court erred in concluding that the matter presented no genuine issue as to any material fact and that it is clear that the moving party was entitled to a judgment as a matter of law. (Citation omitted). In making this assessment, we view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Where our inquiry involves solely questions of law, our review is de novo.

Typically, in negligence actions arising from the conduct of animals, the animal's owner is the person responsible for injuries to others caused by his or her pet. Pennsylvania, however, does not impose absolute liability upon dog owners for injuries occasioned by their dogs. (Citation omitted). Proof of the owner's negligence is required.

In order to establish a cause of action in negligence against a landlord for injuries
caused by his tenant's dog, it must be proven that the landlord owed a duty of care, that he breached that duty, and that the injuries were proximately caused by the breach. (Citation omitted). A landlord out of possession is not liable for attacks by animals kept by his tenant on leased premises where the tenant has exclusive control over the premises. However, a duty to use reasonable care will attach to prevent such injuries if the landlord has knowledge of a dangerous animal on the rented premises and if the landlord enjoyed the right to control or remove the animal by retaking the premises. (Citation omitted).

* * *

Actual knowledge of a dog's dangerous propensities is required before a duty is imposed upon a landlord to protect against or remove an animal housed on rental property.

* * *

We first address the question of whether there was no genuine issue of material fact that Raven did not have any dangerous characteristics. Instantly, the trial court relied upon a record replete with testimonial evidence that Raven had a gentle disposition and wonderful temperament as the basis for its finding that the dog did not have a dangerous propensity. . . .

Mother contends first that the trial court violated the Nanty-Glo rule in relying solely upon the oral testimony of Ms. Evans, Mr. King and the Cannons to find that the dog did not have a dangerous propensity. In Borough of Nanty-Glo v. American Surety Co. of New York, 309 Pa. 236, 163 A. 523, 524 (1932), our Supreme Court held that a directed verdict could not be entered where the moving party relied exclusively on oral testimony, either through affidavits or deposition, to establish the absence of a genuine issue of material fact. (Citation omitted). The Nanty-Glo rule was reaffirmed and expanded to encompass summary judgment . . . . (Citation omitted).

The rule provides that, "[h]owever clear and indisputable may be the proof when it depends on oral testimony, it is nevertheless the province of the jury to decide, under instructions from the court, as to the law applicable to the facts[.]" Nanty-Glo, supra at 524. An exception to the rule has been recognized where the moving party relies upon the uncontradicted testimony of another party, even a co-defendant, who is an adverse party and equally liable to the plaintiff. (Citation omitted).

* * *
As a finding of the dog's dangerous propensities was a prerequisite to liability against Landlord as well as his co-defendants and the additional defendants, the parties had identical aligned interests. The trial court relied upon the uncontradicted oral testimony of Ms. Evans, Mr. King, and the Cannons in concluding that the dog did not have violent tendencies. "Testimonial affidavits of the moving party or his witnesses, not documentary, even if uncontradicted, will not afford sufficient basis for the entry of summary judgment, since the credibility of the testimony is still a matter for the jury." (Citation omitted). As this was not the testimony of parties adverse to Landlord on this issue, we find that the Nanty-Glo rule applies and the trial court erred in finding no issue of material fact based solely on this testimony. (Footnote omitted)

* * *

Thus, viewing the evidence in the light most favorable to the nonmoving party, as we are obligated to do, we conclude that there are genuine issues of material fact regarding the dog's dangerous propensities. However, there was no evidence from which one could reasonably infer that Landlord had actual knowledge of the dog's alleged dangerous propensities to impose a duty of care. (Citation omitted) (summary judgment proper when evidentiary record contains insufficient evidence of facts to make out a prima facie cause of action). Hence, we affirm.

Order affirmed.
Commonwealth Court of Pennsylvania

John E. KAITES and Johnstown Coal and Coke, Inc., Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, Respondent

Opinion

John E. Kaites (Petitioner) has appealed from an order of the Environmental Hearing Board (Board) which, inter alia, denied his petition to reopen the record and entered summary judgment in favor of the Department of Environmental Resources (DER) thereby upholding DER's suspension of coal refuse and industrial waste permits issued to Johnstown Coal and Coke, Inc. (Johnstown) and finding Petitioner, as president and chief executive officer of Johnstown, individually responsible for complying with an abatement order issued by DER. The only aspect of the Board's decision which is challenged in the instant appeal is its conclusion that Petitioner, as an individual corporate officer, may be the subject of an abatement order.

. . . The mining site here involved is known as the Bear Run mining complex in Indiana County . . . . Johnstown bought the mine and storage area in 1966 or 1967 and DER issued a permit authorizing operation of the complex in 1968.

In 1972, Petitioner purchased Johnstown . . . . In that same year, the Bear Run No. 1 mine was sealed following the cessation of mining operations at that location. Despite oral approval of the seals by a DER official, acidic discharges have occurred from the mine. . . . Subsequent attempts, pursuant to two consent orders with DER, to reseal the mine and remedy discharges from the site have proven unsuccessful.

On February 10, 1984, DER issued the abatement and suspension order which is the subject of the instant appeal. The order named both Johnstown and Petitioner individually as responsible for abating the nuisance which admittedly continues to exist at the facility. On appeal, the Board ruled that the imposition of individual liability on Petitioner was proper . . . .

Petitioner has presented three issues for our consideration: . . . ; (2) whether the record supports “piercing the corporate veil” so as to render Petitioner directly liable for
abating the existing nuisance; and (3) whether Petitioner may be found liable under the “participation” theory of joint tortfeasor liability.

* * *

The second issue is whether the record supports “piercing the corporate veil.” If the corporate identity may properly be disregarded in this case, then liability for the continuing nuisance would clearly extend to Petitioner as the owner of the facility. (Citation omitted). . . . We conclude that the record does not support the conclusion that Johnstown was a sham corporation or the alter ego of the Petitioner.

The general rule in Pennsylvania is that a corporation shall be regarded as an independent entity even if, as here, its stock is owned entirely by one person. (Citations omitted). Factors which may justify disregarding the corporate form include undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs and use of the corporate form to perpetrate a fraud. (Citations omitted). The only pertinent evidence on this issue in the record before us is that Johnstown's Board of Directors, which acts in an advisory capacity to Petitioner, has not met formally since the late 1970s. We do not think that this solitary fact would support disregarding Johnstown's corporate form in the matter sub judice.

Thus, if individual liability is to be imposed on Petitioner, it must be by analogizing the tort law “participation” theory of liability applied by the Board. As a general rule, corporate officers are individually liable for their own tortious actions. (Citations omitted). In Pennsylvania, the participation theory imposes liability “on the individual as an actor rather than as an owner. Such liability is not predicated on a finding that the corporation is a sham and a mere alter ego of the individual corporate officer. Instead, liability attaches where the record establishes the individual's participation in the tortious activity.” (Citation omitted). Thus, in order for liability to attach the officer must actually participate in wrongful acts. (Citation omitted). He may be held liable for misfeasance but not for simple nonfeasance. (Citations omitted).

The parties have stipulated as follows regarding Petitioner's general involvement in DER compliance matters: In his capacity as CEO and President, [Petitioner] . . . has been and is responsible
for making all management decisions for Johnstown concerning the disposition and operation of the Bear Run mining complex. As President and CEO of Johnstown, [Petitioner's] . . . management decisions include dealing with DER and the resolution of compliance orders, e.g., negotiator of and signatory to the 1976 Consent Order and Agreement. (Citations to Record omitted).

Based on these facts alone, the Board concluded that Petitioner could be found personally liable for violating the CSL and the CRDCA. We must disagree with this conclusion.

Our analysis of the stipulations reveals that they establish two factors: (1) Petitioner's status as a corporate officer and (2) his responsibility for management decisions including “the resolution of compliance orders.” As we have already noted, however, Petitioner's position as a corporate officer cannot, in and of itself, lead to the imposition of personal liability for the tortious conduct of Johnstown. (Citation omitted) By the same token, we do not believe that liability may be imposed by inferring that given Petitioner's managerial position he is necessarily responsible for any statutory infractions committed by Johnstown.

. . . Despite these observations [regarding legislative emphasis on preventing pollution], however, we do not believe that Petitioner may be held personally liable for violating the statutes absent some positive proof of wrongful conduct. (Citation omitted). The record, in fact, contains evidence that Petitioner and Johnstown have twice attempted, albeit unsuccessfully, to remedy the acid mining discharges pursuant to consent orders with DER. Aside from inference and Petitioner's status as a corporate officer, however, there is no specific evidence demonstrating Petitioner's intentional neglect or misconduct which would support imposing individual liability on him for violating the CSL and CRDCA.

. . . Our holding here is controlled by the lack of sufficient evidence demonstrating that Petitioner has contributed, by personal actions of neglect or misconduct, to the existing nuisance at the Bear Run complex.

* * *

We, accordingly, will reverse the order of the Board insofar as it imposes individual liability on Petitioner.
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 or typed in the correct answer screen or book that has been provided. 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 and Grading Guidelines

The applicant, as an associate in the firm of Suite and Sauer, is asked to prepare a first draft of a brief in support of a motion for summary judgment on the issue of liability of two of several related defendants for injuries suffered by a client of the firm in the crash of a limousine. The total damages hoped to be recovered exceed the limits of the insurance and assets of the corporation operating the vehicle in question. That corporation, Lemon Limousine, Inc., has admitted liability and tendered policy limits. However, the firm has also sued the sole shareholder of that corporation, Madison Limousine Service, Inc., an S Corporation that Wanda Weber owns and that acts as the administrative entity servicing the operating company, as well as Ms. Weber. The applicant is instructed to assert all arguments that can reasonably be raised to support the motion for summary judgment against Weber and Madison Limousine.

The applicant has been provided with a memorandum assigning the task, which also contains instructions for drafting the brief, a copy of the complaint, the answer, and excerpts from Weber’s deposition. All of the relevant facts can be extracted from an analysis of those materials. An answer has been filed, so there is no issue as to the adequacy of the pleading of the complaint.

Format 2 Points

Paying attention to instructions, whether those of the firm or of court rules, is an important attribute of a lawyer. The instructions here require that the applicant’s brief consist of a statement of only relevant facts; a statement of the issues in whole sentence question form, followed by a “yes” answer; an argument; and a non-argumentative conclusion. Because the purpose of the brief is advocacy to the court on behalf of a client, conclusions should be expressed positively, and words similar to “likely” or “possibly” should be avoided, notwithstanding that, if this were actually in court, the motion might not be successful. To avoid inadvertent disclosure of the applicant’s real name, the applicant is instructed either not to sign the draft, or if signed, to use the assigning partner’s name.

Statement of Facts 6 Points

The relevant facts are:

- Wanda Weber owns Madison which owns Lemon;
- Lemon was negligent in connection with the installation of the tie rod by its employee;
- The person who installed the tie-rod was not qualified to install it, and improperly installed the tie rod causing Victim’s injuries;
- All of the entities share the same address, web site and telephone number;
- The vehicles of all 4 operating companies are painted alike, and bear Madison’s name and phone number;
- There is a common dispatcher, common mechanic, etc. for all of the companies
- Lemon Limousine is undercapitalized, owns no assets, is designed to operate at a loss and maintains only the minimum required insurance;
- The operating companies did not observe corporate formalities;
- Any extra funds are stripped out of Lemon by Madison as a “service fee”;
• If a company runs short of cash, it is provided by Weber or another of the companies;
• Weber ordered the unqualified mechanic to fix the tie rod, when she knew that the mechanic was not trained in installing tie rods and that he believed he was not qualified to install a tie rod;
• Madison is undercapitalized, is designed to operate at a loss, has made the lease payments on and serviced Weber’s personal SUV, has made mortgage payments on the building owned by Weber, and has intermingled funds with Weber.

Neither the color of the vehicles (except for the fact they were identical) nor where Weber grew up, went to school, etc. is relevant.

**Statement of Issues**  
2 Points

The two substantive issues are whether there are sufficient uncontested facts to establish that Madison and Lemon Limousine are alter egos of each other and Weber so as to make Weber and Madison liable for Lemon’s negligence, and whether Weber can also be held liable for negligence on a participation theory.

**Requirement for Summary Judgment**  
2 Points

Summary Judgment will be granted where there is no genuine issue of material fact as to a necessary element of the cause of action (no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Pa. R. Civ. P. 1035.2(1); *Rosenberry v. Evans*.

All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Rosenberry*

A party moving for summary judgment may rely on uncontradicted oral testimony from an adverse party to establish the absence of a genuine issue of material fact. *Rosenberry*

A motion for summary judgment may be supported by an admission. *Rule 1035.2 Note.*

**Argument re: Alter Ego**  
5 Points

The complaint raises a cause of action to pierce the corporate veil of Lemon to hold Madison liable for Lemon’s negligence and to pierce the corporate veil of Madison to hold Weber liable for Madison's negligence.

Lemon has admitted that it was negligent with respect to the installation of the tie rod that caused a crash that resulted in injuries to Victim.

Where there is a basis to disregard the corporate entity because it is a sham or alter ego of the owner, liability for the wrongdoing of the corporation can be extended to the owner of the company. *Kaites v. DER.*
Madison is the sole owner of Lemon and Weber is the sole owner of Madison.

In order to pierce the corporate veil to disregard the corporate form, a plaintiff must show some of the following factors: undercapitalization, failure to maintain corporate formalities, intermingling of corporate and personal affairs, or use of the corporate form to perpetrate a fraud. *Id.*

*Kaites v. DER* is distinguishable because the only fact to support veil-piercing in that case was the failure of the Board of Directors to meet. In the present case, there are numerous factors supporting the piercing of the corporate veil including evidence of undercapitalization coupled with stripping of funds; intermingling of funds; holding out to the public that Madison Limousine and the operating companies were in fact but one entity by virtue of sharing the same telephone number, web site, address, color scheme and dispatcher; failure to maintain corporate formalities; and commingling of assets.

Here, the evidence to support plaintiff’s prima facie case of piercing the corporate veil of both Lemon and Madison, is established by Weber’s uncontradicted admissions in her deposition. These admissions can support summary judgment because Weber is an adverse party to Victim who is the party moving for summary judgment. *Rosenberry*

The evidence supporting piercing Lemon’s corporate veil to get at Madison is that Lemon is undercapitalized, all of its net income is diverted upstream to Madison, corporate formalities such as maintenance of minutes are not observed, Madison and Lemon share a common officer and director, and it appears to the outside world that Madison is the operator of Lemon Limousine based on the operating scheme.

The evidence to support piercing Madison’s corporate veil to reach Weber’s assets include: undercapitalization, designed to operate at a loss, failure to maintain corporate formalities, Weber is the sole officer and director, intermingling of assets, and use of Madison’s assets for Weber’s personal purposes.

**Argument re: Participation**

The complaint raises a cause of action against Weber based on her participation in the negligence in installing the tie rod.

An officer of a corporation may be held individually liable for his or her own tortious actions on behalf of the corporation where the officer actively participates in the wrongful conduct that caused harm. *Kaites.*

To be held liable for negligence, the officer must actively participate in the acts on behalf of the corporation. Mere nonfeasance is insufficient. *Kaites.*

*Kaites* is distinguishable because, in this case, there is actual misfeasance by Weber, as established by her deposition testimony, in that the defective condition was brought to her attention, she test drove the car, and directed an apprentice mechanic, whom she knew was untrained and
unqualified to replace the tie rod, to replace it. Defendant Lemon Limousine admitted that the
conduct of the mechanic amounted to negligence, and Weber participated in the negligent act by
directing the mechanic to make the repairs when she knew he was not qualified to do so.