Table of Contents

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

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

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

Question No. 3: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines ..........15

Question No. 4: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines ..........22

Question No. 5: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines ..........29

Question No. 6: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines ..........37

Performance Test and Grading Guidelines ......................................................................................44
Index

Question No. 1
1. Decedents’ Estates: simultaneous death
2. Decedents’ Estates: payment of outstanding debt on bequeathed property
3. Federal Income Tax: tax benefit rule, uncashed check
4. Professional Responsibility: assisting in unauthorized practice of law, providing seminars

Question No. 2
1. Torts: negligence – landowner duty to licensee
2. Torts: social host liability
3. Evidence: marital privilege
4. Civil Procedure: discovery

Question No. 3
1. Criminal Law: kidnapping
2. Criminal Law: search incident to arrest
3. Evidence: authentication of telephone conversation

Question No. 4
1. Constitutional Law: standing
2. Constitutional Law/Civil Procedure: state action requirement, summary judgment
4. Employment Discrimination: disparate impact – employer burden
Question No. 5

1. Property: life estate, remainder, shifting executory interest
2. Property: equitable conversion
3. Property: easement, merger of estates
4. Contracts: promissory estoppel

Question No. 6

1. Corporations: duty to minority shareholder
2. Corporations: restriction on transfer of stock
Roger and Belinda were a long-time married couple in their 70’s living in E County, Pennsylvania. They had one child during their marriage, Jane; and Roger had a son, Dennis, from a previous marriage. In January 2012 they each had wills written by Harold, their attorney who was licensed to practice law in Pennsylvania. Roger’s will left everything to Belinda, so long as she survived him, and Belinda’s will reciprocated by leaving everything to Roger, so long as he survived her. Both wills included the direction that, “my Executor shall pay all of my legally-enforceable debts and taxes.”

Roger’s will provided that if Belinda did not survive him Dennis would receive a sports car Roger had purchased in 2011 in his separate name with a bank loan, and the remainder of his entire estate would go equally to Jane and Dennis. Belinda’s alternate distribution if Roger did not survive her was solely to Jane, as Belinda had no other children and chose not to include Dennis. Both wills designated Mavis, a friend of theirs who was also Harold’s girlfriend, as Alternate Executrix of their wills if the other spouse had predeceased or was unable to serve. The wills were properly signed and witnessed. Jane and Dennis were both adults.

One night in November 2012, while Roger and Belinda were sleeping their old furnace suddenly malfunctioned and released a lethal amount of carbon monoxide which killed both of them. There was no sign that either had awakened, and there was no other evidence to determine the order of their deaths. Other than the sports car in Roger’s sole name and personal items such as jewelry and clothing, they owned their home and all of their other assets jointly. The sports car had a remaining balance of approximately $10,000 on the loan Roger had taken to buy it, and there was a lien on the car title. An un-cashed Pennsylvania state income tax refund check dated September 15, 2012, in the amount of $1,000 was found in a desk drawer in their home. The
refund check resulted from an overestimation of the payments by Roger and Belinda that were made during the 2011 year. They had filed joint federal and state returns each year on a cash basis, and had taken a deduction for all of their state and local income tax payments on their 2011 federal tax return, resulting in a corresponding reduction of taxes due for that year.

1. Assume that all of the relevant provisions of Roger’s and Belinda’s wills are set forth in the above facts. Other than their personal items of clothing and jewelry, how should the remaining property of Roger and Belinda be distributed?

2. Mavis requests legal advice from Harold as to whether it is proper for her to pay the outstanding loan balance on the car from the proceeds of Roger’s estate. How should Harold advise her?

3. What is the federal income tax treatment, if any, on Roger and Belinda’s 2012 final federal income tax return of the refund check they received for the 2011 state income taxes?

Mavis, who had taken some paralegal classes, worked as an intake counselor in the office of Legal Aid of E County. The attorneys there had heavy caseloads and a limited scope of matters they were permitted to handle. Mavis decided to help the low-income clients by writing basic wills, powers of attorney and deeds for clients who indicated such a need and didn’t want to wait for one of the lawyers. She did this for very low fees, making appointments in her own home. Harold was aware that Mavis was drafting these documents for low-income clients, and when she asked him to instruct her generally on how to draft the documents, he assisted her because he wanted to help Mavis earn some extra money. Mavis always drafted the individual documents on her own with no supervision or review by Harold. She also convinced Harold to conduct periodic instructional seminars for individuals who wanted to learn how to represent themselves in eviction, summary offense, and other legal proceedings.

4. Did Harold violate the Pennsylvania Rules of Professional Conduct when (a) instructing Mavis about how to prepare the legal documents, or (b) instructing the individuals on how to represent themselves?
Question No. 1: Examiner’s Analysis

1. The simultaneous deaths of Roger and Belinda result in Dennis receiving the car from Roger’s will, and sharing the joint property with Jane by splitting the joint property in half and distributing one-half through each will for a total distribution of Jane receiving 3/4 and Dennis receiving 1/4 of the jointly held property.

The facts of the narrative make clear that Roger and Belinda either died simultaneously or that the order of death is not possible to determine. Virtually all of their assets were jointly owned as spouses, other than the car in Roger’s sole name and personal property consisting of clothing and jewelry. Their wills were primarily reciprocal, each naming the other as sole beneficiary so long as he or she survived; with a different alternate distribution in the event the spouse did not survive. The facts set forth the relevant provisions of their wills and do not indicate that any instruction was made in either will as to a presumption of survivorship of Roger or Belinda in the event they died simultaneously.

The Pennsylvania Probate, Estates and Fiduciaries (PEF) Code has adopted provisions similar to the Uniform Simultaneous Death Act (SDA), 20 Pa. C.S.A. 8501-8505, to determine the distribution of property passing by will, intestacy or joint ownership in such circumstances. Section 8501, “No sufficient evidence of survivorship” states:

Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this chapter.

Pennsylvania has not adopted the Uniform Act’s provisions setting forth a 120-hour survival requirement to overcome the determination of simultaneous death.

Section 8505, “Chapter does not apply if decedent provides otherwise” states that the distributions set forth in the Simultaneous Death statutes do not apply “in the case of wills, living trusts, deeds or contracts of insurance wherein provision has been made for distribution of property different from the provisions of this chapter.” The effect of these provisions is that both of the wills are to be probated and distribution is to be made through each of the wills as though each of the testators had survived, as there is no indication that either will stated a presumed order of death in the event of their simultaneous death.

Section 8503 of the SDA, “Joint tenants or tenants by the entirety” states that, “where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously, the property so held shall be distributed, one-half as if one had survived, and one-half as if the other had survived.”

Roger’s will makes the specific bequest of the sports car to his son Dennis, and bequeaths all the rest of his estate to Dennis and Jane equally. Belinda’s will has no specific bequests, and
gives everything to Jane and excludes Dennis, her stepson. Their estates consist of jointly held property except for the car, some clothing and jewelry.

The sports car was owned solely by Roger. Since there was no evidence of the order of their deaths, Roger’s property will be disposed of as if he had survived. Dennis will receive the car as it was individually owned by Roger and under Roger’s will the car was specifically given to Dennis. Splitting the joint property of Roger and Belinda in half and distributing each half as if the respective spouse had survived, as required by the SDA, will result in Belinda’s half being given to Jane who was the sole beneficiary of Belinda’s will. Roger’s half will be divided two ways, giving Jane and Dennis 1/4 of the total residue. Therefore, adding the fractional shares from each half of the residue gives Jane 3/4 and Dennis 1/4 of the jointly held residue.

2. **Harold should advise Mavis that the outstanding loan amount on the sports car should not be paid from Roger’s estate, as the general instruction to pay debts in his will does not apply to personal property subject to an encumbrance.**

Roger’s will made a specific bequest of the sports car, an item he owned in his sole name, to Dennis. It is subject to an outstanding security interest to secure a loan, $10,000 of which was still owed at the time of Roger’s death. Roger’s will included the instruction to the Executor to “pay all of my legally-enforceable debts and taxes,” and the executrix of Roger’s estate has requested advice on whether it is proper for her to pay the loan balance from the proceeds of Roger’s estate.

The PEF Code provides specifically for such events at Section 2514, Rules of Interpretation, subsection (12.1) which states:

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

Property subject to a security interest—A specific devise or bequest of real or personal property passes that property subject to any security interest therein existing at the date of the testator’s death, without any right of exoneration out of any other estate of the testator regardless whether the security interest was created by the testator or by a previous owner and any general directive in the will to pay debts.

This section is consistent with the Uniform Probate Code at Section 2-607, (1997 revision), which states: “A specific devise passes subject to any mortgage interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.” In order for Dennis to have been exonerated from paying the loan, Roger’s will would have to have stated specifically that his estate should pay the balance of the car loan.

The effect of this provision is to require that Dennis, the specific legatee of the car which was separately owned by Roger, must pay the outstanding loan, as there was no specific directive in Roger’s will to require or permit his executor to pay the balance.
3. The state tax refund check became income when received in 2012, and must be reported on Roger and Belinda’s 2012 final federal tax return because they had a tax benefit from the 2011 deduction of state income taxes.

Roger and Belinda had neglected to cash their 2011 Pennsylvania income tax refund check at the time they died in November 2012. Section 61 of the Internal Revenue Code (IRC), 26 U.S.C. §61, defines “gross income” as “all income from whatever source derived,” including certain specified types.

The refund check represents a return to Roger and Belinda of excess state taxes paid by them in 2011. This represents a portion of their income which was overpaid to the Pennsylvania Treasury. In reporting their 2011 federal income, Roger and Belinda took a deduction from their income for the state and local income taxes paid.

The return of $1,000 of the 2011 state income taxes paid by Roger and Belinda is a clear application of the “Tax Benefit Rule.” This judicially created rule provides generally that if an amount was deducted on a prior year’s tax return which resulted in a reduction of tax and a tax benefit to the taxpayer, a subsequent recovery by the taxpayer of such amount must be included in gross income in the year the recovery is received. Alacon v. C.I.R., T.C. Memo 2005-63. The tax benefit rule cancels out an earlier deduction when a later event such as a refund of state taxes is fundamentally inconsistent with the premise on which the deduction was initially based. See Hillsborough National Bank v. Commissioner of Internal Revenue, 460 U.S. 370 (1983). Section 111(a) of the IRC limits the tax benefit rule and provides:

Deductions—Gross income does not include income attributable to the recovery during the taxable year of any amount deducted in any prior taxable year to the extent such amount did not reduce the amount of tax imposed by this chapter.

Roger and Belinda overpaid their 2011 state income taxes, apparently by an innocent overpayment of estimated taxes, and thus a refund check for $1,000 was issued by the Department of Revenue. This refund is a “recovery” of a deductible payment, which had reduced the amount of tax imposed upon them in 2011. Therefore, they had received a “tax benefit,” and the refund is “gross income.”

The refund should be reported as income to them in 2012 despite the fact that they did not cash the check prior to their deaths. A cash-basis taxpayer is not permitted to avoid or defer the taxability of a payment tendered by check by delaying the realization of the check. A check is a negotiable instrument and is equivalent to cash when tendered. Checks received even at the end of the year but not cashed or deposited until the next year have generally resulted in decisions requiring the taxpayer to include the income in the year received. Lavery v. Commissioner, 158 F.2d 859 (7th Cir. 1946), Kahler v. Commissioner, 18 T.C. 31 (1952). The refund check received in 2012, should have been reported as income on their final 2012 joint personal income tax return, because even though the check was not cashed by them, it was in their possession prior to their death in November 2012.
4. Harold violated the Pennsylvania Rules of Professional Conduct (RPC) by assisting Mavis in the unauthorized practice of law as to her drafting legal documents for fees, but did not violate the RPC as to the instructional seminars for pro-se representation.

Mavis was drafting legal documents such as wills, deeds and powers of attorney for fees, which constitutes the practice of law. Rule of Professional Conduct (RPC) 5.5, Unauthorized Practice of Law prohibits a lawyer from aiding a non-lawyer in the unauthorized practice of law.

The facts state that Mavis had some paralegal training and a personal relationship with Harold and that Harold was instructing her on how to draft certain legal documents for which she receives fees. This activity by Mavis constitutes the practice of law. Mavis was not authorized to practice law, as she was a paralegal. The commentary to RPC 5.5 notes that:

This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for the work. See Rule 5.5, Comment 2.

Harold was not “supervising” Mavis or “delegating” work to her, as she did not work for him. He did not “supervise” her work or have any responsibility for the work done. Courts have defined the preparation of documents requiring familiarity with legal principles beyond the knowledge of ordinary laymen by which legal rights are secured as the practice of law. See Matter of Arthur, 15 B.R. 541 (E.D. Pa. 1981); Shortz v Farrell, 327 Pa. 81, 193 A. 20 (1937). Harold was aware that Mavis was preparing legal documents for others and his assistance of Mavis’ unauthorized practice of law by instructing her about drafting the legal documents violates RPC 5.5(a).

The seminars Harold gave to laypersons are specifically referenced by the Comment to RPC 5.5 as permissible, as “providing professional advice and instruction to non-lawyers who wish to proceed pro se.” The facts state that the individuals wanted to learn how to represent themselves in minor judicial proceedings. Harold did not violate the RPC in giving them instruction in doing so.
Question No. 1: Grading Guidelines

1. Simultaneous death; effect on property passing by will and joint property

Comments: Candidates should discuss the application of the Simultaneous Death statutes to the joint and separate property of the married decedents.

6 points

2. Specific bequest subject to outstanding lien

Comments: Candidates should recognize that the outstanding loan on the car specifically left to Dennis by will was not made an estate expense by the will language and that the estate is not responsible for payment of the outstanding loan.

4 points

3. Check taxable when received; Tax benefit rule

Comments: Candidates should recognize the inclusion of a state tax refund check within the meaning of “income,” where a tax benefit was realized by the prior deduction of the tax payments, and the requirement for tax reporting of a check received but not cashed.

5 points

4. Professional Conduct, Unauthorized Practice of Law, Instruction of non-lawyers

Comments: Candidates should note that assisting a non-lawyer to create legal documents for fees violates the RPC, but that instructing individuals in self-representation does not.

5 points
Question No. 2

Ted is the owner of an empty lot located in the downtown business area of A City, Pennsylvania. In the past it had always been Ted’s practice to permit local residents to use the lot as a meeting place for community affairs and recreational activities. During one such instance in December of 2011, Ted permitted a local service club to erect a Christmas tree on the lot. The service club installed the Christmas tree by securing it with stakes in the ground and tying the trunk to the stakes. After the Christmas season when the club members removed the tree, they found that they were unable to remove the stakes due to them being frozen into the ground. In an attempt to dispose of the stakes the club members drove them into the ground and covered them with dirt. Ted mowed the grass in the lot regularly, and he maintained that he did not know of the existence of the stakes and never saw the stakes while mowing the grass.

In the spring of 2013, a group of law students, who were all over 21 years of age, got together for an impromptu football game at Ted’s lot. For many years law students and others in the community had often used Ted’s lot to play sports, including football. While running to catch a pass one of the law students, Mike, tripped over one of the stakes which had emerged from its position in the ground and sustained serious permanent injuries.

After the game, Phil and some of the other students went to the hospital to visit Mike and then afterwards went to Al’s house to eat and watch television. During the evening, Al provided free beer for everyone who came to his home, and Phil consumed a substantial quantity of beer to a degree that rendered him visibly intoxicated. While still intoxicated, Phil left Al’s residence, and when he was driving his automobile home he ran a red light and collided with Ann’s car. Blood alcohol tests taken shortly after the accident indicated Phil’s blood alcohol content was three times the legal limit. Due to the collision with Phil’s car, Ann’s vehicle was damaged and
she suffered bodily injuries. Ann filed a lawsuit against Phil, and during the discovery period her attorney sent a Notice of Deposition to Phil which scheduled depositions for all of the students other than Phil who were present at Al’s home after the football game. Ann’s attorney sent a copy of the Notice of Deposition to each of the students to be deposed and also sent each student a set of interrogatories related to what occurred at Al’s house.

Mike never fully recovered from the injuries that he sustained due to tripping on the stake on Ted’s property and due to his injuries was forced to drop out of law school before completing his first year. Mike retained Attorney Wiley to file a negligence lawsuit for damages against Ted.

All actions occurred in A City, Pennsylvania, and all litigation was filed in the Court of Common Pleas for A City, Pennsylvania.

1. Under the facts as set forth above, will Mike be successful in his lawsuit against Ted?

2. Assume for purposes of this question only that Mary, who is Ted’s ex-wife, contacted Attorney Wiley, and because of her hatred for Ted as a result of a bitter divorce, she advised Attorney Wiley that while she was married to Ted, he privately told her about the stakes protruding from the ground and stated he couldn’t care less if someone got hurt by the stakes. Mary also said, before the divorce was filed against Ted she saw him cover up the stakes with dirt to conceal them. At trial, Attorney Wiley attempts to have Mary testify to this information, and Ted’s attorney objects to Mary’s proposed testimony on the basis of the marital privilege. How will the Court rule on the objection?

3. Will Ann be successful if she filed a negligence lawsuit against Al for serving alcohol to Phil to the point of intoxication and permitting him to drive while intoxicated?

4. The students who were present at Al’s home do not want to provide information that might hurt their friend Phil, and they sought legal advice on whether based on the actions taken by Ann’s attorney as set forth in the facts they must attend the depositions that have been scheduled and whether they must respond to the interrogatories. What advice should be given to the students?
Question No. 2: Examiner’s Analysis

1. Mike, who is a licensee, will probably not be successful in his negligence lawsuit against Ted.

A cause of action for negligence has four basic elements:

(1) a duty on defendant to conform to a certain standard of conduct toward a plaintiff;
(2) defendant’s breach of that duty;
(3) causal connection between defendant’s conduct and plaintiff’s injury; and
(4) loss or damage suffered by plaintiff.


Mike will allege in his lawsuit that as a licensee who was legally on Ted’s property, Ted had a duty of care to him to warn of the dangerous condition of the stakes which was breached, and that the breach of the duty of care caused substantial and permanent damages to him.

The courts have held that, “it has long been the law of this Commonwealth that the duty of a possessor of land towards a third person entering the land has been measured by the status of the entrant at the time of the accident.” Palange v. City of Philadelphia, Law Department, et al., 433 Pa. Super. 373, 640 A.2d 1305 (1994), appeal denied, 542 Pa. 649, 666 A.2d 1057 (1995).

It would appear that Mike is a licensee since his entry onto Ted’s property and his right to remain on the land is only by virtue of Ted’s continuing consent. In this situation Ted did not erect signs inviting or encouraging the general public to use his lot. However, Ted was fully cognizant of the public usage of his lot and on occasion not only permitted civic groups to use his lot but knew that citizens from time to time used his lot for sporting events. In Pennsylvania, a licensee has been defined as:

a person who is privileged to enter or remain on land only by virtue of the possessor’s consent. Restatement (2nd) of Torts §330 (1965). Palange, 640 A.2d at 1308.

A licensee is owed a duty by the landowner of reasonable care to warn of dangerous conditions which are known or of which the landowner had reason to know. Wiegand v. Mars National Bank, 308 Pa. Super. 218, 454 A.2d 99 (1982). Thus, Ted only had a duty to warn those using his property, such as Mike during his football game, that there were stakes in the ground from the Christmas tree that may pose a threat of harm if Ted had knowledge or should have known that the stakes were above ground level.

The fact that Ted mowed the grass regularly, which would have included the past summer when the stakes were in the ground and was not aware of any problem with the stakes coming out of the ground would show that there is no breach of duty, and Mike would have a
difficult time establishing his case. In our situation there is no evidence that the existence of the stake was known to Ted or was visible. To the contrary, Ted maintained that he did not know of the existence of the stakes and Ted’s cutting the grass in the area without seeing the stakes would be some evidence that the stakes were not visible. Mike never stated he saw the stake nor did he state that he did not see it. Under these facts it would be difficult for Mike to establish liability on the part of Ted. See Wiegand at 102.

2. The objection made by Ted’s attorney to Mary’s proposed testimony will be sustained in part and denied in part. The marital communication between the parties is inadmissible, however, Mary’s observation of Ted covering the stakes with dirt will be admissible since the parties are now divorced.

There are two separate factual matters that are potentially admissible into evidence. First, Mary will testify that during the parties’ marriage Ted told her that he was aware of the stakes protruding from the ground, and that he did not care if anyone was injured as a result of the stakes. Secondly, Mary will testify that during the parties’ marriage she observed Ted covering the stakes by putting dirt over them.

There are two separate marital privileges applicable to civil proceedings in Pennsylvania. First, Pennsylvania recognizes a privilege against the disclosure of confidential communications between spouses in civil matters. 42 Pa.C.S.A. 5923. Neither spouse is competent nor is permitted to testify to confidential communications made by one to the other unless the privilege is waived at trial. Id. The fact that the parties are divorced is immaterial since the statement was made during the parties’ marriage. See Brock v. Brock, 116 Pa. 109, 9 A. 486 (1887). Therefore, Ted’s attorney would be successful in objecting to Mary’s testimony concerning what Ted told her about the stakes.

The purpose of this privilege is to protect intimate communications between spouses by assuring that the statements would not be forcibly disclosed in court. The statement by Ted was made privately to Mary and does not fall within any recognizable exception. The law requires that there be an actual communication, Commonwealth v. Chiappini, 566 Pa. 507, 782 A.2d 490, (2001); that there be a valid marriage at the time of the communication, Commonwealth v. Borris, 247 Pa. Super. 260, 372 A.2d 451 (1977); that the communication be made in confidence in the marital relationship, Commonwealth v. Dubin, 399 Pa. Super. 100, 581 A.2d 944 (1990); and the privilege is not waived. All four requirements to assert this privilege exist. There is an oral communication in this matter that falls within the privilege, and Mary would not be able to testify at a civil trial as to the contents of the communication.

However, Mary could be a witness in this civil matter and testify against her ex-husband as to her observations. While in certain limited circumstances a communication need not involve words, it must involve more than observation by one person of the conduct of another; there must be an attribution of a message to the conduct by the actor. Chiappini, 782 A.2d at 496. The observation made by Mary was not a communication of a message by Ted as there is nothing in the facts to indicate that Ted was attempting to convey a message to her by his actions; and therefore Mary’s observation is not protected by 42 Pa. C.S.A. 5923. Nor is Mary’s testimony about her observation precluded by the second marital privilege set forth at 42 Pa.
C.S.A. 5924, which precludes a husband or wife from testifying against each other in a civil matter, except for certain enumerated exceptions none of which are applicable here. Since Mary and Ted are no longer husband and wife because of the divorce, she would be free to testify. Boris, 372 A.2d at 454. The lack of competency to testify issue presented by 42 Pa. C.S.A. 5924 no longer exists due to the divorce, and Mary would be free to testify as to what she saw Ted do.

3. **Ann will not prevail if she filed a negligence lawsuit against Al for serving alcohol to Phil and allowing Phil to drive while he was intoxicated.**

   Phil was a social guest at Al’s home where beer was served to Phil. No charge was made for the beer. It appears that Phil consumed a substantial amount of beer and became visibly intoxicated. Phil then left Al’s home and drove his vehicle. Unfortunately, Phil drove his vehicle through a red traffic signal and caused his vehicle to collide with Ann’s vehicle. Ann’s vehicle sustained damage and Ann received bodily injuries. The issue is whether Ann would be successful if she filed a negligence lawsuit against Al for serving beer to Phil to a degree where Phil was legally intoxicated and then permitted him to drive. The facts indicate that Phil’s blood alcohol level was three times the legal limit. Ann would be unsuccessful in her civil claim for damages against Al under Pennsylvania law. Even though Al provided beer to his guests, he did not charge them for the beer, nor is there any evidence that he was licensed to sell alcoholic beverages. The facts are unclear whether Al permitted Phil to drive home; however that would be irrelevant. Al would be considered to be a social host and under Pennsylvania law would have no liability for any damages caused by those adults consuming beverages containing alcohol at his home. For the purpose of determining potential social host liability, adults are those individuals who have attained the age of twenty one, which is the required age for one to legally consume beverages containing alcohol in Pennsylvania.

   Pennsylvania law does not impose liability on a social host who serves beverages containing alcohol to an adult guest because it is the consumption of alcohol rather than the furnishing of the alcohol which is the proximate cause of any subsequent occurrence. Klein v. Raysinger, 504 Pa. 141, 470 A.2d 507 (1983). The fact that Al did not stop Phil from operating his vehicle after drinking a substantial amount of beer will not support a civil claim against him as a social host. Burkhart v. Brockway Glass Company, 352 Pa. Super. 204, 507 A.2d 844 (1986). Al had no liability in serving him beverages containing alcohol in a social setting, nor is there any liability for failing to stop Phil from leaving Al’s home and operating his motor vehicle.

4. **The students should be advised that they do not need to attend the depositions or respond to the interrogatories sent by Ann’s attorney.**

   In civil litigation, discovery is governed generally by the Pennsylvania Rules of Civil Procedure. Discovery is generally conducted between or among the parties without court intervention unless there are objections or issues relating to non-compliance. In this situation, students who attended Al’s party are seeking advice as to whether they must comply with the discovery by attending the depositions and responding to the interrogatories. The information sought by Ann’s attorney generally would be discoverable since it is relevant information or it
may lead to admissible information. Pa.R.C.P. No. 4003.1. The statements of those who attended the party would be relevant to how much Phil drank.

Pursuant to Pa. R.C.P. No. 4007.1, the deposition of any person may be taken upon oral examination. Any party upon proper notice will be compelled to appear at the deposition and give testimony under oath unless there is a valid objection filed with the court. *Id.* While a party is required to attend the deposition without being subpoenaed, the same is not true for a non-party. See Pa. R.C.P. No.’s 4007.1 and 234.1. In this situation the students are not required to appear at the scheduled depositions since they are non-parties to the action and there is no evidence that they were issued a subpoena to attend the depositions.

Written interrogatories are a set of questions directed to a party who is compelled to answer the questions in writing. Pa.R.C.P. No. 4005. This rule of court limits individuals who must answer interrogatories to parties to the litigation. Therefore the students, as non-parties to the litigation, are not required to respond to the interrogatories.
Question No. 2: Grading Guidelines

1. Premises liability

Comments: The candidate is expected to discuss the elements necessary to prove a negligence cause of action including the property owner’s duty to a licensee of reasonable care to warn of dangerous conditions. A proper conclusion that Ted has no liability should be reached.

6 points

2. Marital privilege

Comments: The candidate should discuss both confidential communications and observations made by and between spouses and further distinguish between communications and observations. The candidate should discuss the effect of a divorce on the admissibility of a former spouse’s testimony.

7 points

3. Social host liability

Comments: The candidate should discuss Pennsylvania law which holds that a social host is not liable for serving alcohol to an adult guest nor for the damages an intoxicated guest may cause to others.

3 points

4. Discovery

Comments: The candidate should discuss whether non-parties can be required to attend a deposition without being subpoenaed and whether non-parties can be compelled to answer interrogatories.

4 points
Jim and Emily married in June of 2009 in C County, Pennsylvania. In July 2012, Jim began an affair with Tanya which quickly turned into a volatile relationship. On August 1, 2012, after engaging in a lengthy verbal argument with Tanya at her home, Jim became enraged and told her that he was going to teach her a lesson. Jim gagged and bound Tanya and took her out to his car and placed her in the back seat. Jim drove Tanya approximately 30 miles to a farmhouse owned and occupied by Jim’s friend, Larry. Jim carried Tanya into Larry’s home and locked her in one of the downstairs bedrooms. Every couple of hours Jim would enter the room and make threats towards Tanya with his .357 handgun with the intent to terrorize her.

Two days later, Jim called Wilma, Tanya’s friend, from his cell phone. Jim told her that if she wanted to see her friend again, she should bring $25,000 cash to his location within three hours. Wilma immediately recognized Jim’s voice as she had been in his company on many occasions where she heard him speak and had spoken with Jim on the phone a number of times in the past. When she hung up the phone, Wilma immediately contacted the police. The police asked Wilma to call Jim back and tell him she would have the money there on time. When Wilma called Jim back he answered the cell phone number which she had used to call Jim on prior occasions, and Jim directed her where to bring the money. The number that Wilma called was the number assigned to Jim by his cell phone company.

Upon receiving the call from Wilma, the police immediately mobilized and proceeded to the farmhouse. Upon arrival, Larry consented to the officers entering into the home and showed them where Tanya was being held captive. An officer entered the room that Tanya was in, removed the cloth from her mouth and asked her what happened. Tanya told the officer that she was taken from her home and that Jim had been threatening her with a handgun.
Larry then proceeded to tell the police that Jim was in the upstairs bedroom and he directed the police to the room. As the police entered the room, Jim attempted to reach for a jacket immediately next to where he was lying on the bed. Before he could reach the jacket, he was grabbed by one of the officers who began to place him in handcuffs. At the same time, another officer checked the jacket and found a .357 handgun. The police did not have a search warrant to seize the weapon. Jim was informed he was being placed under arrest, and charges were filed in the Common Pleas Court of C County, Pennsylvania.

In January 2011, Jim received as a gift from his uncle an antique table valued at $500. In February 2012, Jim received a bequest from his aunt of $10,000, and two days later he went out and purchased a new ATV for $10,000 from the monies he received from the bequest. Jim titled the ATV in his name. Shortly after Jim’s arrest involving the incident with Tanya, Emily filed for divorce, and as part of her claim for equitable distribution she asked that the antique table and ATV be divided in the equitable distribution scheme. Neither piece of property has appreciated in value since Jim received them.

1. What arguments should be made by the prosecution under the facts to support a charge of kidnapping against Jim, and with what likelihood of success?

2. Assume that Jim’s arrest was legal and his counsel files a Motion to Suppress the gun seized by the police on the basis that the police lacked a valid search warrant. What argument should the prosecutor make in opposition to the motion, and how should the court rule on the Motion to Suppress?

3. If Wilma is called at trial by the prosecution to testify as to her two telephone conversations with Jim, assuming that the content of the conversations are otherwise admissible, discuss all of the ways under the facts that the prosecution could use to lay a proper foundation to admit the substance of the two telephone calls into evidence?

4. Would either the antique table or the ATV be considered marital property for purposes of equitable distribution in the divorce action between Jim and Emily?
Question No. 3: Examiner’s Analysis

1. The prosecution should argue that Jim unlawfully removed Tanya a substantial distance from her home and unlawfully confined her for a substantial period of time with the intention to terrorize her and hold her for ransom, and the charge of kidnapping would therefore likely be supported by the facts.

   A person is guilty of kidnapping if he unlawfully removes another a substantial distance under the circumstances from the place where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with the intention to hold for ransom or to terrorize the victim. See 18 Pa. C.S.A. Section 2901 (a) (1) and (3). A removal or confinement is unlawful under Subsection (a) of the statute if it is accomplished by force, threat or deception. See 18 Pa. C.S.A. Section 2901 (b)(1). In Commonwealth v. Ruehling, 232 Pa. Super. 378, 334 A.2d 702 (1975), the Court held that thirty miles was a “substantial distance” for the purposes of the kidnapping statute. In Commonwealth v. Hughes, 264 Pa. Super. 118, 399 A.2d 694 (1979), the Court found that the removal of the victim for a distance of only two miles was substantial enough to meet the requirements of the kidnapping statute as the victim was moved to a completely different environment and away from the security of familiar surroundings. The Court further indicated that what is a substantial period in time for the purposes of the kidnapping statute can depend on the mental state of the victim, since the fright that can be engendered in thirty minutes can have the same debilitating effect on one person as thirty hours may have on another.

   In this case, the prosecution has two primary arguments to support the kidnapping charge. First, the prosecution should argue that Jim unlawfully removed Tanya from her home a substantial distance under the circumstances from the place where she was found. Namely, Jim gagged and bound Tanya at her home and transported her thirty miles to his friend’s farmhouse. As discussed in Commonwealth v. Ruehling and Commonwealth v. Hughes, supra, thirty miles will be deemed to be a sufficient distance to meet the substantial distance requirement of the kidnapping statute. Tanya was taken away from the security of her home to a place which she was not familiar with and where she had no security or protection. Second, the prosecution should argue that Jim unlawfully confined Tanya for a substantial period in a place of isolation. It is clear from the facts that Tanya was gagged and bound and confined in the locked bedroom for a period of approximately 48 hours. Tanya would be deemed to be in a place of isolation as she was far removed from her home and no one in her vicinity was willing or inclined to render her aid or assistance.

   At the time that Tanya was removed and confined, as discussed above, Jim had the intention to both terrorize Tanya and hold her for ransom. Namely, the facts make clear that Jim wanted to teach Tanya a lesson and he went into the bedroom every couple of hours and made repeated threats with his gun in order to terrorize her. Further, he attempted to secure money from Wilma for Tanya’s release which would also support an argument that he had the intention to hold Tanya for ransom.
In summary, the prosecution should be able to successfully argue that a charge of kidnapping is supported by the facts presented.

2. **The prosecutor should argue that this was a proper search incident to arrest under the exception to the warrant requirement, and the Court should deny the Motion to Suppress.**

“The Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution provide that individuals shall be free from unreasonable searches and seizures.” *Commonwealth v. Clark*, 558 Pa. 157, 735 A.2d 1248, 1251 (1999). In order for a search and seizure to be reasonable a search warrant is generally required. However, there are several well-recognized exceptions to the warrant requirement. *Commonwealth v. Lewis*, 394 Pa. Super. 403, 576 A.2d 63 (1990). Incident to a lawful arrest, police officers may conduct a warrantless search of the person arrested and the area within that person’s immediate control in order to remove any weapons that might be used to facilitate escape or resist arrest, and to prevent destruction of evidence. *Chimel v. California*, 395 U.S. 752 (1969); *Commonwealth v. Davis*, 466 Pa. 102, 351 A.2d 642 (1976). Whether an item has been properly seized pursuant to a search incident to arrest depends upon the facts of each case. The central question is whether the area searched is one within which the arrested person might gain possession of the weapon or destroy evidence. *Chimel*, 395 U.S. at 763. The scope of the search incident to arrest can extend to the person and the area around the person into which he might reach in order to grab a weapon or evidentiary items. *Chimel*, 395 U.S. at 763, and *Commonwealth v. Gelineau*, 696 A.2d 188 (Pa. Super. 1997), appeal denied, 550 Pa. 699, 705 A.2d 1305 (1988). A search incident to arrest must be substantially contemporaneous to the arrest and confined to the immediate vicinity of the arrest. *Commonwealth v. Wright*, 742 A.2d 661 (Pa. 1999). Although Pennsylvania Courts could provide greater protections to a defendant under the Pennsylvania Constitution than afforded under the Federal Constitution as discussed in *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991), under the facts presented the analysis would likely be the same under both Constitutions.

As applied here, the police entered the room Jim was in and saw him reach for the jacket next to his bed. The police immediately placed him under arrest and at the same time searched the jacket. The police clearly did not have a warrant to seize the weapon. Accordingly, the prosecutor will have to argue the search incident to arrest exception in order to justify the seizure of the weapon. The question establishes that the arrest was legal so the prosecution should argue that the police were entitled to search the jacket and seize the weapon as a search incident to an arrest as the jacket in which the gun was found was right next to the bed Jim was in and within the immediate control of Jim at the time of his arrest. The seizure of the gun occurred contemporaneous with his arrest while Jim was being placed in handcuffs but not yet under complete police control, and the seizure will likely be deemed to be a proper search incident to arrest.
3. In order to be able to admit the content of the two phone calls into evidence, the prosecution would have to authenticate the phone calls by showing that the calls were between Wilma and Jim and could do this by establishing that Wilma recognized Jim’s voice and that she called his phone number which she had used in the past and which was assigned to Jim by his phone company.

The requirement of authentication or identification is set forth at Pa. R.E. 901. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Pa. R.E. 901(a). Here, the prosecution must establish that the telephone calls were between Wilma and Jim in order to have the content of the telephone calls admitted into evidence.

Rule 901 goes on to set forth specific examples of authentication or identification which conform with the requirements of the general rule for identification. These include voice identification, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker; or telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person if circumstances, including self-identification, show that the person answering the phone is the one who was called at the phone number. See Pa. R.E. Section 901(b)(5) and (6)(a). Rule 901 provides that anyone who has heard the voice of the alleged speaker, at any time under circumstances connecting it with the alleged speaker, may offer opinion testimony sufficient to identify the voice. Such a witness need not offer conclusive proof on the issue of identity, but must merely offer testimony sufficient to establish a finding of identity. A proponent of voice identification testimony must establish by way of foundation that the witness has some familiarity with the alleged speaker’s voice. In the typical situation, a witness offering an opinion on voice identification will do so based upon familiarity with the voice in question acquired prior to the operative event or situation.

Rule 901(b)(6) also provides that telephone conversations can be authenticated through the introduction of evidence demonstrating the assignment of the number to the specific individual which can be done through cell phone records, where there is circumstantial evidence that identifies the person who answered the call as the one who was intended to be called. This requirement may be satisfied by testimony that the recipient identified him or herself or by other circumstances that are probative of the recipient’s identity.

Rule 901(b)(4) also provides for authentication via contents or substance of a conversation taken in conjunction with the surrounding circumstances.

As applied here, the first phone call can be authenticated by Wilma testifying that she recognized Jim’s voice because she was familiar with his voice having spoken with him on a number of occasions in the past, and this should provide a sufficient foundation for the authentication of that phone call.
With regard to the call that Wilma placed to Jim, this can be authenticated by her recognition of Jim’s voice as discussed above as well as by showing that she called the number she had for Jim, which she had called on a number of occasions in the past. The prosecution should introduce cell phone records from Jim’s cell phone carrier, through the appropriate business representative or via stipulation, to show that this number was assigned to Jim. In addition, when Jim answered the call and spoke with Wilma, she can testify that based on her familiarity with Jim’s voice she once again recognized Jim’s voice and that the subject and content discussed with the recipient of the second call arose out of and was directly related to the subject of her prior conversation with Jim. This should all provide a sufficient foundation for the authentication of the second call.

The telephone calls can also be authenticated on the basis of the contents and substance of the calls taken into conjunction with the facts of this case. In particular, Jim told Wilma that if she wanted to see her friend again that she should bring $25,000 in cash to his location. After conveying this information to the police, the police went to the stated location where they located both Jim and Tanya. These facts further support the conclusion that Jim was the person who made the calls to Wilma.

4. **Neither the antique table nor the ATV will be considered to be marital property in the divorce action between Jim and Emily.**

Marital property is defined in the Pennsylvania Divorce Code as all property acquired by either party during the marriage with certain specifically delineated exceptions. 23 Pa. C.S.A. Section 3501(a). Property acquired by gift, except between spouses, bequest, devise or descent or property acquired in exchange for such property is not included in the definition of marital property. 23 Pa. C.S.A. Section 3501(a)(3). To the extent that the property defined in Section 3501(a)(3) increased in value during the marriage, the increased portion would be considered to be marital property. *Id.*

As applied here, the first piece of property at issue is the antique table. This table was received by Jim as a gift from his uncle during the marriage. The facts make clear that the table has not increased in value during the marriage. Accordingly, no portion of the antique table should be deemed to be marital property, and it should be excluded from the equitable distribution scheme in the divorce action.

The second piece of property at issue is the ATV. The facts indicate that Jim received a bequest from his aunt in the amount of $10,000 in February 2012. Two days later Jim used the proceeds of this bequest to purchase a new ATV for $10,000 which he titled solely in his name. The bequest of $10,000 from his aunt is specifically excluded as marital property under 23 Pa. C.S.A. Section 3501(a)(3). When he used the $10,000 to purchase the ATV, which he titled solely in his name, the property continued to be excluded as marital property since he simply converted the proceeds from the bequest to ownership of the ATV. The facts indicate that the ATV has not appreciated in value during the marriage. Accordingly, no part of the ATV should be considered as marital property in the equitable distribution scheme.
Question No. 3: Grading Guidelines

1. Criminal Law

Comments: The prosecution should argue that Jim unlawfully removed Tanya a substantial distance from her home and unlawfully confined her for a substantial period of time with the intention to terrorize her and hold her for ransom, and the charge of kidnapping would likely be supported by the facts presented.

6 Points

2. Criminal Procedure

Comments: The prosecutor should argue that this was a proper search incident to arrest under the exception to the warrant requirement and the Court would likely deny the motion to suppress filed by the defense.

4 Points

3. Evidence

Comments: In order to be able to admit the content of the two phone calls into evidence, the prosecution would have to authenticate the phone calls by showing that the calls were between Wilma and Jim and could do this by establishing that Wilma recognized Jim’s voice and that she called his phone number which she had used in the past and which was assigned to Jim by his phone company.

5 Points

4. Family Law

Comments: The candidate is expected to recognize that gifts and bequests, as well as property acquired in exchange for such property, are not included in the definition of marital property and conclude that neither the antique table nor the ATV will be considered to be marital property in the divorce action between Jim and Emily.

5 Points
Question No. 4

Vendors Valhalla (VV) is a large indoor shopping mall in C City, S State. VV is owned and operated by Valhalla, Inc. (“Valhalla”), an S State business corporation. VV has 35 retail stores. It is open to the public seven days a week, from 10 a.m. to 8 p.m. but is closed on eight national holidays. In bad weather, residents often come to VV to walk for exercise.

One of the stores in VV is Pageant Princesses, a store that sells clothing, shoes, makeup, and wigs for small children who compete in beauty pageants. The store sells clothing for children as young as age three. Some of the clothes are very revealing and resemble costumes worn by Las Vegas showgirls and adult beauty pageant competitors. An organization, Parents Against Kids in Pageants (PAP), began a publicity campaign against the store and encouraged picketing. A large group, including some PAP members, went into VV and stood in front of Pageant Princesses holding signs and handing out PAP leaflets opposing children in beauty pageants. Some of the protesters tried to speak to shoppers. The shopping mall’s security officer tried to convince the protestors to leave. When they refused, stating that the mall was open to the public and they had rights, the security officer called the C City Police. When the police arrived, the protestors were again asked to leave, and when they refused, the protestors were arrested for trespass at the request of the manager of VV.

PAP filed suit against Valhalla in the appropriate federal district court in State S on behalf of its members, alleging that its members had been denied their rights under the First Amendment to the Federal Constitution as a result of state action when they were arrested by the police at the request of the manager of VV for protesting at the shopping mall, and seeking declaratory and injunctive relief. The Complaint stated the facts outlined above in support of its allegations. Discovery established the facts as set forth above and also established that there
were no signs at VV prohibiting protestors, the protestors were warned at least twice to stop protesting and were asked to leave, the store owner and VV manager considered the protest to be a disruption to the commercial operation, and every other person or group that had attempted to protest or picket at VV had been prohibited from doing so.

1. Does PAP have standing to raise the claims set forth in the Complaint?

2. Assume that discovery has just been closed, and Valhalla intends to file a Motion for Summary Judgment setting forth its defense to PAP’s Constitutional claim. Based on the facts established in discovery, what defense to the Constitutional claim should Valhalla raise in its Motion for Summary Judgment, and how would the court analyze and rule on the Motion?

A promotion exam was developed for the C City Police Department for the rank of corporal. Patrol officers were eligible to take the exam, and promotion was based on the exam results. One hundred (100) officers took the exam in 2011, including Philip, an African American officer. Fifty (50) of the candidates were African American, and fifty (50) were Caucasian/white. The top twenty one (21) officers were promoted, and only one was African American. The remaining twenty (20) officers who were promoted were Caucasian/white. Philip, who was not promoted, filed suit in federal district court in C City, after following appropriate administrative procedures, alleging violation of his rights under Title VII of the Civil Rights Act of 1964, as amended, based on the racially disparate impact of the promotion test.

3. Can Philip establish a *prima facie* case of discrimination under Title VII?

4. Assume for purposes of this question only that Philip succeeded in establishing a *prima facie* case. What must the police department show in order to successfully defend against the claim, and what must Philip show in response in order to prevail?
Question No. 4: Examiner’s Analysis

1. **PAP likely does have standing to bring a First Amendment claim on behalf of its members against Valhalla under Article III of the Constitution.**

   Article III of the Constitution limits exercise of federal judicial power to “cases and controversies”, an essential part of which is ‘standing’ to sue. *Northeastern Florida Chapter of Associated General Contractors of America v. Jacksonville*, 508 U.S. 656, 663 (1993). The essential elements of standing are: (1) plaintiff must have suffered an “injury in fact” which requires a concrete injury to a legally-protected right; (2) there must be a causal connection between the injury and the complained-of conduct; and (3) the injury must be redressable by a favorable decision. *Id.* at 663.

   Here, the claim was brought by PAP, which is an organization. It was not brought by an individual who was prohibited from protesting at the children’s pageant wear store. As an organization, PAP has standing to bring suit on behalf of its members only if: (1) its members would have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief sought would require participation of individual members of the organization in the litigation. *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 343 (1977).

   In this case, the PAP members who were protesters would likely have had standing to sue in their own right based on the police arresting them for protesting at the mall at the request of the manager of VV. Standing does not depend on the merits of the Plaintiff’s contention that particular conduct is illegal. *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Rather, “where the plaintiff presents a non-frivolous legal challenge alleging an injury to a protected right such as free speech, the federal courts may not dismiss for lack of standing on the theory that the underlying interest is not legally protected. *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006), *cert. denied*, 549 U.S. 1245 (2007). Second, the organization’s purpose seems to be germane to the purpose of the protest at issue. PAP encouraged the protest, and its leaflets were distributed by the protestors. Finally, participation by individual members injured by the action of VV would likely not be required to establish a claim under the First Amendment to the Federal Constitution. In *Warth v. Seldin*, 422 U.S. at 511, the Supreme Court stated: “so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court’s jurisdiction.”

   Here, individual participation in the lawsuit by each of the PAP protestors is not required to establish the claim because evidence of the protest and arrests is easily available from a number of sources, the alleged constitutional violation turns on a question of law that is not particular to each member, and injunctive relief, not damages, was sought. Associational standing to bring suit on behalf of its members depends in a large part on the nature of relief sought, and where declaratory, injunctive or some other form of prospective relief is sought, the remedy if granted will likely inure to the benefit of those members of the association actually injured. *Id.* at 515. Individual participation is not normally necessary when an association seeks
prospective or injunctive relief for its members, and associational standing has generally been understood to be precluded when an organization seeks damages on behalf of its members. United Food and Commercial Workers Union v. Brown Group, 517 U.S. 544 (1996).

Accordingly, PAP likely meets the requirements of organizational standing required under Article III to bring a First Amendment claim on behalf of its members.

2. In its Motion for Summary Judgment, Valhalla should raise the absence of state action as a defense to the federal constitutional claim made by PAP, and the court would likely grant the motion because there are no material facts at issue and Valhalla is entitled to judgment as a matter of law.

The First Amendment to the United States Constitution provides: “Congress shall make no law . . . abridging the freedom of speech…”

PAP has raised a claim of violation of the First Amendment free speech rights of some of its members who were stopped from protesting at a children’s pageant attire store at VV when they were arrested by the police at the request of the manager of VV. It is well-established that the First and Fourteenth Amendments to the Constitution safeguard free speech rights against governmental, not private, action. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). The Supreme Court has held that the First Amendment does not protect the right to free expression within a privately-owned shopping center. Hudgens v. N.L.R.B., 424 U.S. 507 (1976). The shopping mall at issue, VV, is privately-owned by Valhalla, and the protest took place on private property.

The fact that the police responded to the manager’s call and arrested the protestors, does not transform the manager, the mall, or its owner, Valhalla, from private actors into state actors with First Amendment obligations. If it were otherwise, demonstrators, by simply getting themselves arrested for a violation of private rights, could thereby acquire First Amendment rights they would not otherwise have had, and the state action requirement would be eviscerated. See Cape Cod Nursing Home Council, et. al., v. Rambling Home Rest Home, et. al., 667 F.2d 238, 243 (1st Cir. 1981). Moreover, the police action was taken to enforce the trespass laws and VV’s private property rights, and did not abridge any constitutional right to free speech.

Accordingly, there was no violation of the protestors’ First Amendment rights when they were arrested for protesting at the children’s pageant clothing store on VV’s premises.

Rule 56 of the Federal Rules of Civil Procedure provides, in pertinent part:

(a) A party may move for summary judgment, identifying each claim or defense…on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material facts and the movant is entitled to judgment as a matter of law. . . .

(b) Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.
(c) Procedures.

(1) A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

A “material fact” is one that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Here, based on the documents of record, there can be no dispute that the property on which the protest took place is privately owned. The presence of the police and the arrest of the protestors, does not change the essential character of the incident as one involving private property. *Cape Cod Nursing Home Council* 667 F.2d at 243; *Radich, et. al., v. Goode, et. al.*, 886 F.2d 1391, 1398-99 (3d Cir. 1989). Accordingly, in applying the governing law to this undisputed fact, it is clear that the Constitutional claim raised by PAP would fail because of a lack of state action, and the Motion for Summary Judgment will be granted.

3. Plaintiff will be able to establish a *prima facie* case of disparate impact race discrimination.

Title VII of the Civil Rights Act of 1964 prohibits employers from failing or refusing to hire or discharging any individual, or otherwise discriminating against an individual with respect to compensation, terms, conditions or privileges of employment because of such individual’s race, color, religion, sex, or national origin, or limiting, segregating, or classifying employees or applicants in any way that would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual’s race, color, religion, sex or national origin. 42 U.S.C.A. §2000e-2(a)(1), (2). Facialy neutral practices, such as use of employment or promotion exams that are “discriminatory in operation” are prohibited. *Griggs, et. al v Duke Power Company, et. al.*, 401 U.S. 424, 431 (1971).

Twenty years after the *Griggs* decision, the Civil Rights Act of 1991 codified the burden of proof in establishing disparate impact discrimination. A plaintiff may establish a *prima facie* violation by showing that the employer uses “a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.” 42 U.S.C.A. §2000e-2(k)(1)(A)(i).

To establish a *prima facie* case of disparate impact, a plaintiff must show that a facially neutral employment practice (the promotional test in question) had a significant discriminatory impact on a protected class. *Connecticut v. Teal*, 457 U.S. 440 (1982). The Equal Employment Opportunity Commission (EEOC) has established guidelines to demonstrate disparate impact,
notably the “four-fifths rule”, which provides that a “…selection rate for any race … which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded … as evidence of adverse impact.” 29 C.F.R. §1607.4(D). Smaller differences in selection rates may constitute adverse impact where the differences are significant in both statistical and practical terms. Id.

In this case, the disparity between the promotion rates of African Americans and Caucasians is overwhelming, given the 50-50 split of those who took the exam. Applying the “four-fifths rule”, we can see that only one African American test taker (out of fifty) was promoted based on the results of the promotion test, whereas twenty out of fifty of the “group with the highest rate” were promoted. Therefore, the promotion rate of the majority group was 40%, and the rate of promotion for African Americans was 2%. The promotion rate for African Americans was well below the guideline level of 32% (4/5 of the 40% promotion rate of the majority), clearly violating the four-fifths rule. The clear disparate impact of the promotional exam established by the statistical evidence will establish a prima facie case of employment discrimination.

Accordingly, Philip will be successful in establishing a prima facie case of disparate impact.

4. **Once the plaintiff has established a prima facie claim, the burden shifts to the defendant to justify the promotion exam, following which the plaintiff may show that alternative measures would have produced a less-discriminatory result.**

Once a complaining party demonstrates that an employment practice has a disparate impact, the burden is on the employer “to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.” 42 U.S.C. § 2000e-2(k)(1)(A)(i). See also, Griggs, 401 U.S. at 431. The employer is required to show that the practice at issue “has a manifest relationship to the employment in question.” Id. at 432.

An employer is permitted to give and to act upon the results of any “…professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race…” 42 U.S.C. §2000-e-2(h). Employers may show that the test was validated using professionally-accepted techniques and standards under one of three generally accepted methods: content validity, construct validity or criterion related validity. 29 C.F.R. 1607.5.

If the employer succeeds in establishing job relatedness, the plaintiff may prevail by showing that the employer was using the practice as a pretext for discrimination. Teal, 457 U.S. at 447. This may be done by identifying “an alternative employment practice” that serves the employer’s needs with less disparate impact, which the employer “refuses to adopt.” 42 U.S.C. §2000e-2(k)(1)(ii), (C). See also Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

Accordingly, the court will analyze whether defendant has demonstrated the validity of the promotion exam in question and whether plaintiff can show that alternatives exist that would produce less disparate impact.
Question 4: Grading Guidelines

1. **Constitutional law- Standing**

   Comments: Applicants should demonstrate an understanding of the rules of constitutional standing, and should apply the rules to the facts to reach a well-reasoned conclusion.

   6 points

2. **Constitutional Law- First Amendment/ Civil Procedure- Motion for Summary Judgment**

   Comments: Applicants should demonstrate an understanding of the First Amendment and the requirement for state action, and apply the requirements for Summary Judgment under the Federal Rules of Civil Procedure to reach a well reasoned conclusion.

   6 points

3. **Title VII**

   Comments: Applicants should demonstrate an understanding of the elements of a *prima facie* case of adverse impact discrimination under Title VII of the Civil Rights Act of 1964, and should apply the rules to the facts to reach a well-reasoned conclusion.

   4 points

4. **Title VII**

   Comments: Applicants should demonstrate an understanding of Title VII rules for disparate impact race discrimination once a plaintiff as established a *prima facie* case.

   4 points
Question No. 5

Warren, a billionaire investment banker, decided to retire and move from his palatial estate known as “the Abbey,” in Downton, Pennsylvania, to Rural, Pennsylvania, so that he could hunt and fish and attend sporting events at Hardly Normal College (“College”), his alma mater. On July 1, 2012, Warren executed a valid deed, “granting the Abbey to Amy; then, upon her death, to Bob and his heirs; but if Bob dies without children surviving him, then to Megan and her heirs.”

Prior to his retirement, Warren built luxury homes on two adjoining lots known as Blackacre and Whiteacre that he owned near Big Bear Lake in Rural County. Warren retained ownership of Whiteacre and conveyed Blackacre to Bob by a deed stating in part: “Reserving unto Warren and all future owners of Whiteacre the right to use an unimproved road on Blackacre for ingress and egress to Big Bear Lake.”

Amy moved to the Abbey and entered into a written sales agreement to sell her home known as Greenacre to Megan for $500,000, with $20,000 paid at signing and the remaining amount to be paid at the time of closing. The sales agreement, however, did not include a provision dealing with loss in the event of a fire or similar casualty. Between the time of the signing of the sales agreement and the closing, lightning struck the house on Greenacre and it was completely destroyed in the ensuing fire. Amy had insured the house on Greenacre for $500,000. Megan had no insurance on the property.

The College wanted to install a new state of the art electronic scoreboard at its football stadium. Warren, who previously had made many generous donations to the College’s athletic programs, called the College’s athletic director several times and said, “You can take it to the bank that I’ll give you the five million to build that Jumbotron!” Based upon Warren’s repeated
assurances of funding, the College spent $175,000 on engineering studies, architectural fees and other expenses in preparation for construction of the new scoreboard.

Warren wanted to install a runway on Whiteacre so that he could fly his private jet to the College’s football games. Believing that he needed additional land to build a runway to comply with federal aviation regulations, Warren had Bob transfer Blackacre to him with the understanding that Warren would convey the property back to Bob as soon as Warren obtained approval for the runway. When Warren determined that the acreage on Whiteacre satisfied applicable regulations, Warren conveyed Blackacre back to Bob by a valid deed that made no mention of ingress or egress to Big Bear Lake.

When the College abruptly fired its longstanding football coach, who was Warren’s close friend, after the coach failed to report that one of his former assistant coaches had been a participant in a point-shaving scheme, Warren withdrew his pledge to pay for the new scoreboard. Upset over Warren’s withdrawal of his pledge to pay for the new scoreboard, Bob erected a barrier across Blackacre’s unimproved road to prevent Warren from traveling from Whiteacre to get to Big Bear Lake.

1. What respective interests or estates in the Abbey were created by Warren’s deed?

2. What right, if any, does Amy have to (a) specific performance of the contract to purchase Greenacre, and (b) the proceeds of the insurance policy on the house?

3. (a) What cognizable property interest did Warren retain when he first conveyed Blackacre to Bob? (b) Following the conveyance of Blackacre back to Bob, does Warren have a recognizable property interest in Blackacre that would require Bob to remove the barrier preventing Warren from traveling on the unimproved road to get to Big Bear Lake?

4. What contract law theory can the College use to enforce Warren’s pledge to pay for the new scoreboard, and what amount, if any, would the College recover?
1. Warren’s deed created a life estate in Amy, a vested remainder in fee simple subject to complete divestment in Bob, and a shifting executory interest in fee simple in Megan.

A life estate arises when a conveyance or will limits the duration of the created estate in terms of the life or lives of one or more persons. S. KURTZ, MOYNIHAN’S INTRODUCTION TO THE LAW OF REAL PROPERTY, Chap. 2, § 10, at 64 (4th ed.). The use of particular phrases or words of art is not required to create a life estate. In Re Appeal of Board of Directors of Owen J. Roberts School District, 500 Pa. 465, 469, 457 A.2d 1264, 1266 (1983). Here, Warren’s deed stated that Amy’s estate in the Abbey would end “upon her death.” Based upon use of these words of limitation, Amy’s interest in the Abbey is clearly a life estate.

A remainder is a future interest in favor of someone other than a grantor which is capable of becoming possessory upon the natural expiration of a prior estate of lesser duration created at the same time and in the same instrument. R. BOYER, H. HOVENKAMP and S. KURTZ, THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY, § 7.5, at 165 (4th ed.). The second clause in the deed granted an estate in the Abbey to someone other than Warren, the grantor. The estate created in Bob followed the grant of an estate of lesser duration (Amy’s life estate) and was created at the same time as the estate of lesser duration and in the same deed. Bob’s estate in the Abbey thus is a remainder.

Reminders are classified as either vested or contingent. In Re Houston’s Estate, 414 Pa. 579, 201 A.2d 592 (1964). A remainder is vested if the person to whom the interest is given is born, ascertainable and does not have to satisfy an express condition precedent to obtain possession. R. BOYER, H. HOVENKAMP and S. KURTZ, supra, at 167. Bob, the person to whom the remainder interest is given in Warren’s deed, is an ascertainable, identifiable person. Although there is an express condition recited in the deed that qualifies Bob’s interest in the Abbey, Bob does not have to satisfy that condition prior to obtaining possession of the Abbey. Therefore, Bob’s remainder in the Abbey would be considered to be vested.

Like many other states, Pennsylvania has abolished the need to use the classic common law words of limitation “and his heirs” to create a fee simple interest. The use of the words “grant” or “convey” are sufficient to pass fee simple title. 21 P.S. § 2 (2001). Bob’s vested remainder, therefore, would be considered to be a fee simple under Pennsylvania law regardless of whether Warren used the words “and his heirs” in his deed.

A vested remainder can be subject to complete divestment if the future right to possession or actual possession of the estate can be cut off due to the happening or non-happening of a condition subsequent stated in the instrument of conveyance. R. BOYER, H. HOVENKAMP and S. KURTZ, supra, Chap. 5, § 5 (C), at 163. In this instance, Warren’s deed subjected Bob’s estate to the express condition subsequent that Bob have surviving children. If Bob died without children surviving him (either before or after Amy’s life estate ends), his interest in the Abbey would be completely cut off or “divested” and given to another transferee, Megan.
An executory interest or limitation is a future interest that becomes possessory only upon the occurrence or non-occurrence of an event that divests or defeats the interest of another. Gohn’s Estate, 324 Pa. 177, 188, 188 A. 144, 146 (1936). It is distinguished from a remainder because it will not come into effect, if at all, due to the natural expiration of the prior estate. R. BOYER, H. HOVENKAMP and S. KURTZ, supra, § 7.6, at 170. An executory interest is classified as “shifting” or “springing” depending whether it divests an interest from a transferee or the grantor. Id., Chap. 8, § 9, at 249-50. In this case, Megan’s interest in the Abbey is a shifting executory interest1 or limitation because it comes into being only if the condition subsequent of Bob not having any surviving children occurs. If Bob does not satisfy the condition, the interest in the Abbey will shift from the original transferee, Bob, to another transferee, Megan.

Warren’s deed thus created a life estate in Amy, a vested remainder in fee simple absolute in Bob subject to complete divestment by a shifting executory interest or limitation in fee simple absolute in Megan.

2. Amy is entitled to specific performance of the sales agreement because Megan became the equitable owner of Greenacre under the doctrine of equitable conversion and bears the risk of loss for its destruction prior to the closing. Amy, however, is not entitled to keep both the purchase price from Megan and the insurance proceeds.


Where an agreement of sale is silent as to which party assumes the risk of loss for injury to the property caused by fire or other casualty which occurs after the execution of the agreement of sale but before delivery of the deed, Pennsylvania law places the risk squarely upon the buyer as equitable owner. DiDonato, 433 Pa. at 224, 249 A.2d at 329. Moreover, equitable conversion requires the buyer to pay the full contract price to the seller whatever the condition of the property. Partrick & Wilkins Co. v. Reliance Insurance Co., 500 Pa. 399, 403, 456 A.2d 1348, 1351 (1983).

Where the seller has insured the property, there is an additional issue of who is entitled to recover the insurance proceeds. To prevent the harsh result of a seller recovering both the purchase price and the insurance proceeds for the damage sustained to the property during the period between execution of the contract and final settlement, Pennsylvania case law has long

---

held that the seller’s insurance covers both the legal and equitable interests in the property. *Dubin Paper Co. v. Insurance Co. of North America*, 361 Pa. 68, 63 A.2d 85 (1949). The seller’s equitable entitlement to the insurance proceeds thus is limited solely to the recovery of the unpaid balance of the purchase price for his ownership of the legal title in the property. *Partrick & Wilkins Co.*, 500 Pa. at 404, 456 A.2d at 1351. Any amount in excess of the unpaid balance is deemed to be held by the seller in constructive trust for the buyer and must be paid over to the buyer to prevent any unjust enrichment. *Dubin Paper Co.*, 361 Pa. at 85, 86, 63 A.2d at 94, 95. Based upon these principles, although Megan would be obligated to pay the remainder of the purchase price, Amy too would be obligated to act as a trustee of the insurance proceeds and pay over the proceeds to Megan, the equitable owner of the property.

In conclusion, even though the house on Greenacre was completely destroyed by fire, Amy is still legally entitled to specific performance of the agreement with Megan for the purchase of Greenacre because Megan, as the equitable buyer under the doctrine of equitable conversion, bears the risk of loss for injury to the property caused by fire or other casualty occurring after the execution of the agreement of sale but before delivery of the deed. Equitable principles, however, would prevent Amy from recovering both the remaining amount of the purchase price and the entire amount of the proceeds of her insurance policy on the property.

3(a). **When Warren transferred Blackacre to Bob, he reserved for himself and future owners of Whiteacre an easement appurtenant to travel across the unimproved road on Blackacre to the lake.**

“An easement is defined as an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose.” *Stanton v. Lackawanna Energy, Ltd.*, 584 Pa. 550, 565 n.7, 886 A.2d 667, 676 n. 7 (2005) (citation omitted). Easements generally are of two types: easements appurtenant and easements in gross.

An easement is appurtenant when it affords “a right or privilege in one man’s estate for the advantage or convenience of the owner of another estate.” *Perkinpine v. Hogan*, 47 Pa. Super. 22, 25 (1911). Creation of an easement appurtenant requires two parcels of property: a dominant tenement or estate, which is the land benefited by the easement, and a servient tenement or estate, which is the land burdened by the easement. R. BOYER, H. HOVENKAMP and S. KURTZ, THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY, § 10.1.1, at 309 (4th ed.).

Easements may be expressly created either by a direct grant or by reservation. *Brady v. Yodanza*, 493 Pa. 186, 425 A.2d 726 (1981). To reserve an easement to use land conveyed to another, the grantor must disclose his intent to do so by the plain meaning of the words used in the instrument. *Piper v. Mowris*, 466 Pa. 89, 351 A.2d 635 (1976).

In his conveyance of Blackacre to Bob, Warren expressly created an easement by reservation. The deed specifically stated that Warren reserved the right for him and all future owners of Whiteacre to use an unimproved road located on Blackacre to obtain ingress and egress to Big Bear Lake. The easement reserved by Warren would be an easement appurtenant
because one parcel, Whiteacre, would receive the benefit of the easement while the second parcel, Blackacre, would be burdened by the easement.

3(b). **Absent some necessity or a valid and legitimate purpose, Warren will not be able to compel Bob to remove the barrier preventing travel from Whiteacre across the unimproved road on Blackacre to the lake because the easement appurtenant that Warren had reserved in the deed to Bob was extinguished when Warren became the owner of both Blackacre and Whiteacre.**

The Pennsylvania Supreme Court has observed that “[n]o man…can have an easement in his own land.” *Schwoyer v. Smith*, 388 Pa. 637, 640, 131 A.2d 385, 387 (1957). If there is a union of title and possession of the dominant and servient lands in the same person, the easement will be deemed to have been swallowed up in a “merger” of the two estates and extinguished. Moreover, a separation of title and possession by a subsequent transfer of one of the parcels does not automatically revive the easement. *Zerbey v. Allan*, 215 Pa. 383, 387-88, 64 A. 587, 589 (1906). Pennsylvania law only permits a revival of an easement upon separation of title where there is a valid and legitimate purpose or a high, real and continuing necessity for the revival. *Schwoyer*, 388 Pa. at 640, 641, 131 A.2d at 387; *Witman v. Stichter*, 299 Pa. 484, 489, 149 A. 725, 727 (1930).

When Bob transferred Blackacre, Warren gained title and possession to both the dominant and servient estates. Thus, the easement appurtenant that Warren had reserved at the time of his original transfer of Blackacre to Bob was extinguished by a merger of the two estates. Warren’s conveyance of Blackacre back to Bob did not specifically reserve an easement to use the unimproved road on Blackacre to travel from Whiteacre to Big Bear Lake. Unless Warren can demonstrate some valid and legitimate purpose for reviving the easement or a necessity for the easement, he will not have the legal ability to compel Bob to remove the barrier preventing his access to the lake.

4. **The College should use the doctrine of promissory estoppel to recover the monies that it expended on engineering studies, architectural fees and other expenses made in reliance upon Warren’s promise to pay for the construction of the new scoreboard.**

Pennsylvania has long recognized promissory estoppel as a vehicle by which a promise may be enforced in order to remedy an injustice. *See, Fried v. Fisher*, 328 Pa. 497, 196 A. 39 (1938). The doctrine of promissory estoppel, which also is referred to as detrimental reliance, allows a party, under certain circumstances, to enforce a promise even though that promise is not supported by consideration. *Crouse v. Cyclops Industries*, 560 Pa. 394, 402, 745 A.2d 606, 610 (2000); RESTATEMENT (SECOND) OF CONTRACTS, § 90.

To establish a cause of action based upon promissory estoppel, a plaintiff must prove three elements: (1) the promisor made a promise that would reasonably be expected to induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise. *Holewinski v. Children’s Hospital of Pittsburgh*, 437 Pa. Super. 174,
determining whether a promisee has satisfied the third element of injustice, one factor that a
court must consider is “the reasonableness of the promisee’s reliance.” Thatcher’s Drug Store of

The facts state that Warren called the College’s athletic director several times and said,
“You can take it to the bank that I’ll give you the five million to build that Jumbotron!”
Warren’s statements would appear to constitute an express or “contract-like” promise necessary
Further, College took action in reliance on the promise by spending money on various studies in
preparation for construction of a new scoreboard. Finally, Warren’s prior history of making
“many generous donations to the College’s athletic programs” would be expected to reasonably
induce the College to expend monies in preparation for construction of the new scoreboard and
would make the College’s reliance on Warren’s promise to donate the money reasonable. Based
upon the stated facts, the College can assert that it has satisfied all three elements needed to
support a claim against Warren based upon the doctrine of promissory estoppel.

The Restatement (Second) of Contracts does not take a clear position as to the measure of
damages to be awarded for a promissory estoppel claim. Comment d to Section 90 of the
Restatement (Second) of Contracts states in part:

A promise binding under this section is a contract, and full-scale enforcement by normal
remedies is often appropriate. But the same factors which bear on whether any relief
should be granted also bear on the character and extent of the remedy. In particular,
relief may sometimes be limited to restitution or to damages or specific relief measured
by the extent of the promisee’s reliance rather than by the terms of the promise.

RESTATEMENT (SECOND) OF CONTRACTS §90, cmt. d.

Relying upon the language in Section 90(1) of the Restatement that the remedy under
promissory estoppel may be limited as justice requires, the Pennsylvania Supreme Court has
observed in dicta that the measure of damages under promissory estoppel should be the amount
of money that a plaintiff expended in reliance on the defendant’s promise. Lobolito, Inc. v.

In light of the ambiguous position of the Restatement and the sparse case law on the
issue, it is more likely that the College’s recovery on its claim of promissory estoppel based upon
the stated facts would be limited “as justice requires” to the $175,000 spent on engineering
studies, architectural fees and other expenses in preparation for construction of the new
scoreboard.
Question No. 5: Grading Guidelines

1. **Life Estate and Future Interests**

Comments: Candidates should analyze the language of the stated conveyance and apply the appropriate common law and statutory rules to determine the respective present and future interests.

6 Points

2. **Equitable Conversion and Risk of Loss**

Comments: Candidates should discuss the doctrine of equitable conversion and its application to which party bears the risk of loss for damage to a property during the period between the execution of a sales agreement and the delivery of the deed. Candidates should recognize the principles of unjust enrichment are applied to the doctrine of equitable conversion to prevent the harsh result of a seller recovering both the purchase price of the property and insurance proceeds.

3 Points

3. **Creation and Extinguishment of an Easement Appurtenant**

Comments: Candidates should express an understanding of the basic principles applicable to easements. Candidates should recognize that an easement can be created by reservation and discuss how the benefits and burdens associated with an easement appurtenant are affected by subsequent transfers of the dominant and servient parcels. Candidates should recognize that easements can be extinguished by unity of ownership of the dominant and the servient estate and are not necessarily revived when there is a separation of the ownership.

5 Points

4. **Promissory Estoppel**

Comments: Candidates should recognize the applicability of the doctrine of promissory estoppel. Candidates should discuss the elements of the doctrine and apply this doctrine to the stated facts in the course of reaching a well-reasoned conclusion as to the amount College would recover.

6 Points
Brad, Brian, and Lauren Smith (the “Smiths”) equally inherited their father’s stock in Wood, Inc. (“Wood”), a Pennsylvania corporation. Their father was Wood’s sole shareholder. Wood produces wood pellets for use in woodstoves. The Smiths promptly held shareholders’ and directors’ meetings where they elected themselves the sole directors of Wood, and named Brad president, Brian treasurer, and Lauren secretary. Brad noted that Wood’s articles of incorporation and bylaws did not restrict the transfer of shares. Brad drafted an agreement requiring any shareholder wishing to transfer his or her shares to first offer the shares to Wood under the terms of any third party offer. The Smiths and Wood all signed the agreement, but Wood did not place a legend noting the restriction on the share certificates issued to the Smiths.

Six months ago, Stoves, Inc. (“Stoves”), met with Brad and proposed a contract for Stoves to buy all wood pellets that Wood produced. Based upon Wood’s production levels at that time, Stoves had markets to sell all wood pellets being produced. Brad presented the proposal at a board meeting, and the Board agreed to the proposal. Wood and Stoves properly executed a contract for Stoves to buy all of the wood pellets that Wood produced.

Five months ago, Brad and Brian had a falling out with Lauren. Brad called special shareholders’ and board meetings where he and Brian removed Lauren as a director, fired her as secretary, awarded themselves each a $50,000 unearned bonus, and established a bonus program for officers to assure that, as a shareholder, Lauren would not receive another penny from Wood. They told Lauren not to return to Wood and refused her requests for information about Wood.

Shortly before the special board meeting, Lauren obtained a personal loan from Bank. As collateral for the loan Lauren pledged her shares in Wood. When applying for the loan, Lauren gave
Bank a copy of her Wood stock certificate along with Wood’s articles and bylaws. Lauren had forgotten about the stock transfer agreement and thus did not mention it to Bank.

Unbeknownst to Stoves, Wood has made a deal to purchase a competitor. The purchase, closing in a few days, will result in Wood’s production capacity being increased fivefold.

Brad determined that Wood needed a new server for its computers to handle the anticipated expansion. Brad met with Computer Techs (“Techs”), a seller of servers, seeking a server that will be compatible with Wood’s existing computers. Without saying anything else, Techs recommended the Server 2000. Brad signed a purchase agreement for the Server 2000, paid Techs in full, and Techs was to deliver the server in two weeks. The agreement properly disclaimed all implied warranties under the Uniform Commercial Code. Last week the server was delivered. When the server was delivered, but before it was installed, Brad wanted to confirm that the server would work with Wood’s existing computers. He called Techs, and Techs’s representative assured him that the Server 2000, “would absolutely and completely work with Wood’s computers.” After one week of use Brad determined that the Server 2000 is incompatible with Wood’s computers and is irreversibly corrupting files on Wood’s computers.

1. What claim(s) to protect her personal rights should Lauren assert against Brad and Brian as a result of their actions?

2. If Lauren defaults with Bank, and Bank exercises its right to receive her Wood shares, will Wood be required to deliver a new stock certificate to Bank given the transfer restriction agreement?

3. (a) Under the Uniform Commercial Code, is the contract between Wood and Stoves enforceable given the lack of a specific quantity term?

   (b) Assume for purposes of this question only that the contract is enforceable. Will Stoves be required to purchase all of the wood pellets produced when Wood’s production capacity increases?

4. Assuming Wood has accepted the server and that acceptance can no longer be revoked, what claim should be asserted by Wood against Techs under the Uniform Commercial Code as a result of the inadequacy of the server?
1. Lauren should file suit against her brothers asserting that they have breached fiduciary duties to her as a minority shareholder.

Majority shareholders in a corporation owe a fiduciary duty to the minority shareholder not to use their majority position within the corporation for their own selfish interests in a way that excludes the minority shareholder from his or her due share of the benefits derived from the operation of the corporation. “It is axiomatic that majority shareholders have a duty not to use their power in such a way to exclude minority shareholders from their proper share of benefits accruing from the enterprise. . . . Pennsylvania law holds that an attempt by a group of majority shareholders to ‘freeze out’ minority shareholders for the purpose of continuing the enterprise for the benefit of the majority shareholders constitutes a breach of the majority shareholders’ fiduciary duty to the minority shareholders.” Viener v. Jacobs, 834 A.2d 546, 556 (Pa. Super. 2003), appeal denied, 857 A.2d 680 (2003). Courts have recognized that improper tactics used by majority shareholders include generally oppressive conduct, withholding of dividends, restricting or precluding employment in the corporation, paying excessive salaries to majority stockholders, withholding information relating to corporate affairs and excluding minority shareholders from a meaningful role in the corporate decision-making process. See Orchard v. Covelli, 590 F.Supp. 1548 (W.D. Pa. 1984), appeal denied, 791 F.2d 916 (3d Cir. 1986).

In the instant matter, Brad and Brian have acted to “freeze out” Lauren. Lauren was removed from the board, was fired as secretary, was asked to stay out of the facility and has been refused information about Wood. Additionally, Brad and Brian have awarded substantial unearned bonuses to themselves and have adopted a bonus plan designed to keep Lauren from receiving any benefit as a shareholder of Wood while Brad and Brian will receive an increased share. Brad and Brian have engaged in conduct that is fundamentally unfair to Lauren and have “frozen her out” of any meaningful role in Wood’s operations.

Brad and Brian may argue that they are protected by the business judgment rule. This argument should be rejected because Brad and Brian have not acted in good faith and were interested in the subject matter of the business judgment.

Accordingly, Lauren should be successful in seeking compensatory and possibly punitive damages from Brad and Brian as a result of their breach of fiduciary duty. See generally, McLamb and Shiba, Pennsylvania Corporation Law and Practice §5.7 (1994).

2. Wood would be required to deliver a stock certificate to Bank if Lauren defaults and Bank demands a certificate, as the stock restriction would not be applicable to the pledge to the Bank because the restriction was not endorsed on the certificate and Bank was not aware of the restriction.

Restrictions on the transferability of shares in a corporation imposed by the corporation’s articles of incorporation or bylaws or by written agreement of the shareholders and the corporation are generally enforceable. 15 Pa. C.S.A. §1529(b); 15 Pa. C.S.A. §1504(c). Any restrictions that are reasonable, necessary and convenient to furthering the objectives of the corporation are valid. See, Sell and Clark, Pennsylvania Business Corporations §1529.3 (1997). An agreement entered into by and among shareholders and the corporation may be in the form of
a right of first refusal. *15 Pa. C.S.A. §1529(c)(1).* In the instant case, the agreement grants the corporation a right of first refusal before a shareholder may transfer his or her shares in the corporation. It, therefore, appears that the Smiths and Wood have entered into a valid stock transfer restriction agreement.

With respect to a third party transferee of shares from a shareholder who is a party to a stock restriction agreement, Pennsylvania law provides that such a restriction is enforceable if it is noted conspicuously on the face or back of the pledged security or if the transferee had actual knowledge of the restriction. “Unless noted conspicuously on the security . . . , a restriction, even though permitted by this section, is ineffective except against a person with actual knowledge of the restriction.” *15 Pa. C.S.A. §1529(f).*

Lauren gave Bank a copy of Wood’s articles of incorporation, bylaws and her stock certificate in Wood. The stock certificate made no reference to the stock transfer agreement and did not indicate that the stock was subject to a restriction on transferability. The articles and bylaws are also devoid of any restriction on transferability. Bank advanced funds to Lauren without knowing that its collateral, Lauren’s stock in Wood, was subject to a transfer restriction. If Lauren defaults on the loan and Bank exercises its rights under its stock pledge agreement Bank would be entitled to receive a certificate from Wood for the shares held by Lauren and could compel production of the certificate if Wood refuses Bank’s demand.

3. **The contract is enforceable as an output contract, but Stoves most likely will not be required to purchase all of the wood pellets at the increased production level.**

The Uniform Commercial Code (the “Code”) generally requires that to be enforceable contracts for the sale of goods over $500 be in writing and state a specific quantity. *13 Pa. C.S.A. §2201(a).* The Code does, however, recognize that the quantity term may be satisfied by a contract where the seller agrees to sell and the buyer agrees to buy all of the goods of a particular kind produced by the seller. The Code provides, “[a] term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.” *13 Pa. C.S.A. §2306(a).* The Code recognizes that an output contract is not too indefinite as to quantity since it is held to mean the actual good faith output of the seller. *13 Pa. C.S.A. §2306, comment 2. See also, 13 Pa. C.S.A. §2204(c).* Accordingly, the contract between Wood and Stoves is not unenforceable for lack of a specific quantity term. *See, White and Summers, Uniform Commercial Code §3-9 (4th Ed. 1988).*

The issue then becomes whether under this valid contract enforceable by Wood, Stoves must buy all wood pellets produced by Wood when Wood’s production capacity increased fivefold. As stated above, good faith is imposed on all output and requirements contracts under the Code. “Good faith” means that the seller has acted honestly and in conformity with commercially reasonable standards of fair dealing. *13 Pa. C.S.A.§1301(b)(20).* However, the new output tendered cannot be unreasonably disproportionate to previous outputs or to stated estimates. The Code anticipates reasonable elasticity in the output or requirements obligations of the parties under such an agreement. Here, we are dealing with a sudden expansion of the production facilities by which the output quantity will be measured. Wood will be increasing its
production capacity fivefold. The Code states, “a sudden expansion of the plant by which requirements are to be measured would not be included within the scope of the contract as made but normal expansion undertaken in good faith would be within the scope of this section.” 13 Pa. C.S.A. §2306, comment 2.

Stoves could argue that the output contract between it and Wood was entered into with Stoves knowing Wood’s then existing production capacity. It could further argue that a fivefold increase due not to normal expansion but instead to the acquisition of a competitor was outside the contemplation of Stoves when the contract was negotiated and approved and that this increase was unreasonably disproportionate to the normal prior output. Wood might counter that if Stoves wanted to set a limit on the output it was required to purchase it could have included an estimate in the contract or set a floor and ceiling on the output. It will be for a court to decide, but it is unlikely under the Code that Stoves would be required to purchase all of the wood pellets produced when Wood’s production capacity increases fivefold since such an increase was unreasonably disproportionate to the normal prior output and would not be considered to be a commercially reasonable expansion of the contract.

4. **Wood should assert that Techs breached its express warranty to Wood that the server would be compatible with Wood’s existing computers.**

The Code provides, “Express warranties by the seller are created as follows: (1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.” 13 Pa. C.S.A. §2313(a)(1). The Tech’s representative clearly stated that the server would work with Wood’s existing computers, which would constitute an affirmation of fact with respect to the server and not mere puffing.

Techs may argue that its statement that the server would absolutely work with Wood’s computers cannot support an express warranty claim because it was made well after the sale contract was consummated and could not be part of the basis of the bargain. The Code addresses this situation stating, “[t]he precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (Section 2-209).” 13 Pa. C.S.A. §2313, comment 7. Section 2209 of the Code indicates that an agreement modifying a contract under the Code does not need consideration to be binding.

Wood was clearly concerned that the Server 2000 would be compatible with its existing computers. It was so concerned that before Brad permitted it to be installed he made a call to Techs to confirm that the server would be compatible. Techs response was not equivocal. It was clear and definitive. Had Techs equivocated, Brad might have prohibited installation until he got the definitive answer he needed or he might have revoked the deal and sought his money back. Instead he relied on the representation that was made and allowed the server to be installed. The statement by the Tech’s representative was relevant in Brad’s decision to have the server installed and would be considered part of the basis of the bargain. The server has proven to be incapable of working with Wood’s computers causing significant problems for Wood.
Therefore, assuming that revocation of acceptance is not an option (as set forth in the question), Wood should pursue and should be successful in asserting a breach of express warranty claim. See generally, *White and Summers, Uniform Commercial Code §9-5 (4th Ed. 1988).*
Question No. 6: Grading Guidelines

1. Duty to Minority Shareholder

Comments: Applicants should recognize that majority shareholders owe minority shareholders a fiduciary duty to not freeze them out of the benefits that would normally accrue to them from the operations of the corporation and apply this principle to the facts.

5 points

2. Restrictions on Transferability of Stock

Comments: Applicants should recognize that stock restrictions are enforceable but that third party transferees without knowledge of the restriction will not be bound by the restriction.

5 points

3. Output contract

Comments: Applicants should recognize that a valid contract can exist for the sale of goods without a specific quantity term provided that it is an output contract and that the output requirement is limited by good faith.

5 points

4. Express Warranty Arising out of Words Uttered After Contract Formed

Comments: Applicants should recognize this as a warranty issue and should discuss the express warranty claim that can be raised. They should note the applicability of the express warranty despite the fact that the affirmation came after the contract was signed.

5 points
Supreme Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination
July 30 and 31, 2013

PERFORMANCE TEST
July 30, 2013

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

© 2013 Pennsylvania Board of Law Examiners
# TABLE OF CONTENTS

## File
- Memorandum to applicant assigning task.................................................................1
- Memorandum of client interview..................................................................................2
- Complaint, Airy v. Gabalot, Inc., et al. (less notice to defend and verification).............3
- Return of Service and Affidavit of Service...................................................................4
- Articles of Incorporation, Wire4Less, Inc. .................................................................5
- Business Bill of Sale ...................................................................................................6
- Business Lease ..........................................................................................................7

## Library

### Statutes:
- 42 Pa. C.S.A. § 5524. Two year limitation.................................................................8
- 42 Pa. C.S.A. § 5525. Four year limitation.................................................................8
- Florida Statutes, Title VI, Chapter 48 §48.031 Service of process generally..........8
- Florida Statutes, Title VI, Chapter 48 §48.081 Service on corporation. .................8

### Rules:
- Pa. R. Civ. P. No. 1007. Commencement of Action..................................................8
- Pa. R. Civ. P. No. 237.3. Relief from Judgment of Non Pros or by Default .............9
- Pa. R. Civ. P. No. 404. Service Outside the Commonwealth ....................................9

### Cases:
- Dumoff, et al. v. Spencer, et al. (Superior Court of Pennsylvania)............................10
- Penn-Delco School District v. Bell Atlantic-PA, Inc. (Superior Court of Pennsylvania)......12
FILE
To: Applicant  
From: Suzanne Suite  
Date: July 30, 2013  
Re: Alice Airy v. Gabalot, Inc., et al.  
Our File Number: 123456

Our clients are Gabalot, Inc., a Florida corporation with a registered office in Key West, Florida, and Sam Speak.

They have retained us to open a judgment in the amount of $150,000.00 that was entered against them in the Madison County, Pennsylvania, Court of Common Pleas at Docket No. 2012-1007 on June 5, 2012, by default. They first learned of the entry of this judgment yesterday, when Gabalot’s bank notified Speak that it had been served with interrogatories in aid of garnishment.

I examined the docket entries for the lawsuit that had been filed against them. The complaint had been filed on April 26, 2012, and the Return of Service had been filed on May 4, 2012. I spoke to Neil Bore, upon whom service apparently was made, and he stated that he did not deliver any of the documents he received to Speak or anyone else. The default judgment was entered on the docket on June 5, 2012, and a notice that a default judgment was entered was mailed by the Prothonotary to the address at which service of the Complaint was made.

The File which follows this memorandum contains my notes of my interview with Speak, the complaint in Airy v. Gabalot, Inc., et al., and other relevant materials.

Your assignment is to prepare a memorandum to me discussing whether, in your opinion, this judgment may be opened, and the legal and factual support for your position. You need not recite the facts, except as they may be pertinent to the legal issues you discuss. Your memorandum should be directed to me, identify you only as “Associate”, be dated, and have an appropriate subject line containing our file number. In the body of the memorandum in an introductory paragraph you should state the purpose of the memorandum and your conclusion, and then identify and discuss the relevant issues, fully explaining the reasoning which supports your conclusion. You should cite to pertinent legal authority, although formal citation (i.e., “Bluebook” form) 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.
Memorandum

To: Applicant
From: Suzanne Suite
Date: July 30, 2013
Re: Alice Airy v. Gabalot, Inc., et al.

Summary of Interview
Our File Number 123456

I met with Sam Speak earlier this morning. The following is a summary of the facts he related to me.

Gabalot, Inc., is a Florida corporation and is a franchisee of Budget Wireless, Inc. All of the shares of Gabalot are owned by Speak, who is its president and treasurer. Gabalot operates several stores in Florida under the Budget Wireless name at which it sells Budget Wireless access plans, wireless telephones and related accessories, all of which are obtained from Budget Wireless and bear Budget’s trademark and name.

About ten years ago, Gabalot attempted to expand its business into Pennsylvania and opened and operated a Budget Wireless franchise store at 100 Main Street in Madison. This store was closed on December 31, 2007, because it did not perform as well as expected.

Alice Airy was a sales clerk at the Main Street store, and Max Plank was the assistant manager. When the store was closed, Airy was laid off and not offered a position at any other Gabalot location, but Plank was transferred to another store in Florida and promoted.

Speak lives in the Flagler Arms Apartments in Key West, Florida. Gabalot owns several retail properties in Key West, and it operates its Budget Wireless franchises from some of these locations. Gabalot’s registered office and principal place of business is in the Conch Office Complex in Key West, Florida.

Speak stated that he and Gabalot first learned of the entry of a judgment the day before this interview when Gabalot’s bank advised him that it had been served with interrogatories in aid of garnishment.
COMPLAINT

Plaintiff comes, by her attorney, and complains against defendants upon causes of action of which the following is a statement:

1. Plaintiff, Alice Airy, is an individual who resides in the City of Madison, Madison County, Pennsylvania.

2. Defendant, Gabalot, Inc., is a Florida corporation with a place of business in the City of Key West, Monroe County, Florida.

3. Defendant, Sam Speak, is an individual and resident of the State of Florida, and owns all of the outstanding shares and is President of defendant Gabalot.

4. Gabalot is a franchisee of Budget Wireless, Inc., and operates stores under the Budget Wireless name.

5. Prior to December 31, 2007, plaintiff had been hired by all defendants as a sales clerk at defendants’ Budget Wireless store at 100 Main Street, Madison, Pennsylvania.

6. Although plaintiff did not have a written employment agreement, defendants told her that her position with Gabalot was secure as long as she performed her job satisfactorily.

7. On December 31, 2007, defendants closed the Budget Wireless store at 100 Main Street, Madison, laying off plaintiff who was not offered employment at any of Gabalot’s other stores, although another employee was transferred to Florida and promoted to manager.

8. By virtue of the foregoing acts, defendants breached their contract with plaintiff, and tortiously interfered with her advantageous contractual arrangement, causing plaintiff to suffer damages in the amount of $150,000.00.

WHEREFORE, plaintiff demands judgment in her favor and against defendants in the amount of $150,000.00

L. John Silver, Esquire
L. John Silver, attorney for plaintiff
Return of Service

L. John Silver, attorney for plaintiff, hereby certifies, on the basis of the attached affidavit of Michael Rock, certified process server, that the complaint was served upon all defendants on May 3, 2012, by service upon Neil Bore at his usual place of business at the Budget Wireless store located at the corner of Duvall and Greene Streets, Key West, Florida.

L. John Silver, Esquire
L. John Silver, attorney for plaintiff

Affidavit of Service

Michael Rock, being first duly sworn according to law, states the following:

1. I am a process server certified by the Sheriff of Monroe County, Florida.

2. On May 3, 2012, at 1:00 P.M., I served all defendants in the above captioned case by depositing two (2) true and correct copies of the complaint along with a notice to defend with Neil Bore at the Budget Wireless store located at the corner of Duvall and Greene Streets, Key West, Monroe County, Florida, such store being his usual place of business.

3. Under penalty of perjury, I declare that I have read the foregoing affidavit, and that the facts stated therein are true. I certify that I am of adult age, have no interest in this matter, and that I am a private process server in the judicial circuit in which this process was served.

Michael Rock
Michael Rock, CPS #1727
Articles of Incorporation for Florida Corporation

Article I
The name of the corporation is: Wire4Less, Inc.

Article II
The street address of the principal office of the corporation is:
Whitehead and Front Streets
Key West, FL 33095

The mailing address of the corporation is:
Whitehead and Front Streets
Key West, FL 33095

Article III
The purpose for which this corporation is organized is:
Any and all lawful business

Article IV
The name and address of the owners are:
Neil Bore
Whitehead and Front Streets
Key West, FL 33095

Article V
The effective date of this corporation shall be:
June 1, 2010
Signature of owner/authorized representative:
Neil Bore

Filed on June 1, 2010
Florida Department of State
Division of Corporations
Business Bill of Sale

This Bill of Sale was executed at Conch Office Complex, Key West, Florida, on June 2, 2010, by Gabalot, Inc. (“Seller”) and Wire4Less, Inc., (“Buyer”).

For and in consideration of $20,000, the receipt and sufficiency of which are hereby acknowledged, Seller hereby sells, conveys and assigns to Wire4Less, Inc., all the assets, rights and interest of Seller in and to that certain Budget Wireless franchise store located at Duvall and Greene Streets, Key West, Florida, including the rights and obligations of Seller under that certain Budget Wireless franchise agreement (which Buyer hereby assumes) dated January 1, 2006, all inventory thereat located, all books and records, customer lists, and accounts receivable.

IN WITNESS WHEREOF, Seller and Buyer have executed this instrument on the date set forth above.

Gabalot, Inc., a Florida Corporation                     Wire4Less, Inc., a Florida corporation
By: Sam Speak                                          By: Neil Bore
     President                                         President
BUSINESS LEASE

THIS LEASE is made this 2nd day of June, 2010, between Gabalot, Inc., a Florida corporation ("Lessor") and Wire4Less, Inc., a Florida corporation ("Lessee").

Lessor hereby leases and rents to Lessee, upon the terms and conditions set forth below, the premises known and identified as the retail store on the southwest corner of Duvall and Greene Streets, Key West, Florida, for the term of four (4) years beginning June 2, 2010, and ending June 1, 2014.

Monthly Rent: $1000.00 per month, payable without demand at the office of Lessor in the Conch Office Complex, Key West, Florida.

Use: Lessee will not use the demised premises for any purpose other than a retail store selling Budget Wireless plans, telephones and accessories without Lessor’s written consent.

Taxes, utilities and maintenance: Lessee shall pay all real estate and ad valorem taxes, all utility charges and all maintenance and repair expenses incurred during the term of this lease.

Insurance: Lessee shall keep the demised premises and its contents insured against loss due to fire, hurricane, wind, rain, flood and other casualty, and maintain public liability insurance with a combined single limit of $3,000,000.00; and all such policies must name Lessor as an additional insured.

Lease absolute: Lessee bears the risk of impossibility of performance, and loss due to fire, casualty or condemnation, the occurrence of which will not toll the accrual of rent.

IN WITNESS WHEREOF, Lessor and Lessee have executed this instrument on the date set forth above.

Gabalot, Inc., a Florida Corporation

By: Sam Speak
    President

Wire4Less, Inc., a Florida corporation

By: Neil Bore
    President
LIBRARY
Statutes:

42 Pa. C.S.A. § 5524. Two year limitation

The following actions and proceedings must be commenced within two years:

* * *

(7) Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud . . . .

42 Pa. C.S.A. § 5525. Four year limitation

(a) General rule. . . . The following actions and proceedings must be commenced within four years:

* * *

(3) An action upon an express contract not founded upon an instrument in writing.

* * *

Florida Statutes, Title VI, Chapter 48 §48.031 Service of process generally.

(1)(a) Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint . . . or by leaving the copies at his or her usual place of abode . . . .

Florida Statutes, Title VI, Chapter 48 §48.081 Service on corporation.

(1) Process against any corporation, domestic or foreign, may be served;

   a. On the president or vice president, or other head of the corporation;
   b. In the absence of any person described in paragraph (a), on the cashier, treasurer, secretary or general manager;

***

(2) If a foreign corporation has none of the foregoing officers or agents in this state, service may be made on any agent transacting business for it in the state.

Rules:


An action may be commenced by filing with the prothonotary

   (1) a praecipe for a writ of summons
   (2) a complaint.

(b) . . . every pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading but no pleading need be filed unless the preceding pleading contains a notice to defend or is endorsed with a notice to plead.

Pa. R. Civ. P. No. 237.3. Relief From Judgment of Non Pros or by Default

(a) A petition for relief from a judgment of non pros or of default . . . shall have attached thereto a verified copy of the complaint or answer which the petitioner seeks leave to file.

(b) If the petition is filed within ten days after the entry of the judgment on the docket, the court shall open the judgment if the proposed complaint or answer states a meritorious cause of action or defense.

* * *


(a) Original process may be served

(1) by handing a copy to the defendant; or

(2) by handing a copy

   (i) at the residence of the defendant to an adult member of the family with whom he resides; but if no adult member of the family is found, then to an adult person in charge of such residence; or

   (ii) at the residence of the defendant to the clerk or manager of the hotel, inn, apartment house, boarding house or other place of lodging at which he resides; or

   (iii) at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof.

Pa. R. Civ. P. No. 404. Service Outside the Commonwealth

Original process shall be served outside the Commonwealth within ninety days of the issuance of the writ or the filing of the complaint or the reissuance or the reinstatement thereof:

(1) by a competent adult in the manner provided by Rule 402(a);

(2) by mail . . . ;

(3) in the manner provided by the law of the jurisdiction in which the service is made for service in an action in any of its courts of general jurisdiction;

* * *
Superior Court of Pennsylvania
Leonard DUMOFF, et al.
v.
Kevin SPENCER, et al.

Opinion

This is an appeal from an August 17, 1999, order denying Harold Cooper's (“Appellant”) petition to open a default judgment. Appellant asserts that the lower court abused its discretion when it found that Appellant failed to file his petition to open promptly. We disagree and affirm the lower court's order.

The relevant factual and procedural history is as follows. This case arose as a result of a motor vehicle accident on February 22, 1996. (Footnote omitted.) Leonard Dumoff and Patricia Dumoff (“Appellee”) filed a complaint on January 28, 1998, and served it upon Appellant on May 1, 1998. On June 4, 1998, the lower court entered default judgment against Appellant only for failure to file his answer within the required time. Counsel for Appellant filed an appearance on July 20, 1998. On July 9, 1999, Appellant petitioned the lower court to open the default judgment. The lower court denied Appellant's petition on August 23, 1999. This appeal followed.

In general, a default judgment may be opened when the moving party establishes three requirements: (1) a prompt filing of a petition to open the default judgment; (2) a meritorious defense; and (3) a reasonable excuse or explanation for its failure to file a responsive pleading. (Citations omitted). The standard of review for challenges to a decision concerning the opening of a default judgment is well-settled. A petition to open a default judgment is an appeal to the equitable powers of the court. The decision to grant or deny a petition to open a default judgment is within the sound discretion of the trial court, and we will not overturn that decision ‘absent a manifest abuse of discretion or error of law.’ (citations omitted).

* * *

The lower court found that Appellant met the second requirement by pleading a meritorious defense and met the third requirement by having a reasonable excuse that he believed his insurance company would protect his interests. However, the lower court denied Appellant's petition to open judgment because it was filed untimely.
Appellant asserts that on numerous occasions, Appellee's counsel assured Appellant that he would stipulate to a petition to open the default judgment. While the record is void of evidence that Appellee's counsel made such assurances, even if we assume this to be true, the lower court did not err in finding that Appellant failed to file a prompt petition to open judgment.

The default judgment was entered in June of 1998, and the petition to open was filed in July of 1999. We recognize that if Appellant's delay in filing was the result of Appellee's alleged actions, equity would require the judgment to be opened. (Citation omitted). However, Appellee's alleged actions do not justify the entire thirteen-month delay. It is undisputed that on March 9, 1999, Mr. Jonathan Wheeler, Esquire, counsel to Appellant in an unrelated action in Bucks County, forwarded to Appellee a stipulation to open the default judgment. Appellee refused to sign the stipulation. Appellee's alleged actions may have justified Appellant's delay in filing until March but do not justify the delay from March to the filing in July.

In evaluating whether the petition to open judgment has been promptly filed, “[the] Court does not employ a bright line test .... [The Court focuses] on two factors: (1) the length of the delay between discovery of the entry of a default judgment, and (2) the reason for the delay.” (Citations omitted). Appellant did not file the petition until four months after learning that Appellee was not going to stipulate to the opening of the judgment. In the past, we have held that delays of as little as twenty-one days have been untimely. (Citation omitted) (twenty-one day delay is not prompt); (Citation omitted) (forty-one day delay is not prompt). In cases where we have held that the filing was prompt, the period of delay was generally less than one month. (Citation omitted) (fourteen-day delay is timely); (Citation omitted). Appellant proffers no reasons for the four-month delay in filing the petition.

We find that the lower court did not err in finding that it was unreasonable for Appellant to not file a petition to open judgment for nearly four months after learning of Appellee's denial to the stipulation to open judgment.

* * *

Order affirmed.
Superior Court of Pennsylvania

PENN–DELCO SCHOOL DISTRICT, Appellee,
v.
BELL ATLANTIC–PA, INC., Appellant.

Opinion

This is an appeal from the order entered in the Court of Common Pleas of Delaware County denying Appellant Bell Atlantic–Pennsylvania, Inc.’s (Bell Atlantic) petition to open the default judgment entered against it. On appeal, Bell Atlantic contends that the trial court abused its discretion in failing to open the default judgment since (1) the petition to open did not require a verification and (2) Bell Atlantic has a meritorious defense. We reverse and remand for proceedings consistent with this decision.

The relevant facts and procedural history are as follows: Bell Atlantic contracted with the Penn–Delco School District (the Penn–Delco School) to provide various telephone services. A dispute arose concerning the services and, on March 30, 1998, the Penn–Delco School filed a complaint against Bell Atlantic raising numerous allegations of fraudulent misrepresentation, negligent misrepresentation, breach of contract, and breach of implied warranty. The complaint was served on March 31, 1998, and, on April 21, 1998, as a result of Bell Atlantic's failure to respond to the complaint, the Penn–Delco School served Bell Atlantic with a Notice of Intent to File a Default Judgment. Bell Atlantic did not respond to the notice, and, therefore, on May 4, 1998, the Penn–Delco School filed a Praecipe for Entry of Judgment by Default, which was served on Bell Atlantic. On May 7, 1998, the trial court sent Bell Atlantic notice of the default judgment, and, on May 13, 1998, Bell Atlantic filed a petition to open the default judgment, which did not contain a verification. On June 5, 1998, in response to the Penn–Delco School's answer, Bell Atlantic filed a praecipe to affix a verification to its petition, which was signed by Bell Atlantic's attorney. On November 20, 1998, the trial court filed an order and opinion denying Bell Atlantic's petition to open the default judgment entered against it, and, on November 30, 1998, Bell Atlantic filed a motion for reconsideration, which was denied. This timely appeal followed.
“It is well settled that a petition to open a default judgment is an appeal to the equitable powers of the court, and absent an error of law or a clear, manifest abuse of discretion, it will not be disturbed on appeal.” (citation omitted). An abuse of discretion is not a mere error of judgment, but if in reaching a conclusion, the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence or the record, discretion is abused. (Citation omitted).

“In general, a default judgment may be opened when three elements are established: the moving party must (1) promptly file a petition to open the default judgment, (2) show a meritorious defense, and (3) provide a reasonable excuse or explanation for its failure to file a responsive pleading.” (citation omitted). However, on July 1, 1995, Pa.R.C.P. 237.3 went into effect. The Rule's purpose is to ease the burden of parties who move promptly for relief from judgment entered by default or non pros. Specifically, Rule 237.3 provides that:

(a) A petition for relief from a judgment of non pros or a default entered pursuant to rule 237.1 shall have attached a verified copy of the complaint or answer which the petitioner seeks leave to file.

(b) If the petition is filed within ten days after the entry of the judgment on the docket, the court shall open the judgment if the proposed complaint or answer states a meritorious cause of action or defense.

Here, the trial court concluded, and we agree, that Bell Atlantic filed its petition to open the default judgment within ten days of the judgment being entered, and, therefore, Rule 237.3 is applicable. However, we disagree with the trial court's conclusions that Bell Atlantic is not entitled to relief pursuant to Rule 237.3 since it failed to verify its petition to open the default judgment and a meritorious defense was not stated. . . .

With regard to the verification requirement, we hold that the trial court erred in concluding that Bell Atlantic was not entitled to relief under Rule 237.3 because Bell Atlantic failed to verify the petition to open.

* * *
Having made this determination, we must decide whether Bell Atlantic's answer contained a meritorious defense. See Pa.R.C.P. 237.3(b). As indicated earlier, where the petitioner files a petition to open the judgment within ten days, as occurred in this case, the petitioner need demonstrate only that the verified pleading attached to the petition states a meritorious defense. See Pa.R.C.P. 237.3, 1994 Explanatory Comment, Illustration 4. It is unnecessary for the petitioner to explain its reason for failing to file its answer earlier.

“The requirement of a meritorious defense is only that a defense must be pleaded that if proved at trial would justify relief.” (citation omitted). “The defendant does not have to prove every element of [its] defense, however, [it] must set forth the defense in precise, specific and clear terms.” (citation omitted).

In its petition to open, Bell Atlantic stated that “Defendant, Bell Atlantic–Pennsylvania, Inc. has a meritorious defense as evidenced by the attached Answer to Plaintiff's Complaint.” This statement, in and of itself, is insufficient to meet the requirement of pleading a meritorious defense. (Citation omitted). However, in its answer, Bell Atlantic provided the trial court with nineteen reasons why the Penn–Delco School is not entitled to relief. Included among the reasons are the arguments that the Penn–Delco School's causes of action are barred by the statute of limitations, as well as the doctrine of res judicata, and the Penn–Delco School failed to exhaust all available administrative remedies. If Bell Atlantic is able to prove any one of the defenses at trial, it would be entitled to relief. As such, we find that Bell Atlantic has met the meritorious defense requirement under Pa.R.C.P. 237.3 . . . .

For all of the foregoing reasons, we reverse the trial court's denial of Bell Atlantic's petition to open the default judgment entered against it and order the default judgment to be opened.
**Instructions**

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

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

Your response should be written in the answer 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.
The applicant, as an associate in the firm of Suite and Sauer is asked to prepare a memorandum discussing whether a default judgment that had been entered against a Florida corporation and a resident of Florida who is the owner and operator of the corporation, could be opened. The underlying dispute concerns the termination of an employee by a corporation when it closed a wireless telephone store in the City of Madison, Pennsylvania. Service of process was allegedly made at a wireless telephone store in Key West, Florida. Speak stated that the first notice he had of the judgment was when the corporation’s bank account was garnished pursuant to a default judgment.

The applicant has been provided with a memorandum of an interview with Speak, a memorandum assigning the task, a copy of the complaint, a copy of the Return of Service and Affidavit of Service, the Articles of Incorporation of a Florida corporation, a Business Bill of Sale, and a Business Lease. All of the essential relevant facts can be extracted from an analysis of these documents.

**Format** 1 Point

Paying attention to instructions, whether internal to the lawyer’s employer or imposed by court rule, is an important part of the practice of law. The instructions here require that the applicant’s product should be a memorandum, be addressed to the assigning partner, be dated, have a subject line, follow the stated format and be signed by applicant as “Associate”.

**Standards for opening a default judgment** 1 Point

Where, as here, the petition will be filed more than 10 days after the judgment was entered, there are three requirements that must be met in order for a default judgment to be opened:

1. prompt filing of the petition to open the default judgment, (2) a meritorious defense, and (3) a reasonable excuse or explanation for the failure to file a responsive pleading. *Dumoff v. Spencer; Penn-DelcoSchool District v. Bell Atlantic-PA, Inc.*, 63

**Timeliness of Filing the Petition** 3 Points

The promptness of filing the petition focuses on two factors: the length of delay between the discovery of the entry of the default judgment and the reason for the delay. *Dumoff v. Spencer*.

If the petition is filed within two weeks of defendants having learned of the entry of default judgment, it will generally be deemed timely. *Dumoff v. Spencer*.

Here, the delay between the discovery of the entry of the default judgment and the filing of the petition will be very short.
In this case, the reason for the delay is that the defendants did not receive notice of the entry of the judgment until the day before the assignment to the associate.

Upon discovery of the default judgment, a reasonable amount of time is required to determine and evaluate the facts and prepare the motion. If a petition to open the default judgment is filed quickly, within two weeks of defendants having learned of the judgment, it should be deemed timely.

**Meritorious defense**

A meritorious defense is one which if proved at trial would entitle the defendant to relief. *Penn-Delco*

It is a valid defense that the cause of action is barred by the statute of limitations. *Penn-Delco*

The complaint alleges two causes of action, one sounding in breach of contract, and one in tort.

The statute of limitations for an action based on tortious conduct is two years. Section 5524(7).

The statute of limitations for breach of an oral express contract is four years. Section 5525(a)(3).

The acts complained of in the complaint occurred more than four years prior to the filing of the lawsuit and are barred by the statute of limitations.

Therefore, defendants have a meritorious defense to the complaint. *Penn-Delco*

**Reasonableness of Explanation for Failure to File Responsive Pleading**

An answer to the complaint must be filed within 20 days after service of the complaint if the complaint contained a notice to defend. *Pa. R.C.P. No. 1026*

Defendants should argue that a responsive pleading was not timely filed because they were never served with a copy of the complaint.

*Pa. R. Civ. P. 404* allows service of original process outside of the Commonwealth by one of three ways:

1. by a competent adult making service as permitted by Rule 402(a)
2. by mail, or
3. in a manner provided by the law of the foreign jurisdiction in which service is made for service in an action in any of its courts of general jurisdiction.

*Pa. R. Civ. P. 402(a)* permits service or original process on a party, including an individual, to be made one of four ways:

1. Handing a copy to the defendant,
(2) Handing a copy to an adult residing or in charge of the defendant’s residence,
(3) If the defendant lives in an apartment or hotel, by handing a copy to the clerk or manager, or
(4) Handing a copy to the person in charge at the defendant’s usual place of business.

The Complaint was served on Neil Bore at a Budget Wireless store in Florida that was owned and operated by Wire4Less, Inc.

Speak lives in the Flagler Arms Apartments in Key West, Florida and has offices in Florida that are part of Gabalot Inc.

A copy of the complaint was not served on Speak by any of the methods permitted by Rule 402(a) because service was attempted only at a location where Speak’s corporation once did business, but no attempt was made to hand it to him personally, serve it at his residence or on the person in charge of his actual place of business.

Service was not made on the person in charge of a usual place of business of Speak or Gabalot because service was made on Neil Bore at a business owned and operated by Wire4Less, Inc, which is a Florida corporation and separate from any entity owned by Speak or Gabalot.

Bore did not provide any of the documents he received to Speak or anyone else.

On the basis of the foregoing, proper service was not made on Speak or Gabalot under Rule 402.

No attempt was made to serve Speak or Gabalot by mail pursuant to Rule 404(2).

Florida statutes with respect to service on individuals are more restrictive than Pennsylvania’s rule, in that service can only be made by handing it to the person to be served or leaving it at his or her residence. Section 48:031.

Rock neither handed the complaint to Speak nor left it at his residence.

On the basis of the foregoing, proper service was not made on Speak.

Florida statutes permit service on a domestic corporation by serving either specified officers or agents. Section 48:081.

Although Gabalot does business in Florida, Rock did not make service upon it in any of the accepted ways provided by Florida statutes.

Although Neil Bore was in charge of the Budget Wireless store at Greene and Duvall Streets in Key West, service by handing copies of the complaint to him was not valid on Gabalot because:

Bore was an owner and employee of Wire4Less, Inc, which is a Florida corporation, entirely separate from Gabalot, even though it was also a Budget Wireless franchisee and had purchased its business from Gabalot, Inc.
Although Gabalot is Wire4Less’s landlord, nothing in the Florida statutes permits service on a corporation by serving its tenant.

Accordingly, service of process was improper on all defendants, thus excusing their failure to respond to the complaint.

**Conclusion**

Assuming that Suite and Sauer files its petition to open the default judgment quickly, before the expiration of fourteen days from the date on which Speak learned of the judgment, the petition should be successful because it will be timely, there is a valid excuse, namely lack of proper service, for the failure to respond to the complaint, and a meritorious defense exists.