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Question No. 1

Elizabeth and Ian married on June 17, 1998, and lived at 61 Mockingbird Lane in C County, Pennsylvania, in a home owned by Elizabeth since 1995. Just prior to the marriage the couple executed a valid pre-nuptial agreement which had one provision that provided that Ian would not be entitled to any interest in the Mockingbird Lane home in the event of a divorce. In December 2011 the couple separated, and Elizabeth immediately evicted Ian from her home and filed for divorce. When Ian left he took his antique car which was valued at $25,000 when the couple married and which appreciated to $165,000 in value as of the time the couple separated.

A few weeks after being evicted, Ian telephoned Elizabeth and during their conversation learned that she was entertaining a male friend, Logan, who Ian did not like. Ian told Elizabeth he was coming over to beat the daylights out of Logan. Despite being told by Elizabeth that he was not welcome, Ian went to Elizabeth’s home and broke down the front door. Ian immediately approached Elizabeth and said, “Where is he?” Elizabeth responded that Logan had already left and that she had called the police. Angered by her response, Ian ripped Elizabeth’s purse from her hand and threw it to the ground and proceeded to push Elizabeth to the ground. Knowing that he was not supposed to be in Elizabeth’s home and fearing the arrival of the police, Ian ran out of the house, jumped in his car and sped backwards down the driveway towards the street. As he approached the end of the driveway he struck Sandy, an 80 year old neighbor, who was standing at the end of the driveway, and Ian immediately fled the scene. Ian never saw Sandy before he struck her.

When Ian’s vehicle struck Sandy the impact severed an artery in her leg which caused her to bleed profusely. When the police arrived moments later, Sandy, who could clearly see the blood pooling around her, mumbled to the responding officer, “This is not good, is it? I’m going
to die, aren’t I? Ian is the one who hit me.” Sandy died a few minutes later as a result of her leg injury.

1. The police have charged Ian with burglary, robbery, and second degree murder with regard to the incident at Elizabeth’s property. Which of these charges, if any, are likely supported by the above facts?

Assume that criminal charges are filed against Ian with regard to the death of Sandy. At trial the prosecution calls the responding officer to testify as to the statements made to him by Sandy to show that Ian is the one who struck her. The defense objects on the grounds of hearsay.

2. Aside from arguing the present sense impression or excited utterance exceptions to the hearsay rule, what argument should be made by the assistant district attorney in response to the hearsay objection, and how should the Court rule on the hearsay objection?

Several days after the incident at her home involving Ian, Elizabeth learned that Ian had gone to a car auction and sold the antique car for $165,000. She also learned that Ian intended to use the proceeds of the sale to go on a gambling trip to Las Vegas. When confronted by Elizabeth, Ian confirmed that he was going to spend every last cent of the proceeds. Elizabeth wants to determine her rights with respect to the proceeds from the sale of the antique car and to determine what can be done to prevent the dissipation of any portion of the proceeds to which she might have a right.

3. (a) What portion, if any, of the proceeds from the sale of the antique car would constitute marital property?

(b) Assume for purposes of this question that some portion of the proceeds constitutes marital property. What remedy could be pursued on behalf of Elizabeth under the Pennsylvania Divorce Code to ensure that any proceeds of the sale of the vehicle which constitute marital property are properly preserved for equitable distribution purposes?
1. The charges of burglary and second degree murder are likely supported by the above facts, while the robbery charge is likely not supported by the facts.

A person is guilty of burglary if such person enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or such person is licensed or privileged to enter. 18 Pa. C.S.A. Section 3502 (a). In order to be guilty of the offense, a defendant must enter the building or occupied structure with the intent to commit a crime. Commonwealth v. Russell, 313 Pa. Super. 534, 460 A.d 316 (1983). As applied here, Elizabeth was the owner of 61 Mockingbird Lane, which is clearly a building, and had expressly told Ian during their telephone conversation that he was not welcome at her home. Despite this warning, Ian proceeded to Elizabeth’s home and broke down the door. Ian was not licensed or privileged to enter Elizabeth’s home because the home was Elizabeth’s and Elizabeth had evicted Ian. Moreover, prior to the marriage, Ian had waived any interest in the home. Ian knew that he did not have permission to enter the home, and there is no indication in the facts that the residence was open to the public. At the time Ian entered the home he had the intent to commit a crime. Namely, when he was speaking with Elizabeth on the telephone he told her that he was coming over to beat the daylights out of Logan and it was clearly his intent to commit an assault, at a minimum. Since the elements of the offense of burglary have been met, this charge is likely supported by the facts.

A person is guilty of robbery if, in the course of committing a theft, he or she physically takes or removes property from the person of another by force however slight. 18 Pa. C.S.A. Section 3701 (a)(1)(v). An act shall be deemed “in the course of committing a theft” if it occurs in an attempt to commit theft or in flight after the attempt or commission. 18 Pa. C.S.A. Section 3701 (a)(2). A person commits a theft if he unlawfully takes or exercises unlawful control over movable property of another with intent to deprive him thereof. 18 Pa. C.S.A. Section 3921. As applied here, it is clear that Ian took Elizabeth’s purse from her person through the use of force, however, there is no indication from the facts that he actually took the purse with an intent to deprive Elizabeth thereof. The facts indicate that Ian grabbed the purse out of anger and threw it to the ground before leaving the house. Accordingly, since there was no evidence to support a theft, Ian’s actions would not likely support a charge of robbery.

A criminal homicide constitutes murder of the second degree when it is committed while the Defendant was engaged as a principal or an accomplice in the perpetration of a felony. 18 Pa. C.S.A. Section 2502 (b). A person who is the actor or perpetrator of the crime is defined as a principal. 18 Pa. C.S.A. Section 2502 (d). Perpetration of a felony is defined as the act of the Defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping. 18 Pa. C.S.A. Section 2502 (d). As applied here, Ian had just committed a burglary, as discussed above, and was in the process of fleeing the scene. He knew that he was not supposed to be in Elizabeth’s home and the police were on their way to the scene. During his flight he struck Sandy with his vehicle and as a direct
result of this impact she died. Since Sandy was killed during Ian’s flight after having committed the underlying burglary, the charge of second degree murder would likely be supported under the facts presented.

2. **The Assistant District Attorney should argue that the statement should be admissible under the statement under belief of impending death exception to the hearsay rule, and the Court should overrule defense counsel’s hearsay objection and permit the officer to testify to Sandy’s statement.**

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Pa. R.E. 801. A declarant is a person who makes a statement, including an oral assertion. Id. Hearsay will not be admissible unless it falls within an exception set forth in the Rules of Evidence or some other rule prescribed by the Supreme Court or by statute. Pa. R.E. 802. Pa. R.E. 804 (b)(2) provides an exception to the hearsay rule where the declarant is unavailable as a witness and the statement was made by the declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

As applied here, the prosecution is attempting to introduce the oral assertion of Sandy which would be considered a statement under the hearsay rule and Sandy would be considered to be the declarant. The statement was being offered by someone other than Sandy, namely the police officer, and the statement is being offered for the truth of the matter asserted, i.e. that Ian is the person who “hit her.” Although the statement sought to be admitted would be considered to be hearsay, there is a strong argument that it should be admissible under the statement under belief of impending death exception (also known as dying declaration exception) to the hearsay rule. In particular, the declarant, Sandy, is now unavailable as a witness since she is deceased. At the time that she made the statement to the responding officer she was bleeding profusely and based upon the content of the statement itself it is clear that she believed that she was on the verge of death. The statement directly related to the circumstances surrounding her being struck. Accordingly, despite the fact that the statement would be considered hearsay it would likely be admissible under Pa. R.E. 804 (b)(2).

3(a). **The portion of the proceeds representing the increase in value of the vehicle from the date of marriage up to the date of separation would likely be considered to be marital property.**

Marital property for the purposes of equitable distribution includes all property obtained during the marriage together with the increase in value of any non-marital property acquired prior to marriage. 23 Pa. C.S.A. Section 3501 (a) (1). The increase in value of non-marital property acquired prior to marriage shall be measured from the date of marriage to either the date of final separation or the date as close to the hearing on equitable distribution as possible, whichever date results in a lesser increase. 23 Pa. C.S.A. Section 3501 (a.1.) Marital property also includes property acquired after final separation but prior to the divorce if the property acquired was in exchange for marital assets. 23 Pa. C.S.A. Section 3501 (a)(4).
As applied here, the antique vehicle, which was acquired by Ian prior to the marriage, was worth $25,000 at the time of marriage but was worth $165,000 on the date of the parties’ separation. Ian’s $25,000 interest in the antique car at the time of marriage would be considered to be non-marital property which would not be subject to equitable distribution; however the $140,000 increase in value at the time of separation would constitute marital property. Ian subsequently sold the antique car after the parties separated but prior to a divorce for $165,000. When the vehicle was sold, the $140,000 that reflected the increase in value of the vehicle was property received in exchange for marital property and would be subject to equitable distribution.

3(b). Special Relief should be sought pursuant to the Pennsylvania Divorce Code in order to prevent the dissipation of proceeds received from the sale of the antique vehicle.

Special relief under the Pennsylvania Divorce Code is governed by 23 Pa. C.S.A. Section 3323 (f) as follows:

In all matrimonial causes, the Court shall have full equity power and jurisdiction and may issue injunctions or other orders which are necessary to protect the interests of the parties or to effectuate the purposes of this part and may grant such other relief or remedy as equity and justice require against either party or against any third person over whom the Court has jurisdiction and who is involved in or concerned with the disposition of the cause.

Further, where it appears to the Court that a party is about to dispose of property in order to defeat equitable distribution, an injunction may issue to prevent the removal or disposition and the property may be attached as prescribed by general rules. 23 Pa. C.S.A. Section 3505 (a).

As applied here, Elizabeth has learned that Ian has sold his antique car, which was worth $25,000 at the time the couple was married, for $165,000. The question assumes that some portion of the proceeds constitutes marital property. Elizabeth has learned that it is Ian’s intention to use the sale proceeds to go on a gambling spree and spend every last cent of the proceeds. In order to prevent the dissipation of this marital asset, Elizabeth’s counsel should immediately petition the Court for special relief in the nature of an injunction to protect this marital asset. The Court could be asked to have the funds placed in escrow until such time as an agreement can be reached on the distribution of the marital property component of the sales proceeds. In short, the equitable powers of the Court should be invoked to prevent the dissipation of this marital asset.
Question No. 1: Grading Guidelines

1. Criminal Law

Comments: The Candidate is expected to argue that the facts likely support the charges of burglary and second degree murder but do not likely support the charge of robbery. The applicable facts and legal principles should be discussed to reach each conclusion.

12 Points

2. Evidence

Comments: The Candidate should discuss and define hearsay and the statement under belief of impending death exception to the hearsay rule, apply the facts and conclude that Sandy’s statement will likely be admitted.

5 Points

3. Family Law

Comments: The Candidate is expected to discuss how to differentiate between the non-marital and marital components of property for equitable distribution purposes and discuss the appropriate remedy under the Divorce Code for protecting marital property in the event that a dissipation of that property is anticipated.

3 Points
While on his way home from work Len, a 40 year old pharmacist, was involved in a motor vehicle accident that was caused solely by Carl’s negligence. The accident left Len confined to a hospital bed and later to a nursing home until his death six months after the accident. During this time, Len was continuously in severe pain, endured multiple operations and was visibly upset when visited by his wife Ann and two minor children. Len died due to accident related injuries. Ann was named as executrix in his will.

After Len’s death his family had to significantly reduce their standard of living due to the loss of Len’s income. Len’s wife was forced to sell the family’s house and the family moved into a small rental property. Len incurred significant unreimbursed medical expenses for his hospitalization and nursing home stay. Len’s funeral expenses remain unpaid.

Ann was being treated by her family medical doctor who, after Len’s accident, prescribed medication to help her cope with the stress and anxiety surrounding Len’s injury and ultimate death. Ann did not believe the medication was helping and shortly after Len’s death consulted Ed, a Pennsylvania licensed psychologist and practicing psychic, whose advertisements promised that he could contact the recently deceased. In reality Ed had a long history of cheating emotionally distraught people he treated in his psychology practice. Ann told Ed about her husband’s death and also her medical treatment for stress and anxiety. After several sessions Ed assured Ann that he could put her in contact with Len’s spirit who would speak to her and advise her on important matters. Ann and Ed reached an agreement for Ed to provide this service for a fee of $50,000.

Ed rigged the chair that Ann was to sit in during the séance with electric current so that it would give her an electrical jolt at appropriate times during the séance. The séance went on as
Ed planned and he was able to jolt Ann in response to questions directed to Len’s spirit. The jolts not only caused an unpleasant electrical shock sensation but also resulted in permanent nerve damage to Ann.

Based upon the “spirit’s advice,” Ann made important family decisions and she paid Ed the agreed upon amount. Two weeks after the séance and after Ann had paid the money, Ed was arrested by police on unrelated matters involving several fraud complaints from former clients. Ed confessed to the police that he also deceived Ann and charged her $50,000 for the rigged séance. Without a warrant the police searched Ed’s office and seized incriminating documents. When the police advised Ann of Ed’s confession, she became very upset which ultimately led to her confinement in a mental health facility. Although Ann has been released from the mental health facility she is under the treatment of a psychiatrist for severe depression and anxiety.

Assume that all activities occurred in A County, Pennsylvania, and all lawsuits would be filed with the Court of Common Pleas of A County, Pennsylvania, within six months of Len’s death. In Ed’s criminal case, the incriminating documents that were seized by the police were suppressed due to a violation of Ed’s rights under the Fourth Amendment to the United States Constitution.

1. What cause(s) of action should be brought in a lawsuit to recover damages caused by Carl’s negligence, who should bring the cause(s) of action, and what damages should the cause(s) of action in the complaint seek?

2. Other than fraud, what intentional tort claim(s), if any, should Ann pursue against Ed?

3. In an administrative proceeding brought by the Commonwealth licensing board to suspend Ed’s license to practice psychology, the licensing board’s attorney attempts to introduce the incriminating documents seized by the police, and Ed’s counsel objects to the admission of the documents on the basis that Ed’s Fourth Amendment rights were violated by the illegal search and seizure. How would the admissibility of these documents be analyzed, and with what likely result?
1. **Ann, as the personal representative of Len’s estate, should bring a survival action seeking damages sustained by Len during his lifetime and an action for wrongful death for the damages his survivors would be entitled to recover as a result of Len’s death. Ann could also bring a cause of action for loss of consortium for the limited period between Len’s injury and his death.**

The personal representative of Len’s estate should bring the lawsuit against Carl, alleging a cause of action for wrongful death and a survival action based on Carl’s negligence in causing the accident. Ann, as the executrix would be the proper party to bring these causes of action. See Pa.R.C.P. No. 2202, Tulewicz v. S.E. Pa. Transportation Authority, 529 Pa. 588, 606 A.2d 427 (1992). The damages that could be sought in the lawsuit are the damages sustained by Len during his lifetime which would be pursued by the estate and the damages that his survivors would be entitled to recover.


Wrongful death damages are established for the purpose of compensating the spouse, children or parents of a deceased for pecuniary loss they have sustained as a result of the death of the decedent. (citations omitted) The damages recoverable in a wrongful death action include the present value of the services the deceased would have rendered to the family, had she lived, as well as funeral and medical expenses.

A survival action, on the other hand, is brought by the administrator of the decedent’s estate in order to recover the loss to the estate of the decedent resulting from the tort. (citations omitted) The measure of damages awarded in a survival action include the decedent’s pain and suffering, the loss of gross earning power from the date of injury until death, and the loss of his earning power-less personal maintenance expenses, from the time of death through his estimated working life span.

The Court went on to point out that both the wrongful death and survivor action are meant to compensate two different categories of claimants. The surviving spouse and/or other members of the decedent’s family would be compensated under the wrongful death statute and the decedent himself, through the executrix, would be compensated under the survival action.

The Court in Frey v. Pennsylvania Electric Company, 414 Pa. Super. 535, 607 A.2d 796 (1992) has further pointed out how the two causes of action are completely different, stating:

An action for survival damages is completely unlike the action for wrongful death brought by appellant. Under the survival statute, survival damages are essentially those for pain and suffering between the time of injury and death. 42 Pa.C.S.A. 8302. The survival action has its genesis in the decedent’s injury, not his death. In a survival action, the decedent’s estate sues on behalf of the decedent, upon claims the decedent could have
pursued but for his or her death. The recovery of damages stems from the rights of action possessed by the decedent at the time of death.

In contrast, wrongful death is not the deceased’s cause of action. An action for wrongful death may be brought only by specified relatives of the decedent to recover damages in their own behalf, and not as beneficiaries of the estate. (citation omitted) Wrongful death damages are implemented to compensate the spouse, children or parents of the deceased for the pecuniary loss they have sustained by the denial of future contributions decedent would have made in his or her lifetime. The damages are also meant to compensate for some administrative, funeral, and medical expenses. (citations omitted) This action is designed only to deal with the economic effect of the decedent’s death upon these specified family members.

Len’s estate, through the executrix Ann, would seek compensation for damages Len could have pursued if he had lived. Damages for pain and suffering would be recoverable because Len suffered for six months from the time of the injury until death. He also was emotionally distraught when his relatives visited him in the hospital and nursing home. Len also incurred substantial medical expenses that were not paid by insurance. Len suffered a loss of income due to the injuries from the time of the injury until his death. Also, Len’s estate could claim damages for loss of earning power less personal maintenance expenses from time of death through Len’s estimated working lifespan. The executrix could claim all of these damages in the survival cause of action.

The executrix should also seek damages on behalf of certain enumerated survivors who, as entitled by law, could recover damages for Len’s wrongful death. The two children as well as Ann would be proper individuals to be compensated for Len’s wrongful death. Both Ann as the spouse and the minor children were economically dependent upon Len. Both the children and Ann can show that they have suffered economically after Len’s death and have lost the value of his services to them as husband and father. The surviving family members had to scale down their lifestyle substantially and they have been forced to sell their home and move into a small rental property. Len, as a 40 year old pharmacist, would have been able to provide financially for his family for many future years. This claim for lost monetary contributions and services would be a proper claim of damages under the Pennsylvania wrongful death statute that would be pursued by the estate on behalf of Len’s wife and children. Also, under the wrongful death cause of action, damages for funeral and medical expenses are proper. The actions for damages for wrongful death and survival are cumulative rather than alternative but are not intended to result in a duplication of damages. Tulewicz, supra.

2. In addition to fraud, Ann should pursue a claim against Ed for the intentional torts of battery and intentional infliction of emotional distress.

Ed intentionally had Ann’s chair at the séance fixed so that at appropriate times Ann would suffer an electrical jolt that would emulate, in theory, a response from the spirit world. Ann was not aware that she was to be jolted nor did she consent to any such contact. Battery is an intentional tort that has been defined in the law as a harmful or offensive contact with another. Dalrymple v. Brown, 549 Pa. 217, 701 A.2d 164 (1997). Battery requires the intent to cause offensive contact and resultant harmful contact. Field v. Philadelphia Electric Co., 388 Pa. Super. 400, 565 A.2d 1170 (1989).

There is no evidence that Ann consented to any touching during the séance. Ann was unaware that she would be jolted by electricity. The electricity jolt would be sufficient to establish an offensive contact. It is noted that the electricity not only caused pain to Ann but resulted in permanent nerve damage. Ann not only had the physical damages from the offensive contact but sustained substantial anxiety that required medical treatment.

The Court in Fields, supra. recognized that exposure to radiation is a cognizable cause of action in battery where there was an intent to bring about the desired contact. Here, the electricity is no different. Although there was no physical object used to touch Ann, the electricity entered her body, causing the jolt and ultimate injuries, and Ed intended that this occur. Thus, the intentional tort of battery should be pursued by Ann.

Ann should also pursue the tort of intentional infliction of emotional distress. Here Ed knew of Ann’s previous anxiety and her medical treatment. Ed also knew of Ann’s desire to communicate with the spirit world to receive guidance from her husband. Ed went to great lengths to make sure that Ann received a jolting message from the spirit world knowing that he would be compensated. When Ann found out about this scam she experienced substantial emotional distress. She was hospitalized and was thereafter treated by a psychiatrist with medication.

In order for Ann to prove the claim of intentional infliction of emotional distress the following elements must be established:

1. The conduct must be extreme and outrageous;
2. It must be intentional or reckless;
3. It must cause emotional distress; and
4. The distress must be severe.


Although the Pennsylvania Supreme Court has acknowledged Section 46 of the Restatement (Second) of Torts, it has never had the occasion to specifically adopt this section as the law in Pennsylvania. Nevertheless, the Supreme Court has recognized that the graveman of
the tort of intentional infliction of emotional distress is outrageous conduct on the part of the tortfeasor. *Kazatsky v. King Memorial Park, Inc.*, 515 Pa. 183, 527 A.2d 988 (1987). The Pennsylvania Superior Court has recognized intentional infliction of emotional distress as an actionable wrong in Pennsylvania, referencing Section 46 and Comment (d) thereto which states:

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, “outrageous!”


Ed’s conduct appears to be outrageous since he was responsible for taking advantage of an emotionally fragile widow with his scam that he knew was untrue by making her believe that she was in contact with her deceased husband. His conduct was reckless, if not intentional, in that he knew that the contact with Ann’s husband was a farce and that if discovered it was likely to cause severe emotional distress. His actions caused her substantial physical harm through the jolting, and caused her emotional distress that was severe. In fact, the emotional distress was severe enough that it resulted in her hospitalization in a mental health facility and subsequent medical care. Although Ann was under some emotional stress prior to Ed’s actions, there was clearly an aggravation of Ann’s condition for which Ed would be liable. See *Geyer v. Steinbronn*, 351 Pa. Super. 536, 506 A.2d 901 (1986) – a person is liable for the aggravation of a pre-existing condition. The action of Ed in this situation could be judged by the average citizen as extreme and outrageous and thus the tort of intentional infliction of emotional distress would be proper.

Thus, in addition to fraud, the torts of battery and intentional infliction of emotional distress should be pled in the complaint against Ed.

3. **Even though the documentary evidence seized from Ed’s office was suppressed as evidence in the criminal case, it would likely be admissible evidence in a civil case such as an administrative license revocation proceeding since the deterrence benefits of precluding the evidence would be outweighed by its substantial societal costs.**

Ed was a psychologist licensed by the Commonwealth of Pennsylvania to practice his profession. In addition to psychological services Ed engaged in psychic activities with his clients. The police searched Ed’s office and seized incriminating documents in violation of his Fourth Amendment rights as guaranteed under the United States Constitution. The documentary evidence was suppressed as evidence in the criminal case against Ed.

The exclusionary rule is a judicially created rule for the purpose of deterring illegal searches and seizures by the police in violation of the Fourth Amendment. *Stone v. Powell*, 428
A balancing test would be used to determine if the deterrence benefits of the exclusion of the evidence in the administrative case outweighs its substantial social costs. Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357, 118 S. Ct. 2014 (1998). Initially, it must be recognized that the use of the exclusionary rule in criminal trials provides significant deterrence of illegal searches by police. Id. at 524 U.S. 364. This is apparent from the fact that the evidence seized from Ed’s office has already been excluded as evidence in his criminal case. A Court would in all probability find that there would be marginal additional deterrence because the police are already precluded from the use of the evidence in the criminal context. However, there would be substantial harm to society in precluding relevant evidence relating to Ed’s competence and ability to continue to be a licensed psychologist from being admitted in the administrative case. It is definitely in the public interest to suspend the license of an unethical psychologist who engages in fraudulent and potentially criminal activities. The Courts have recognized the costs to society and have repeatedly declined to extend the applicability of the exclusionary rule to proceedings, including administrative cases, other than criminal trials. Id.

In Kerr v. Pennsylvania State Board of Dentistry, 599 Pa. 107, 960 A.2d 427 (2008) the Pennsylvania Supreme Court recognized that the exclusionary rule does not generally apply outside the criminal context and refused to apply the rule to a civil disciplinary proceeding involving a dentist. The court concluded that the judicially created remedy of the exclusionary rule which was designed to protect Fourth Amendment rights was satisfied by the suppression of the evidence in the criminal case, and the marginal deterrent value of applying the rule to civil proceedings was minimal. Using a similar balancing approach, a court would likely rule against Ed and permit the use of the documentary evidence in the administrative proceeding.
Question No. 2: Grading Guidelines

1. **Wrongful Death/Survival Action/Loss of Consortium**

Comments: The candidate is expected to recognize that damages can be obtained in both the wrongful death and survival actions which should be brought by Ann as the personal representative of Len’s estate in one lawsuit. The candidate should discuss the damages relevant to both the wrongful death and survival action and recognize that Ann can bring an action for loss of consortium for the limited period of time between Len’s injury and his death.

8 points

2. **Battery and Intentional Infliction of Emotional Distress**

Comments: The candidate should identify both torts and discuss the elements needed to prove both battery and the intentional infliction of emotional distress in conjunction with the facts.

8 points

3. **Exclusionary Rule/Administrative Proceeding**

Comments: The candidate should discuss the analysis that would be used in determining that the documents would not be excluded as evidence in the administrative proceeding even though the documents had been suppressed as evidence in the criminal case.

4 points
Roger was a sales agent for Big Insurance Company (Big) in E County, Pennsylvania, for nearly 20 years. He was married to Betty, his second wife, with whom he had a daughter, Sally. He also had one adult son, Jon, from his deceased first wife.

In early 2011, Roger was considering leaving Big to become an independent agent because he felt underappreciated and underpaid by Big. He talked with his long-time friend, Harold, a lawyer practicing in E County, about the situation and suggested that they go into business together in equal ownership providing both legal and insurance services either in a professional corporation or in a partnership; or in the alternative that they share a suite of offices in which they could share expenses and separately provide their respective services from one location. Roger had not made a will and asked Harold what would happen if he died without one. Harold accurately explained the law of Pennsylvania to Roger on that subject, and Roger said he would generally be satisfied with such a result if that happened. He told Harold he would think about any specific gifts or legacies before he would want to make a will, and Harold said he would consider going into business with Roger.

Big became aware of Roger’s dissatisfaction with the company, and Big’s top management decided they did not want to lose him as an agent. In late 2011, Big notified Roger that he was the “Agent of the Year” and would receive a prize of a car worth $25,000. Roger received the car in December 2011, titled in his name alone, along with a plaque which noted his “many years of productive service and bright future with Big Insurance Company.” The award far exceeded the value of any previous awards given by Big to an employee. Roger was unaware he was even being considered for this award, and the receipt of the award caused Roger to reconsider his plan to leave Big.
In January of 2012, Roger’s son Jon was married. At the wedding reception Roger proposed a toast and tossed the keys to his prize car to Jon, saying, “I’m not going to live forever, so you might as well get some of your inheritance now.” He signed over the title the next day as Jon and his bride drove away on their honeymoon. Betty was somewhat annoyed that Roger had decided to give Jon such an expensive present without telling her beforehand, and began urging him to make a will. Roger kept assuring her that he would do so and told her that even with no will she and Sally would be provided for. Unfortunately, Roger suffered a stroke in early February 2012 and died neither having drawn a will nor written any instructions about anything related to his estate. The value of his net estate was approximately $500,000 in assets he owned separately.

1. What options are available for Betty to inherit from Roger’s estate, how would the estate be distributed under each option, and what is the best option for Betty to maximize her interest in the estate?

2. Under the options available to Betty to inherit from Roger’s estate, what effect, if any, would the value of the vehicle given by Roger to Jon have on the property to be distributed from Roger’s estate?

3. Assuming Roger was a cash-basis taxpayer, how should the receipt of the prize car be treated for federal income tax purposes on Roger’s return for 2011?

4. Are any of the three options that Roger proposed for a business relationship with Harold permissible under the Pennsylvania Rules of Professional Conduct?
Question No. 3: Examiner’s Analysis

1. **Betty can take her intestate share or opt to elect against such share, but she will maximize her interest by taking her intestate share.**

   Betty has a choice between taking her intestate share as the surviving spouse under Section 2102 of the Probate, Estates and Fiduciaries (PEF) Code, 20 Pa. C.S.A. §2102, or taking an Elective Share under Section 2203. Her intestate share as the surviving spouse is specifically defined by subsection (4) of Section 2102 which states: “If there are surviving issue of the decedent, one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.” Because Jon is not Betty’s child, this subsection applies to Betty, rather than subsection (3), which applies if all of the decedent’s children are also children of the surviving spouse and would have given her the first $30,000 of the estate plus one-half of the balance. Section 2103, “Shares of others than surviving spouse,” provides that any part of the intestate estate to which the surviving spouse is not entitled, would pass first to “the issue of decedent.” This would therefore provide Jon and Sally, Roger’s only “issue,” with the 50% of the estate remaining to share equally, after Betty receives the first 50% as Roger’s surviving spouse.

   Betty also has the option to demand the Elective Share provided to the surviving spouse which is defined as a one-third elective share of “property passing from the decedent by will or intestacy,” and several other categories of property set forth in the statute. 20 Pa. C.S.A. §2203. The only possible additional property referenced in the facts is the car given to Jon valued at $25,000. Betty’s share of the total elective estate would therefore be one third of the combined amount of $500,000 plus any allowable value of the car; so that a choice to receive one-third of that amount would be much less than taking her one-half intestate share of the $500,000. Under this option, Jon and Sally would receive equal shares of the remaining intestate estate.

   The best option for Betty to maximize her share of Roger’s estate is to take her intestate share.

2. **The value of the car would not have any effect on the property to be distributed from Roger’s estate if Betty elected her intestate share, but would have an effect on the property in the estate if Betty chose to take her elective share.**

   The intestate estate would not include the car which Roger gave to Jon at his wedding, nor would the value of the car be deducted from Jon’s share despite Roger’s spoken reference to it being part of Jon’s inheritance. The PEF Code at 2109.1 “Advancements,” states, in part: “If a person dies intestate as to all or any part of his estate, property which he gave in his lifetime to an heir is treated as an advancement against the latter’s share of the estate only if declared in a writing by the decedent or acknowledged in writing by the heir to be an advancement.” This statute was enacted in 1976 as a change in previous law regarding advancements, which were presumed when a significant gift was made by a decedent to one of his children. The current statute requires a writing to create an advancement with such a gift, and gives no indication that the spoken words of Roger when he gave Jon the car as a wedding present would suffice to establish an advancement of Jon’s share of Roger’s estate.
However, if Betty chose to take her elective share, the value of the car would be included as part of the elective estate, despite it not being considered an advancement. PEF Code section 2203 defines the property subject to election by the surviving spouse to include “property conveyed by the decedent during the marriage and within one year of his death to the extent the aggregate amount so conveyed to each donee exceeds $3,000, valued at the time of conveyance.”

The car which Roger was awarded in December 2011 was worth $25,000, and he gave it to Jon a month later, during his marriage to Betty and within a year of his death in February 2012. If it’s value remained the same, Betty would be entitled to add $22,000 of its value to the elective estate.

3. Roger likely had income of $25,000 which should be reported on his 2011 tax return because the prize was intended as a bonus to retain him as an employee and it does not otherwise qualify for exclusion from income.

Roger was the recipient of a prize from Big Insurance Company, his long-time employer. This was designated as an “Agent of the Year” award and consisted of a vehicle worth $25,000. The Internal Revenue Code at 26 U.S.C.A. §74, “Prizes and Awards” states in part (a): “Except as otherwise provided in this section . . . gross income includes amounts received as prizes and awards.” Subsection (c) provides an exception for certain employee achievement awards, and excludes from gross income the value of an “employee achievement award (as defined in section 274 (j)) received by the taxpayer if the cost to the employer of the achievement award does not exceed the amount allowable as a deduction to the employer for the cost of the employee achievement award.”

Section 274 (j) (3) (A) defines “employee achievement award” as “an item of tangible personal property which is (i) transferred by an employer to an employee for length of service achievement or safety achievement, (ii) awarded as part of a meaningful presentation, and (iii) awarded under conditions and circumstances that do not create a significant likelihood of the payment of disguised compensation.”

The car awarded to Roger was “an item of tangible personal property,” rather than cash, and it was transferred to him by his employer at least in part in recognition of a length of service achievement. However, the giving of the prize as part of an award for the “Agent of the Year” and in recognition of Roger’s bright future with the company raises a question as to whether the award was really intended to be in recognition of length of service. Even if the presentation of the car with the plaque praising his service and future with Big Insurance constituted a “meaningful presentation” of a length of service achievement award as required by 274 (j) (3) (A) (i) and (ii); the restriction in subpart (iii) that the award must be “under conditions and circumstances which do not create a significant likelihood of the payment of disguised compensation” appears to apply very clearly to Roger’s award.

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1 There is a maximum deduction to the employer of $400 for an “unqualified” plan award and of $1,600 for a “qualified” plan award under 26 U.S.C.A. §274(j)(2). Generally, a qualified plan award is an employee achievement award that is awarded as part of an established written plan or program of the taxpayer which does not discriminate in favor of highly compensated employees as to eligibility or benefits. 26 U.S.C.A. §274(j)(3)(B).
Here, although the award recognized Roger’s many years of productive service, it was characterized as the “Agent of the Year” award and was given by the employer to compensate the employee to encourage him to remain with the company. The facts of this narrative clearly show that Big Insurance’s decision to make Roger the “Agent of the Year” with an award of a vehicle worth $25,000 was intended to boost his compensation for the year 2011 so that he would be less likely to leave Big to become an independent agent or work for another company. The award, which referenced Roger’s bright future with Big, far exceeded the value of any award previously given by Big. The facts do not reference whether the employer’s award was made pursuant to a plan that was qualified or unqualified, however, regardless of the type of plan, it is clear that the award to Roger fails to fit within the definition of an Employee Achievement Award at all, thus requiring its value to be treated as income by Roger’s estate when completing his tax return.

4. Harold would have been in violation of RPC 5.4 if he entered into a partnership or professional corporation with Roger because Roger was a non-lawyer who would have had beneficial ownership of the law practice along with Harold. Harold and Roger would have been able to share office space and expenses if they kept separate professional identities.

Roger had suggested that he and Harold begin working together in a Professional Corporation or partnership as a combined insurance and legal office, with ownership equally shared. Pennsylvania Rule of Professional Conduct 5.4 “Professional Independence of a Lawyer,” restricts the practice of law in connection with non-legal professional practices. Section (b) of the Rule states: “A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.” Likewise, Section (d) prohibits a lawyer from practicing law in the form of a professional corporation if a nonlawyer owns any interest therein.

The proposal made by Roger to Harold was that the two of them would join forces as equal partners or equal owners of a professional corporation, or in the alternative simply share a physical location to separately provide their respective services from one location. Section (b) prevents any partnership between a lawyer and nonlawyer in which any of the activities of the partnership consist of the practice of law. Had Harold agreed to this option, it would have been a clear violation of Rule 5.4 (b).

If a professional corporation or association were to be formed in the manner Roger described, with each of them owning half, it would also be a violation of section (d) (1), as Roger, a nonlawyer, would have “an interest therein” in the form of half ownership. The Rule does not set a threshold for an impermissible portion of nonlawyer interest in an entity of this nature.

The only prospect for Roger and Harold to have practiced in the same physical location would be for each of them to maintain a separate professional corporation, association or proprietorship. The Rule does not prohibit a lawyer from sharing an office complex with a nonlawyer, so long as the professional independence of the lawyer is maintained, and the lawyer does not share fees with a nonlawyer, which is prohibited by section (a) of RPC 5.4. Had Harold
and Roger located in a common suite of offices, sharing costs such as rent, equipment and staff, but having neither Roger nor any other nonlawyer involved in Harold’s law practice, they could have accomplished the objective of working together.
Question No. 3: Grading Guidelines

1. **Intestate distribution and elective share of surviving spouse**

   Comments: Candidates should demonstrate an understanding of the options available to a surviving spouse of a person dying without a will, including the effect of children on the intestate share. Candidates should discuss the distribution of the estate under both the intestate and elective share options and identify the better option for Betty.

   6 points

2. **Adancement of inheritance requirements, non-advanced item part of elective estate**

   Comments: Candidates should recognize the general requirement of a writing to credit an inter-vivos gift against an intestate inheritance, as well as the scope of the spousal elective estate as inclusive of non-advancement inter-vivos gifts within a year of decedent’s death.

   5 points

3. **Federal Income Tax- Prizes and Awards to employees**

   Comments: Candidates must identify the car as a prize or award given to an employee as disguised compensation under the circumstances, and therefore reportable as income.

   4 points

4. **Professional Responsibility, RPC 5.4, restrictions upon associations between lawyers and non-lawyers**

   Comments: Candidates should discuss the compliance of each of the alternatives for Roger and Harold to work together with the Rules of Professional Conduct.

   5 points
Question No. 4

Paula is the head librarian for the C City School District. She is responsible for selecting and ordering books for libraries in the city’s public schools. She and her brother own a bookstore in C City, which Paula is allowed to do as a school district employee. Paula reports to Dan, the Superintendent of Schools. At work, Paula has a private office with a door, a desk, and two file cabinets. Paula has been in her position for 20 years and has received excellent performance reviews.

Paula lives in a non-traditional domestic arrangement, sharing a house with three other people, two men and one woman. Paula is the only one of the housemates with full-time employment. In the past year, Dan has expressed dislike for Paula’s book purchases, saying that she has “gone off the deep end,” which he attributes to her unconventional living arrangement. Dan shared his opinion with the school board, which is chaired by Reverend Jones, a local minister. Dan’s dislike for Paula’s lifestyle has developed into a baseless belief that Paula is ordering books more appropriate for her bookstore, and, in fact, takes them to sell in her bookstore. Seeking evidence of wrongdoing, at Dan’s direction, Paula’s office, including her desk and file cabinets, was searched by school security guards after business hours, but no evidence of wrongdoing was found.

1. What federal constitutional claim should Paula assert with respect to the search of her office, and with what likely result?

Recently, the school board added two books to the required summer reading list for all middle school students. Rev. Jones wrote to parents and students about the additions to the reading list, stating that it was the board’s hope that students would return to school in the fall inspired by faith. The books were written by local religious leaders and advocate the religious doctrine of Reverend Jones’ church. A group of parents of middle school students sent a letter to the school board objecting to its addition of the religious books.
2. What federal constitutional claim should concerned parents assert as to the addition of the two religious books on the required reading list, and with what likely result?

Stan, age 55, works as a private security guard for ProteXU, Inc., a large corporation based in C City, with many local clients and 500 employees. He has worked for ProteXU at different locations in and around C City for 5 years. Normally, ProteXU assigns guards to its clients’ locations for as long as the clients need guards, and the guards are paid by ProteXU. Stan has received good performance evaluations and promotions over his years of employment as a private security guard.

On May 27, 2010, Stan was assigned by his employer to work at a new casino that opened in C City. Stan, whose religion forbids gambling as well as any association with gambling establishments, immediately notified his employer of his conflict and requested a different assignment, but his employer refused. When Stan failed to show up for work in the casino on June 1, 2010, his employer fired him. Stan timely filed a complaint alleging religious discrimination with the appropriate administrative agency, in which he claimed that his employer failed to accommodate his religious beliefs which prohibited him from working at a casino. The administrative agency issued a Right-to-Sue letter, and Stan timely brought suit in the appropriate federal district court. Stan’s federal court complaint set forth the above facts, including reference to the filing with the administrative agency alleging religious discrimination, and contained two counts, one for religious discrimination, and one for age discrimination, claiming that younger employees, who had requested a change in assignment for various reasons, had been accommodated.

3. What are the respective burdens for each party in litigating Stan’s claim of religious discrimination, and based on the facts what is Stan’s likelihood of success?

4. What basis does Stan’s employer have to support a Motion to Dismiss the age discrimination claim, and how should the court analyze and rule on the motion?
1. **Paula should assert that the search of her office space violated the Fourth Amendment, and she would likely be successful.**

   The Fourth Amendment to the Federal Constitution protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...” In analyzing whether a workplace search is unconstitutional, courts look at the employee’s expectation of privacy in the workplace. The general rule is that there is a “search” under the Fourth Amendment if “an expectation of privacy that society is prepared to consider reasonable is infringed.” *U.S. v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652 (1984).

   Additionally, the Fourth Amendment protects against trespassory searches of those things that are enumerated in the Amendment (“persons, houses, papers and effects”). *United States v. Jones*, 132 S. Ct. 945, 181 L.Ed. 2d 911 (2012)

   The requirements of the Fourth Amendment with regard to searches and seizures have been applied in the context of government offices and workers. *National Treasury Employees Union, et. al., v. Von Raab*, 489 U.S. 656, 665, 109 S.Ct. 1384 (1989). Accordingly, the fact that Paula is an employee of a local government unit should not affect her right to workplace privacy. In *O’Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492 (1987), the Supreme Court held that the Fourth Amendment was applicable to workplace searches in a government office setting. A majority of the Court concluded that public employees have an expectation of privacy in their offices, and the entire court concluded that Dr. Ortega had a reasonable expectation of privacy in his desk and file cabinets. Here, Paula is the head librarian and has a private office, with a door, desk and file cabinet, all of which would indicate that she has a reasonable expectation of workplace privacy. Moreover, the school security officers in searching Paula’s desk and file cabinets at Dan’s direction also trespassed on her effects thereby triggering the Fourth Amendment protection against unreasonable searches.

   The standard that has been developed for workplace searches is based on reasonableness. In *Ortega*, a majority of the Justices declined to impose either a warrant or probable cause requirement for public employer searches within the workplace. A four-Justice plurality of the Court in *O’Connor, supra*, concluded that the search of an employee’s work space by a supervisor will be justified where there are “reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a non-investigatory work-related purpose, such as to retrieve a needed file,” and the measures adopted in the search are reasonably related to the objectives of the search and not unnecessarily intrusive in light of the nature of the misconduct. *Id at* 726. In his Opinion concurring in the judgment, Justice Scalia stated: “…government searches to retrieve work-related materials or to investigate violations of workplace rules--searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment.” *Id. at* 732-733.

   Here there was nothing to support a suspicion of work-related misconduct that could justify a search. Dan’s assertion that, based on her book choices and lifestyle, she “must have
“gone off the deep end” is unrelated to Paula’s job performance, and does not support a belief that Paula was ordering books and using them for her bookstore. Accordingly, simply because Dan does not agree with all of Paula’s book selections and does not approve of her lifestyle, does not give him a basis to engage in a “fishing expedition” for evidence of misconduct by searching her office.

If Dan had a genuine suspicion that Paula had misappropriated books and sold them in her store, searching her office might have been justified, but without a basis for his suspicion, it is unlikely that the search of her office would be found to be reasonable.

2. The parents should assert that the mandate that students read books advocating a particular religion violates the Establishment Clause of the First Amendment to the Federal Constitution. They will likely be successful.

The First Amendment to the United States Constitution provides, as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Subject to certain constitutional restrictions, local boards of education are authorized to select textbooks for use in public schools without oversight by courts. See Cary v. Board of Education, 598 F.2d 535 (10th Cir. 1978). However, a requirement that students read books advocating one religion over any others or promoting a particular religious viewpoint would likely be viewed by the court as an unconstitutional violation of the Establishment Clause of the First Amendment. Id. In Epperson, et. al. v. Arkansas, 393 U.S. 97, 89 S.Ct. 266 (1968), the Court, referencing Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560 (1963), stated:

“While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment’s prohibition, the State may not adopt programs or practices in its public schools or colleges which ‘aid or oppose’ any religion.” Id at 106.

The traditional tests for determining the propriety of state action under the Establishment Clause as it is applied to the states through the Fourteenth Amendment were discussed by the Supreme Court in Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105 (1971) and include: (1) the governmental action must have a secular purpose; (2) it must have a primary effect that neither advances nor inhibits religion; and (3) it may not foster an excessive entanglement with religion. In more recent years, the Supreme Court has also looked at whether the challenged governmental practice either has the purpose or effect of endorsing religion. County of Allegheny v. ACLU, 492 U.S. 573, 109 S.Ct. 3086 (1989). “When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality . . . .” McCreary Cty., Ky., et. al., v. ACLU, et. al., 545 U.S. 844, 860, 125 S. Ct. 2722 (2005).
Here, since the action of the school board required that students read books of only one religious persuasion, such action will likely be viewed as having the effect of advancing religion and fostering an excessive entanglement with one particular religion. Further, the School Board Chairman is a local minister of the faith espoused in the books, and the letter that notified the students and parents of the additional books stated that the purpose was to enhance the students’ faith. Based on the information provided, it does not appear that the books were added to the reading list so that students might learn about religion from an historical vantage point. If the reading list had included books about other religions for historical or comparison purposes, the added books might be viewed differently, but no such information was provided in the facts. Under the Lemon test, even if promotion of one religion may not have been the board’s sole purpose, it is likely the primary effect of its action, and is, therefore, a violation of the Establishment Clause.

3. Stan must establish a prima facie case of discrimination by showing that his termination was based upon unlawful discrimination against him because of his sincere religious beliefs that prohibit gambling and contact with gambling. If a prima facie case is established, his employer must show that it is unable to provide a reasonable accommodation without undue hardship. Absent evidence of hardship, it is likely that the court will find that Stan has established a claim for religious discrimination.

Under Title VII of the Civil Rights Act of 1964, it is unlawful for an employer to “discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s … religion.” 42 U.S.C. 2000e-2(a)(1). “Religion” includes “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without an undue hardship on the conduct of the employer’s business.” Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 73-74, 97 S.Ct. 2264 (1977), citing 42 U.S.C.A. 2000e-(j).

Various courts have held that, to establish a prima facie case of religious discrimination under Title VII, a plaintiff must show the following: (1) he holds a sincere religious belief that conflicts with a job requirement; (2) he informed his employer of the conflict; (3) adverse action was taken for failing to comply with the conflicting requirement. Smith v. Pyro Mining Co., 827 F.2d 1081, 1085 (6th Cir. 1987), cert. denied, 485 U.S. 989, 108 S. Ct. 1293 (1988). Accord, Adeleke v. Comcast Cable Communication, 2006 U.S. Dist. LEXIS 30972 (N.D. TX 2006); Shelton v. University of Medicine and Dentistry of New Jersey, 223 F.3d 220 (3d Cir. 2000); Gunning et. al. v. Runyon, et. al, 3 F.Supp. 2d 1423 (S.D. FL 1998). It is likely that Stan could make out a prima facie case by showing that the casino assignment conflicted with his sincerely held religious principles, that he informed his employer of the conflict, and that his employer terminated him when he failed to report for work at the casino. Stan will need to demonstrate that his religion and his beliefs prohibit not only gambling but also any association with or presence at a gambling facility.
Following Stan’s initial proof, his employer would have the opportunity to establish that Stan was terminated for non-discriminatory reasons because the employer was unable to provide a reasonable accommodation without undue hardship. See Shelton, supra at 224, 225. “Undue hardship” has been interpreted to mean more than a de minimus cost to the employer. Hardison, supra at 84.

Stan’s employer employed 500 people in and around C City and had many clients, and it is reasonable to conclude that there would be a minimal, if any, hardship to it to accommodate Stan by finding another job for him. There is nothing in the facts to indicate any burden on the employer such as might exist if the assignment was somehow undesirable so that morale would be affected if other employees were required to take the assignment. Accordingly, it seems unlikely that Stan’s employer could establish an inability to accommodate his religious beliefs without undue hardship, and, accordingly, Stan should be able to prove his claim for discrimination.

4. A Motion to Dismiss for Failure to State a Claim will likely succeed with respect to the age discrimination claim because Stan was required to file a charge with the appropriate administrative agency prior to filing suit in federal court and failed to file such a charge.

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides, in pertinent part:

> Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

> * * *

> (6) failure to state a claim upon which relief can be granted…

The standard by which 12(b)(6) motions are judged is whether plaintiff’s complaint, when viewed in a light most favorable to the plaintiff and taking the allegations in the complaint to be true, alleges facts in support of his claim which would entitle him to relief. Kost v. Kozakiewicz, 1 F. 3d 176 (3d Cir. 1993). See also Aguilara v. County of Nassau, et. al., 425 F.Supp. 2d 320, 324 (E.D. N.Y. 2006), Patton v. Fujitsu, et. al., 2002 U.S. Dist. LEXIS 21589 (ND TX 2002). A plaintiff is required to plead enough facts to state a claim that is plausible on its face. Bell Atlantic Corporation, et. al., v. Twombly, et. al., 550 U.S. 544, 127 S. Ct. 1955 (2007) A claim has facial plausibility when the Plaintiff pleads factual content that allows the court to draw the reasonable inference that the Defendant is liable for the misconduct alleged. Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937 (2009).

U.S.C. §2000e-5; 29 U.S.C. § 626(d). The basis of the 12(b)(6) motion would be that Stan’s failure to file a charge of age discrimination with the appropriate administrative agency precluded him from alleging an essential element of the claim.

There is nothing in the facts to indicate that Stan alleged in the federal civil complaint that a complaint of age discrimination had been filed with the EEOC or that all preconditions to bring suit had been met. Rather, the facts indicate that the complaint only referenced the administrative filing alleging religious discrimination. However, “the proper scope of any private lawsuit resulting from the EEOC charge encompasses not only the claims presented in the charge but also those that reasonably could have been expected to grow out of the EEOC investigation of the charge.” Drummer v. DCI Contracting Corp, et. al., 772 F.Supp. 821, 827 (S.D. N.Y. 1991), Hicks v. ABT Associates, Inc., 572 F.2d 960 (3d Cir. 1978), Smith v. American President Lines, Ltd., 571 F.2d 102, 107 (2d Cir. 1978). For the EEOC reasonably to be expected to investigate a charge, it must have somehow been alerted to the claim. Drummer, supra.

Stan timely filed an administrative claim of religious discrimination, but there was nothing in the religious discrimination claim that would lead investigators to believe that Stan was discriminated against on account of his age as well. The charge that was filed was not stated in terms of general discriminatory disparate treatment but specifically referred to religious discrimination based on the employer’s refusal to accommodate Stan’s religious beliefs. Accordingly, the Motion to Dismiss should be based on Stan’s failure to comply with the requirements of the ADEA to file an administrative charge before bringing suit. The Motion to Dismiss is likely to be granted with respect to the claim of age discrimination because the facts set forth in the Complaint failed to show compliance with the administrative filing requirement which is a prerequisite for bringing suit. The civil complaint fails to allege an essential element of the claim because it did not allege that Stan filed the required administrative complaint alleging age discrimination.
Question No. 4: Grading Guidelines

1. **Fourth Amendment – search of offices of government employees**

Comments: Candidates should demonstrate an understanding of the Fourth Amendment’s prohibition against unreasonable searches and seizures in the context of government employment, and apply these principles to the facts to reach a well-reasoned conclusion.

5 points

2. **Establishment Clause**

Comments: Candidates should demonstrate an understanding of the First Amendment Establishment Clause and its application to the facts presented to reach a well-reasoned conclusion.

5 points

3. **Title VII – Religious Discrimination**

Comments: Candidates should demonstrate an understanding of the burden of proof for Title VII religious discrimination cases, based on a failure to accommodate religious beliefs, and apply these principles to the facts to reach a well-reasoned conclusion.

5 points

4. **Civil Procedure- Motion to Dismiss**

Comments: Candidates should demonstrate an understanding of the requirement of the Age Discrimination in Employment Act for an administrative filing before filing a civil complaint, and of the Rules of Civil Procedure insofar as a Motion to Dismiss for Failure to State a Claim may be based on the failure to file an administrative claim of discrimination, and apply the rules to the facts to reach a well-reasoned conclusion.

5 points
Katie, a network news reporter, entered into discussions with WBLE-TV (Station) in Big City, Pennsylvania, to become Station’s 6 PM and 11 PM weekday news anchor. After extensive negotiations, the parties orally agreed that Katie would receive $200,000 per year to anchor the newscasts and a Sunday morning news interview show and a $5,000 monthly personal allowance for clothes and the services of a hairstylist and makeup artist. The parties subsequently signed a detailed written contract which stated that Katie would be paid $200,000 per year to anchor the newscasts and the interview show. The contract made no mention of the monthly allowance. The contract further stated: “The parties intend this writing as the final expression of their agreement and as a complete and exclusive statement of its terms.”

Katie was a highly sought after public speaker. While attending a Big City comedy club, Katie saw Jerry performing his stand-up comedy act. Learning that Jerry also was a paid joke writer for several famous comedians, Katie left a message on Jerry’s Facebook page stating, “My speeches could use some lighter touches.” Jerry wrote jokes specifically for Katie’s use and e-mailed them to her. Katie later sent Jerry a $500 check with a note saying, “Used the jokes in a speech. They were great.” For a period of six months thereafter, Jerry wrote jokes for Katie, and Katie used the jokes and sent a $500 check each month to Jerry.

After signing a long term contract to appear at the comedy club, Jerry leased a house on Lot 1 in Big City from Larry. The written lease provided for $2,000 per month rent and stated that Jerry agreed to take Lot 1 in an “as-is” condition.

Lot 1 and an adjoining parcel, Lot 2, previously had been owned by Gus, who built the houses on both lots. Prior to constructing the houses, several engineers told Gus that connecting Lot 2 directly to a public sewer line in the front of the lot only could be done at a prohibitive cost
because Lot 2’s subsurface was almost entirely solid rock. Gus instead lawfully ran a pipe underground from Lot 2 into the unfinished basement in Lot 1, visibly tagged this pipe “Lot 2 Connector,” and joined the Lot 2 Connector with the sewer pipe serving Lot 1, which connected into another more conveniently accessible public sewer line running along the side of Lot 1. Gus lived on Lot 2 for 15 years before selling it to Amy, its current resident. A year earlier, Gus sold Lot 1 to Larry, who had leased the property from Gus for a number of years. Neither of Gus’ deeds to Larry and Amy mentioned the sewer pipe running from Lot 2 under and into Lot 1.

Three months after moving into Lot 1, Jerry’s house reeked with an overpowering odor of raw sewage due to a tiny break in the Lot 2 Connector and became infested with lice and rodents. Despite receiving numerous complaining telephone calls and e-mails for several weeks from Jerry about the conditions at Lot 1, Larry made no repairs. Finally, Jerry stopped making his monthly rental payments and formally notified Larry that he would not pay rent until Larry remediated the conditions at Lot 1.

1. When Station failed to pay the $5,000 monthly personal allowance, Katie sued for breach of contract. At trial, Katie attempted to offer evidence that Station orally agreed prior to the signing of the contract as well as after the signing of the contract that it would pay the $5,000 allowance. How should the court rule on Station’s objections to this evidence based upon the parol evidence rule?

2. Jerry sent new jokes to Katie for three consecutive months after the initial period for which he had been paid, and Katie used the jokes in her speeches. At the end of the three months, Katie refused Jerry’s demand for payment stating that her prior checks were simply a gratuity. Can Jerry successfully establish that he had a valid contract to write jokes for Katie?

3. Larry sued Jerry for the unpaid rent and for possession of Lot 1. What common law defense should Jerry raise in response to Larry’s suit?

4. Assume for this question only that Larry decided to disconnect and cap the Lot 2 Connector running from Lot 2 under and into the house on Lot 1 as a way of eliminating the sewage odor. What substantive legal theory should Amy use in a suit to prevent Larry’s planned action?
Question No. 5: Examiner’s Analysis

1. The court should sustain Station’s objection to the admission of the prior oral agreement about the $5,000 monthly personal allowance on the ground that it would violate the parol evidence rule, but the court should overrule the objection as to the subsequent oral agreement because the parol evidence rule does not prohibit the admission of subsequent oral agreements or modifications.

Station’s objection to Katie’s attempt to offer evidence of prior and subsequent oral agreements to pay the $5,000 monthly personal allowance is based upon the parol evidence rule. The Pennsylvania Supreme Court has explained the parol evidence rule as follows:

Where the parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement. All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract. ...[U]nless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms and agreements cannot be added to nor subtracted from by parol evidence.


Whether parol evidence is admissible to vary the terms of a written agreement involves a two-fold determination. First, a court must determine whether the written agreement represents the entire contract between the parties. Green Valley Dry Cleaners, Inc. v. Westmoreland County Indus. Dev. Corp., 832 A.2d 1143, 1154 (Pa. Cmwlth. 2003), appeal denied, 578 Pa. 696, 851 A.2d 143 (2004). If the written document “appears to be a contract complete within itself, couched in such terms as import a complete legal obligation without any uncertainty as to the object or the extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of the undertaking, were reduced to writing.” Gianni v. Russell & Co., supra, 281 Pa. at 323, 126 A. at 792. The presence of an integration clause in a contract is viewed as a clear and conclusive sign that the writing contains the entire agreement and expresses all of the parties’ negotiations, conversations and agreements made prior to its execution. McGuire v. Schneider, Inc., 368 Pa. Super. 344, 534 A.2d 115, 117 (1987), affirmed per curiam, 519 Pa. 439, 548 A.2d 1223 (1988). Here, a court likely would conclude that the written contract between Katie and Station constituted the entire agreement between the parties. The written contract not only was described as “detailed” in its terms but also contained an integration clause.

Secondly, a court must examine whether the prior oral agreement or statement comes within the field embraced by the subsequent written agreement. Green Valley Dry Cleaners, Inc. v. Westmoreland County Indus. Dev. Corp., supra. This is done by comparing the earlier terms and determining whether the parties would naturally and normally have included the oral term in the written agreement. “If they relate to the same subject matter and are so interrelated that both would be executed at the same time and in the same contract, the scope of the subsidiary
agreement must be taken to be covered by the writing.” *Gianni v. Russell & Co.*, *supra*, 281 Pa. at 323-24, 126 A. at 792. Since the prior oral agreement and written agreement both relate to the subject of the compensation that Katie would receive by working for the Station, it is reasonable to assume that the subject of the monthly allowance discussed by the parties would naturally and normally be covered by the subsequent written agreement. Because the prior oral agreement that Katie seeks to introduce directly contradicts the integrated written contract, the court should sustain an objection made by Station based upon the parol evidence rule.

The parol evidence rule, however, has no application to oral or written agreements or statements that are made subsequent to the execution of the written agreement. J. E. MURRAY, JR., MURRAY ON CONTRACTS, § 84 (A), at 435 (4th ed. 2001). The Pennsylvania Supreme Court colorfully described this limitation on the application of the parol evidence rule as follows: “The most ironclad written contract can always be cut into by the acetylene torch of parol modification supported by adequate proof.” *Wagner v. Graziano Construction Co.*, 390 Pa. 445, 448, 136 A.2d 82, 83 (1957). Since Katie also wished to offer evidence of a subsequent oral agreement or an oral modification of the terms of the written agreement, it would not be barred by the parol evidence rule. Therefore, the court should admit the evidence of a subsequent oral agreement between Station and Katie concerning the payment of the monthly personal allowance.

2. **Jerry likely can establish that he had a valid implied-in-fact contract to write jokes for Katie.**

Contracts may be classified as being express or implied-in-fact. An express contract is one where the parties specifically declare the terms of the agreement either orally or in writing. *Department of Environmental Resources v. Winn*, 597 A.2d 281, 284 n. 3 (Pa. Cmwlth. 1991), *appeal denied*, 529 Pa. 654, 602 A.2d 863 (1992). An implied-in-fact contract is one where the parties assent to the obligations to be incurred, but instead of being expressed in words, the parties’ assent or intent to contract may be inferred wholly or partly from their conduct. *Cameron v. Eynon*, 332 Pa. 529, 3 A.2d 423 (1939); Restatement (Second) of Contracts, § 4 (1981). A contract implied-in-fact has the same legal effect as any other contract. *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 603 Pa. 198, 983 A.2d 652 (2009).

Because it is the parties’ outward and objective manifestation of assent, as opposed to their undisclosed and subjective intentions, that matters in determining intent to contract, an implied-in-fact contract can be found by looking to the surrounding circumstances. An offer and an acceptance and a moment of formation do not need to be identified in order for an implied-in-fact contract to be legitimately inferred based upon common understanding and the course of dealings of the parties. *Ingrassia Const. Co., Inc. v. Walsh*, 337 Pa. Super. 58, 66-67, 486 A.2d 478, 483 (1984).

Moreover, Pennsylvania law generally will imply a promise to pay for valuable services rendered with the knowledge and approval of a recipient. “A promise to pay the reasonable value of a service is implied where one performs for another, with the other’s knowledge, a useful service of a character that is usually charged for, and the latter expresses no dissent or avails himself of the service.” *Martin v. Little, Brown & Co.*, 304 Pa. Super. 424, 450 A.2d 984,
In this case, there was no express agreement between Katie and Jerry for joke-writing services. Jerry, however, can assert that an implied-in-fact contract was created based on the outward and objective manifestation of intent to contract as seen in the surrounding circumstances. Jerry can argue that Katie knew that Jerry was a paid joke writer when she placed the message on his Facebook page that her speeches “could use some lighter touches.” When Jerry wrote special jokes and sent them to Katie, she availed herself of Jerry’s services as a joke writer by using his jokes in a speech. Moreover, Katie never stated that her $500 checks were intended as a mere gratuity until three months after she had stopped paying for the jokes. Jerry further can argue that an implied contract can be inferred based upon their regular course of dealing over a period of six months during which Jerry wrote jokes for Katie, Katie availed herself of Jerry’s services by using the jokes in her speeches and paid Jerry for his services without any objection or qualification.

Based upon the stated facts, the trier of fact would likely determine that the conduct of Katie and Jerry outwardly manifested an intent to contract. Therefore, Jerry will be able to successfully establish that he had an implied-in-fact contract to write jokes for Katie.

3. Jerry should raise breach of the implied warranty of habitability as a defense to Larry’s suit seeking unpaid rent and possession of Lot 1.

In Pennsylvania, a warranty of habitability is implied in all residential leases. Under this warranty, the landlord represents that the leased premises will be free of defects “of a nature and kind which will prevent the use of the dwelling for its intended purpose to provide premises fit for habitation by its dwellers. At a minimum, this means that the premises must be safe and sanitary.” Pugh v. Holmes, 486 Pa. 272, 289, 405 A.2d 897, 905 (1979). A breach of the implied warranty of habitability may serve not only as the basis of a complaint but also as a defense or a counterclaim to a landlord’s suit for rent or possession. Kuriger v. Cramer, 345 Pa. Super. 595, 498 A.2d 1331, 1336 (1985).

To assert a claim of breach of the implied warranty of habitability, a tenant must show that the defect in the leased premises is material. Materiality of the breach of the implied warranty of habitability is a question to be decided by the trier of fact on a case-by-case basis and is to be determined by examining such factors as regulatory code standards and the nature, seriousness and duration of the defect. Pugh v. Holmes, supra, 486 Pa. at 289, 405 A.2d at 905-06. “Additionally, . . . a tenant must prove [that] he or she gave notice to the landlord of the defect or condition, that [the landlord] had a reasonable opportunity to make the necessary repairs and that [the landlord] failed to do so.” Staley v. Bouril, 553 Pa. 112, 117, 718 A.2d 283, 285 (1998), quoting, Pugh v. Holmes, 486 Pa. at 290, 405 A.2d at 906.

A number of remedies are available to a tenant who can demonstrate a breach of the implied warranty of habitability. These remedies include: (1) the termination of the obligation to pay rent where the tenant surrenders the possession of the premises; (2) full or partial rent abatement where the tenant remains in possession of the premises; (3) the right to repair the defect or condition and to deduct the cost of the repair from the rent; and (4) other traditional
contract remedies such as specific performance. *Pugh v. Holmes*, supra, 486 Pa. at 291-95, 405 A.2d at 907-08.

The facts here provide a basis for Jerry’s assertion of a breach of the implied warranty of habitability defense to Larry’s suit. An overpowering odor of raw sewage and an infestation of lice and rodents more than likely would be found to constitute material health and sanitation defects making Lot 1 unfit for habitation. *See, e.g., Beausang v. Bernotas*, 296 Pa. Super. 335, 442 A.2d 796 (1982) (lice infestation); *Beasley v. Freedman*, 256 Pa. Super. 208, 389 A.2d 1087 (1978) (rodent/insect infestation); *see also*, R. Friedman, Pennsylvania Landlord-Tenant Law and Practice, § 3.6b, at 186 (3rd ed. 2001). (defective waste disposal system and vermin infestation are likely breaches of implied warranty of habitability). Additionally, Jerry gave Larry notice of the defect on the leased premises and an opportunity to make repairs by making numerous telephone calls and sending e-mails for several weeks complaining about the conditions at Lot 1, and Larry failed to make repairs. Finally, Jerry utilized one of the recognized remedies for total breach of the implied warranty of habitability and completely abated his rent payments. As a result, there was no unpaid rent which would have required him to give up possession of Lot 1.

Furthermore, Larry can not argue that Jerry waived the implied warranty of habitability by agreeing to lease Lot 1 in an “as-is” condition. In *Fair v. Negley*, 257 Pa. Super. 50, 390 A.2d 240 (1978), a landlord included a provision in a lease that the tenant recognized certain defects in the leased premises but agreed to accept the premises in an “as-is” condition. The Pennsylvania Superior Court in *Fair* held that a waiver of the implied warranty of habitability would violate the public policy reasons sought to be achieved by the warranty. Despite the doctrine of freedom of contract, the Superior Court concluded that the waiver of the implied warranty of habitability by the insertion of the as-is language was unenforceable in a residential lease.

Based upon the stated facts, Jerry should raise breach of the implied warranty of habitability as a defense to Larry’s suit seeking unpaid rent and possession of Lot 1.

4. To prevent Larry from disconnecting the sewer pipe running from Lot 2 under and into the house on Lot 1, Amy should claim that she has an implied easement by prior use.

Although Amy’s deed from Gus made no mention of the Lot 2 Connector, the sewer pipe running from Lot 2 under and into Lot 1, she nevertheless should assert that Larry cannot disconnect this sewer pipe because she has an implied easement to continue to use it for the benefit of her property. Pennsylvania law has long recognized that an easement can be created by implication. *Bucciarelli v. DeLisa*, 547 Pa. 431, 691 A.2d 446 (1997). An implied easement, which also is referred to as an implied easement by prior use, an easement by implied reservation or quasi-easement, arises when an owner of land subjects part of his land to any open, visible, permanent and continuous servitude or easement in favor of another part of his land and then conveys either part to a purchaser. Under such circumstances, the implication is that the purchasing grantee takes subject to the burden or benefit as the case may be even though a servitude or easement is not expressly reserved in favor of the grantor. *Burns Manufacturing Company, Inc. v. Boehm*, 467 Pa. 307, 314, 356 A.2d 763, 767 (1976).
In determining whether an easement has been created by implication, Pennsylvania law has traditionally focused on four elements. They are: (1) a separation of title from a common owner; (2) prior to separation, the use giving rise to the easement shall have been so long continued and so obvious or manifest as to show an intent that it was meant to be permanent; (3) the easement shall be necessary to the convenient and beneficial enjoyment of the land granted or retained; and (4) the servitude is continuous and self-acting. Becker v. Rittenhouse, 297 Pa. 317, 325, 147 A. 51, 53 (1929). Amy can cite a number of facts to support a claim that the traditional elements for an easement by implication have been established in this instance.

Lot 1 and Lot 2 had a common owner, Gus, at the time of the separation of title. Additionally, prior to Gus’s separation of title, Gus lived on Lot 2 for 15 years. The sewer pipe running from Lot 2 under and into Lot 1 undoubtedly would have been continuously used during this period of time and would suggest that it was intended to be of a permanent nature. See, Bucciarelli v. Delisa, supra, 574 Pa. at 439, 691 A.2d at 449-50.

Further, the necessity that is required for an implied easement under Pennsylvania law is not absolute necessity, but a showing of convenience or benefit to the dominant estate. Where some degree of necessity exists, though it falls short of absolute necessity, the necessity is a circumstance that weighs in favor of finding that an easement was intended to exist. See, Hann v. Saylor, 386 Pa. Super. 248, 251 n.1, 562 A.2d 891, 893 n.1 (1989). The facts here support a finding that an implied easement over Lot 1 is reasonably convenient and beneficial to Lot 2, the dominant estate. The burden upon Lot 1 of continuing to have the underground pipe serve Lot 2 is probably slight. On the other hand, a considerable burden would be created for Lot 2 if another way had to be used to connect Lot 2 to the public sewer system. The facts state that Lot 2’s subsurface was almost entirely solid rock. Because of this condition, connecting Lot 2 to the public sewer line running in the front of the lots could be accomplished, but at a prohibitive cost. Therefore, while it was not absolutely necessary that a connection to the public sewer system for the use of Lot 2 had to be made by utilizing a pipe running from Lot 2 under and into Lot 1, such a connection would be convenient or beneficial to Lot 2 because the prohibitive cost of a more direct connection to the public sewer system could be avoided.

Another method also mentioned in Pennsylvania case law for determining the existence of an implied easement is the multi-factor balancing approach of Section 476 of the Restatement of Property. Thomas v. Deliere, 241 Pa. Super. 1, 5 n.2, 359 A.2d 398, 400 n.2 (1976). Although it has described the factors listed in Section 476 as “useful and persuasive” in determining the existence of an easement by implication, the Supreme Court of Pennsylvania has declined to adopt the Restatement test. See, Bucciarelli v. DeLisa, supra, 547 Pa. at 437 n.1, 691 A.2d at 448 n.1 (1997). Following Bucciarelli, Pennsylvania appellate courts likewise have declined to apply the Restatement test and have applied the traditional factors for determining the existence of an implied easement. Daddona v. Thorpe, 749 A.2d 475, 485 (Pa. Super. 2000); Tricker v. Pennsylvania Turnpike Comm’n, 717 A.2d 1078, 1081 n.6 (Pa. Cmwlth. 1998).
Finally, the prior use from which the existence of an easement can be implied must have been known to the parties, or, at least have been within the possibility of their knowledge at the time of the conveyance. Pennsylvania law thus imputes to a purchaser knowledge of facts concerning the existence of an easement which would have been apparent from a reasonably prudent investigation of the premises. *Bucciarelli v. DeLisa, supra,* 547 Pa. at 436-37, 691 A.2d at 448. (Citation omitted). Here, although the sewer pipe running from Lot 2 was underground, the facts state that this pipe went into the unfinished basement on Lot 1 and was visibly identified by a tag labeled “Lot 2 Connector.” Moreover, Larry leased Lot 1 from Gus for a number of years before purchasing it. The use of the sewer pipe to serve Lot 2 would have been apparent or could have been ascertained during Larry’s lease of Lot 1 as well as prior to the conveyance by an inspection of the premises. *See, Vanderwerff v. Consumers Gas Co.,* 166 Pa. Super. 358, 362, 71 A.2d 809, 811 (1950). Therefore, Larry purchased Lot 2 with actual or constructive knowledge of the easement.

Based upon an application of these traditional factors set forth under Pennsylvania law, Amy should argue that Larry should be prohibited from disconnecting the sewer line running from Lot 2 into Lot 1 because an implied easement by prior use was created and is binding on Larry allowing her to continue to use the sewer line.
Question No. 5: Grading Guidelines

1. **Parol Evidence Rule**

Comments: Candidates should state the parol evidence rule and should apply the rule in reaching a well-reasoned conclusion concerning whether evidence concerning an oral prior agreement and a subsequent oral agreement should be barred.

6 Points

2. **Implied-in-Fact Contract**

Comments: Candidates should recognize that contracts can be implied based upon the parties’ outward and objective manifestation of assent to contract. Candidates should discuss the importance of such factors as the surrounding circumstances or the course of dealings of the parties in determining whether an implied-in-fact contract should be found to exist. Candidates should utilize these factors in analyzing the stated facts in order to determine whether a valid contract existed.

4 Points

3. **Implied Warranty of Habitability in a Residential Lease**

Comments: Candidates should recognize that a warranty of habitability is implied in all residential leases in Pennsylvania. Candidates should discuss the elements necessary to assert breach of the implied warranty of habitability as a defense to an action and the remedies available to a party asserting the warranty. Candidates also should discuss whether Pennsylvania law allows a waiver of the implied warranty of habitability. Candidates should analyze the stated facts in reaching a well-reasoned conclusion regarding whether the implied warranty can be asserted as defense.

5 Points

4. **Implied Easement by Prior Use**

Comments: Candidates should recognize that easements can be created by implication based upon a prior use. Candidates should discuss the elements needed for the creation of an easement by implication under Pennsylvania law. Candidates should analyze the stated facts in reaching a well-reasoned conclusion regarding whether an implied easement based upon a prior use can be asserted as a viable legal theory.

5 points
Perry holds degrees in geology and chemistry. Perry works for Coal, Inc. (“Coal”), a publicly traded Pennsylvania corporation, that operates in Pennsylvania. Perry is a vice president of Coal and owns twenty percent of its stock. He visits Coal’s mine sites regularly and is responsible for dealing with water emanating from Coal’s mine sites (“Mine Water”).

Perry has proposed a new method of treating Mine Water. It involves controlled introduction of chemicals to the Mine Water. To test his theory, Perry needs three machines built to his specifications. The machines will need to be specially manufactured.

Last month, Perry contacted Equipco, and as Coal’s agent, made an oral contract for Equipco to manufacture the machines to Perry’s specifications for a price of $30,000. Equipco began manufacture of the machines. Perry also visited Plastics to buy a dissolving plastic lining to place under the machines. Plastics advised that such linings can no longer be produced by it or others due to new environmental regulations but that the regulations allow the sale and use of any inventoried dissolving plastic linings. It offered Perry its last roll, disclosing it could not get more dissolving plastic lining in the market. Perry agreed, paid a deposit and signed a valid written contract. Plastics agreed to hold the roll, at its risk, until Perry said it was needed.

Perry has concerns about Coal’s mine Site No. 1. Perry has discovered a new seepage of Mine Water at the site. The water is highly contaminated. Perry decided to contain the water until he could try his new technology by collecting the water and piping it to a pond on Site No. 1. Perry and an employee of Coal completed the piping project last month. Perry did not consult with counsel or Coal’s engineer prior to diverting the water, thinking he had the expertise to deal with the situation. Perry negligently failed to take into account the capacity of the pond to handle the new flow of water if a heavy rain storm occurred.
Last week, after a severe storm, the pond on Site No. 1 overflowed and spilled contaminated water on to an adjoining farm owned by Fred. Fred called a Coal employee he knew to ask about the pond and learned that Perry had diverted contaminated water to the pond. Fred called Able, Coal’s in-house counsel, and advised Able that he had called state regulators to report the diversion to the pond and had contacted counsel about suing Coal and Perry.

Able advised Perry and Coal’s president of the call from Fred. Able, mindful that only a handful of people were aware of the situation at Site No. 1 and aware of the risk of civil liability and fines for Coal, immediately sold his 10,000 shares of Coal stock at $20 per share.

Coal immediately fired Perry. Unwilling to proceed with Perry’s treatment plans without an independent engineering report, Coal called Equipco and cancelled the machine order. Equipco advised the machines were 80% complete and could not be marketed elsewhere. Coal also called Plastics and learned that lightning during last week’s storm caused a fire destroying the roll of dissolving plastic lining being held for Coal.

Yesterday, state regulators issued a public order directing Coal to correct the water situation at Site No. 1 and imposed a large civil fine on Coal for diverting the water without a permit in violation of state regulations. Coal’s stock immediately fell to $10 per share.

1. Assuming Perry’s act of diverting water to the pond was negligent, but not criminal, if Fred sues Perry in tort for contaminating his farm and Perry defends on the basis that he was acting as an agent for the corporation and thus should not be personally liable, what theory should be advanced by Fred’s counsel to support personal liability for Perry?

2. Can Equipco enforce the oral contract with Coal?

3. What are Plastic’s and Coal’s rights and duties relative to the contract for the destroyed roll of dissolving plastic lining?

4. Under federal securities laws, does Able have any liability as a result of the sale of his stock?
1. Fred’s counsel should argue the participation theory (liability for torts personally committed) as the basis for Perry’s personal liability.

It is generally recognized that officers, directors and shareholders of a corporation are not personally liable for claims asserted as a result of wrongful action by a corporation. Pennsylvania, however, recognizes that an officer of a corporation who takes part in the commission of a tort by the corporation may be personally liable for the tort. See Wicks v. Milzoco Builders, Inc., 503 Pa. 614, 470 A.2d 86 (1983). The Wicks court recognized the “participation theory” as a basis for liability where a corporate officer had played an active part in the commission of a tort.

Under the participation theory defendants are liable on the theory that they personally participated in the alleged tortious acts committed on behalf of the corporations. Id. Liability under the participation theory is to be distinguished from liability under a piercing the corporate veil theory. “There is a distinction between liability for individual participation in a wrongful act and an individual’s responsibility for any liability-creating act performed behind the veil of a sham corporation. Where the court pierces the corporate veil, the owner is liable because the corporation is not a bona fide independent entity; therefore, its acts are truly his. Under the participation theory, the court imposes liability on the individual as an actor rather than as an owner.” Id. Here, there is no evidence that Coal is a sham corporation. It is publicly traded with multiple stockholders. There is no evidence of undercapitalization or use of Coal as an alter ego of Perry. Thus, a piercing the corporate veil argument is not supported against Perry as a part owner of Coal.

The participation theory also requires that the corporate officer engage in misfeasance rather than nonfeasance. “To impose liability on a corporate officer pursuant to the participation theory, a plaintiff must establish that the corporate officer engaged in misfeasance, i.e., ‘the improper performance of an act.’ Citation omitted. However, a corporate officer cannot be held personally liable for nonfeasance, i.e., ‘omitting to do something which ought to be done.’” Shay v. Flight C. Helicopter Services, Inc., 822 A.2d 1, 18 (Pa. Super. 2003). In essence, the corporate officer must have actively participated in the commission of the tort.

Perry actively supervised and participated in the installation of the piping system that carried the contaminated water to the pond on Coal’s site. In fact, it was Perry’s plan. The facts also are clear that Perry’s act of piping the water was negligent relative to the failure of the pond to handle the water when the storm occurred and the resultant damage to Fred’s land. Fred’s counsel should argue that as an active participant in the commission of the tort that damaged Fred’s land, Perry should have personal liability under the participation theory even though he was acting as an employee and officer of Coal at the time.
2. The oral contract entered into by Equipco and Coal should be enforceable under the Pennsylvania Uniform Commercial Code (the “Code”).

Article II of the Code on Sales generally is applicable to transactions in goods. 13 Pa. C.S.A. §2102. “Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Division 8) and things in action.” 13 Pa. C.S.A. §2105(a). The machines being manufactured by Equipco for Coal are goods under the Code that Equipco is selling to Coal.

Section 2201 of the Code (the statute of frauds) generally provides that a contract for the sale of goods for a price of $500 or more is unenforceable unless in writing and signed by the party to be charged. 13 Pa. C.S.A. §2201(a). The contract between Equipco and Coal is oral and, thus, appears to violate the Code statute of frauds. The Code does, however, provide several exceptions to the general rule in the statute of frauds. An oral contract can be enforced if certain requirements can be met by the party seeking to enforce the contract. One exception allows for enforcement of an oral contract if the goods being sold have been specially manufactured for the buyer and are not suitable for sale by the seller in the ordinary course of business. Section 2201(c)(1) of the Code provides:

A contract which does not satisfy the requirements of subsection (a) but which is valid in other respects is enforceable: (1) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the business of the seller and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; . . .

13 Pa. C.S.A. §2201(c)(1).

For this exception to the statute of frauds to apply the party seeking to enforce the contract must establish the following five elements: (1) the goods are or must have been specially manufactured for the buyer; (2) the goods once manufactured must be goods not suitable for sale to other persons in the ordinary course of the seller’s business; (3) the seller must have made a substantial start in the manufacture of the goods; (4) the seller’s beginning of manufacture occurred under circumstances that reasonably indicate the goods are for the buyer; and (5) the actions of the seller must have occurred before the seller received any notice of any repudiation. See, generally, White and Summers, Uniform Commercial Code, §2-5 (4th Ed. 1995).

Equipco should be able to establish all elements necessary to meet the specially manufactured goods exception to the statute of frauds. The machines have been specially manufactured for Coal. They are not suitable for resale in the ordinary course of Equipco’s business. The machines were 80% complete when Equipco received notice of repudiation from Coal. This exception to the statute of frauds should apply, and Equipco can enforce the contract with Coal.
3. Plastics would be relieved from performance under the contract and Coal would be entitled to a refund of its deposit with no further obligation to Plastics.

As stated above, Article II of the Code on Sales generally is applicable to transactions in goods. 13 Pa. C.S.A. §2102. “Goods” means all things (such as the roll of plastic) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Division 8) and things in action.” 13 Pa. C.S.A. §2105(a). The roll of plastic constitutes goods under the Code that Plastics is selling to Coal.

Section 2613 of the Code provides, inter alia, “[w]here the contract requires for its performance goods identified when the contract is made and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, . . . then (1) if the loss is total the contract is avoided.” 13 Pa. C.S.A. §2613(1). If a contract presupposes the existence of specific goods (in this case the last roll of dissolving plastic lining) and those goods are destroyed through no fault of either party the contract is avoided. It is important to note that the goods in question did not consist of stock plastic but instead was the last roll of dissolving plastic lining that could not be manufactured again by Plastics and that was not available in the marketplace. Plastics could not replace the dissolving plastic lining from its stock, or manufacture more of it; nor could it purchase a replacement roll in the marketplace.

The roll of plastic in question had a unique quality in that it was the last roll of its type available. There is no evidence that either Plastics or Coal were at fault for the destruction of the roll of plastic. The facts indicate that a lightning storm caused the fire. Risk of loss had not yet passed to the buyer. Plastics had agreed to store the roll of plastic at its plant at its risk. Under Section 2613 the total loss of the roll of plastic would support an argument that the contract is avoided with neither party having any further obligation to the other to perform under the contract. Coal would be entitled to a refund of its deposit.

4. Able violated Federal Securities law when he sold his shares in Coal on the basis of material nonpublic information that he knew would affect the value of the shares, and will be liable for such violation.

Rule 10b-5 (17 C.F.R. §240.10b-5) promulgated by the Securities and Exchange Commission under and in support of Section 10(b) of the Securities Act of 1934 (15 U.S.C. §78j(b)) provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of circumstances under which they were made, not misleading, or
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Rule 10b-5-1 (17 C.F.R. §240.10b5-1) provides, “[t]he ‘manipulative and deceptive’ devices prohibited by Section 10(b) of the Act (15 U.S.C. 78j) and §240.10b-5 thereunder include, among other things, the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information.” 17 C.F.R. §240.10b5-1(a). Able sold his shares at $20 because he believed that action by state regulators would result in civil fines being imposed upon Coal that would impact the value of and share price of Coal’s publicly traded shares. The facts indicate that Able was correct and that once the state’s order and fine was made public Coal’s shares dropped to $10 per share. When Able sold his shares the facts indicate that only a handful of people were aware of the pending action by state regulators. One can assume that the purchaser of the shares was not aware of the pending state action.

Able used information made available to him as Coal’s counsel for his own benefit at the expense of the purchaser of the stock that he sold. His use of this inside information operated as a fraud and deceit upon the purchaser of the stock under Rule 10b-5.

Able could have liability to the purchaser for the loss incurred by the purchaser. Section 78t-1 of the Securities Act of 1934 provides, “[a]ny person who violates any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security while in the possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the sale of securities that is the subject of such violation, has purchased securities of the same class.” 15 U.S.C. §78t-1. Able will be required to reimburse the loss to a contemporaneous purchaser of the securities if sued by the purchaser. Able could also face action from the Securities and Exchange Commission to impose civil and criminal penalties as a result of his actions. 15 U.S.C. §78u-1; 15 U.S.C. §78ff.
Question No. 6: Grading Guidelines

1. Corporations—Liability under participation theory

Comments: Candidates should discuss the participation theory exception to insulation of corporate officers from liability in tort situations and recognize that a corporate officer can be liable for his or her own tortious conduct.

4 points

2. Uniform Commercial Code—Sales—Statute of Frauds Exception

Comments: Candidates should discuss the specially manufactured goods exception to the statute of frauds, and apply the exception to the facts in reaching a well reasoned conclusion.

6 points

3. Uniform Commercial Code—Sales—Destruction of Special Goods

Comments: Candidates should discuss the effect the destruction of special identified goods prior to risk of loss passing to the buyer has on a contract between the parties.

5 points

4. Corporations—Insider trading

Comments: Candidates should discuss the insider trading that occurred and the effect and liability associated therewith.

5 points
Supreme Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination
February 28 and 29, 2012

PERFORMANCE TEST
February 28, 2012

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

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FILE
To: Applicant  
From: Susan Suite  
Date: February 28, 2012  
Re: Wolf v. Lam

Our client, Mary Lam, has been sued by William Wolf, to whom she sold a property located at 666 Elm Street in Madison, Pennsylvania, in 2007. In 1975, Ms. Lam had acquired the property from the City of Madison, which had previously acquired it from Frank Fooledya in 1972 for unpaid taxes. Ms. Lam, who is a retired dental hygienist, bought the property, which abuts her house, to use as an extension of her back yard. She told me that because she bought it from the city she did not order a title search, and she believed that she had good title free from all claims. Mr. Wolf is an experienced real estate developer who has, over the last 25 years, purchased, developed, and sold or rented numerous properties in Madison.

In late October 2011, Mr. Wolf called Ms. Lam and told her that he saw a work crew on the property digging a hole with a backhoe. When he ordered them off, they showed him PennDOT ID and said that PennDOT owned the property. Mr. Wolf then asked Ms. Lam to give him back his money, but when she refused he filed a civil complaint against her.

The Complaint raises several claims in connection with the purchase of the property that are based on an interest that PennDOT allegedly has in the property and seeks to rescind the deed and recover the purchase price. Mr. Wolf has instituted a separate suit against the title company that insured his title for failure to mention the PennDOT interest in the property. Madison Title Insurance Company had issued a policy of title insurance to Mr. Wolf, insuring that he had fee simple title to the property, free and clear of all liens and encumbrances.

I believe that Ms. Lam may have several valid defenses to this suit that are suggested by the materials in the attached Library. I would like you to draft a persuasive memorandum of law in which you identify and discuss each of the defenses we should assert to each claim that has been raised against our client in the Complaint. A defense should be raised in the alternative, even if it is inconsistent with another defense that has been raised. As I may send this Memorandum of Law to opposing counsel to attempt to persuade him to withdraw the Complaint, your conclusions should not contain words such as “likely”, “probably”, “possibly”, and the like. The Memorandum of Law should follow the format and structure set forth in the memorandum in the File.

The File contains the Complaint with exhibits. The Complaint, which was filed within the statute of limitations period, included the proper Notice to Defend and verification but these documents have not been included in the File. 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: All associates
From: Susan Suite
Date: July 2, 2006
Re: Instructions for drafting briefs and memoranda

The following instructions for drafting briefs and persuasive memoranda of law should be followed by all firm attorneys. You do not need to draft a caption, as our software will insert one in the final copy.

I. The document should be entitled: “Brief” or “Memorandum of Law.”

II. The first section should be titled “Nature of the Dispute” and should briefly state what the case is about.

III. The second section should be titled “Statement of Questions Presented.”

1. Each question should be separately stated and numbered.

2. Each question should be stated as a complete sentence in question form beginning with a verb such as “is”, “should”, “did”, etc., and end with a question mark. Do not begin with the word “whether.” The question should be answered with one word, either “yes” or “no.”

IV. The third section should be titled “Argument.”

1. There should be a separately numbered heading for each question presented in the form of a short statement that responds to the issue raised by the question.

2. An analysis should be set forth for each question which applies the legal principles to the relevant facts. Authorities should be cited, using short, informal citation forms (Bluebook format is not required). Do not cite authorities that you have not read.

3. The analysis for each question should end with a one sentence conclusion.

V. Finally, there should be a section titled “Conclusion” in which you state in non-argumentative fashion the relief to which our client is entitled.
In the Court of Common Pleas of Madison County

WILLIAM WOLF

v.

MARY LAM

Civil Action No. 2012-17

COMPLAINT

Plaintiff comes, by his attorney, and complains against defendant upon a cause of action of which the following is a statement.

1. Plaintiff is William Wolf, an individual residing in the City of Madison, Madison County, Pennsylvania.

2. Defendant Mary Lam is a resident of Madison County, Pennsylvania.

3. On or about September 1, 2007, defendant Lam entered into an agreement of sale to sell property known as 666 Elm Street, Madison, PA (the Property) to plaintiff William Wolf for $500,000.00. The agreement of sale is attached hereto as Exhibit “A”.

4. On or about December 5, 2007, settlement on the agreement of sale occurred, and in connection therewith, plaintiff Wolf paid $500,000.00 to defendant Lam, and defendant Lam executed and delivered a special warranty deed to the Property. A copy of the deed from Lam to Wolf is attached hereto as Exhibit “B”.

5. Upon information and belief, at the time she entered into the agreement of sale, defendant Lam mistakenly believed she owned the Property in fee simple free of all liens and encumbrances.

6. On or about November 4, 2011, plaintiff Wolf discovered that the Property was owned by PennDOT pursuant to a deed dated April 1, 1960, from Frank Fooledya to PennDOT, a copy of which is attached hereto as Exhibit “C”.

7. Wolf intended to develop the Property as a multi-story condominium project, and would not have entered into the agreement of sale nor closed the transaction if he had known about PennDOT’s interest.
Count 1

8. Defendant Lam breached the agreement of sale by failing to deliver sufficient title and comply with other covenants set forth in the agreement of sale.

9. Plaintiff Wolf has been damaged in the amount of $500,000.00; and judgment should be entered in his favor and against the defendant in the amount of $500,000.00, and the deed executed by defendant Lam should be rescinded.

Count 2

10. Defendant Lam has breached her warranty of title and other warranties contained in the deed.

11. Plaintiff Wolf has been damaged in the amount of $500,000.00; and judgment should be entered in his favor and against the defendant in the amount of $500,000.00, and the deed executed by defendant Lam should be rescinded.

Count 3

12. Further, a mutual mistake of fact concerning PennDOT’s interest in the Property has occurred which justifies rescission of the Agreement of Sale.

13. Plaintiff Wolf has been damaged in the amount of $500,000.00; and judgment should be entered in his favor and against the defendant in the amount of $500,000.00, and the deed executed by defendant Lam should be rescinded.

WHEREFORE, plaintiff respectfully requests that the court enter judgment in favor of plaintiff and against the defendant in the amount of $500,000.00, and rescind the deed executed by defendant Lam.

Simon Silver
Simon Silver, Esquire
Attorney for plaintiff

Filed: February 18, 2012
THIS AGREEMENT made this 1st day of September, 2007, between Mary Lam (Seller) and William Wolf (Buyer).

Background

Seller is the owner of that certain real estate situate in the City of Madison, County of Madison, Commonwealth of Pennsylvania, known as 666 Elm Street (the Property). Seller desires to sell, transfer and convey the Property to Buyer, and Buyer desires to purchase and accept the same from Seller upon the terms and conditions hereinafter set forth.

Agreement

NOW, THEREFORE, for and in consideration of the foregoing and of the mutual covenants of the parties herein contained, intending to be legally bound hereby, the parties hereto agree as follows:

1. Agreement of Sale and Purchase. Subject to the terms and conditions set forth in this Agreement, Seller hereby agrees to sell and Buyer hereby agrees to purchase from Seller all of Seller’s right, title and interest in and to the Property, and Seller’s improvements, appurtenances and hereditaments appertaining thereto.

2. Purchase Price. The purchase price for the Property is Five Hundred Thousand Dollars ($500,000.00) (the Purchase Price).

3. Payment of Consideration. Ten Thousand Dollars ($10,000.00) shall be paid upon execution of this Agreement. At the time of Settlement, Buyer shall pay the balance of the Purchase Price in cash or by certified, official or title company check.

4. Representation of Title.
   (a) On the date of settlement, Seller shall deliver or cause to be delivered to Buyer good and marketable title to the Property, as will be insured, at regular rates, by Madison Title Insurance Company, free and clear of all liens, restrictions, easements, encumbrances, leases, tenancies, other rights to use or occupancy, and other title exceptions, excepting only the following: existing building restrictions; zoning regulations and all other laws, ordinances, regulations or restrictions imposed by public authorities in effect as of the date hereof; easements of record existing as of the date hereof; easements apparent and visible upon the surface; and privileges or rights of public service companies.

   (b) If title to the Property cannot be conveyed to Buyer on the date of settlement in accordance with the requirements of this Agreement, then at Buyer’s option, Buyer may complete the transaction accepting the title Seller can give without abatement of purchase...
price or Seller shall return any deposit to Buyer, without diminution and with any interest actually earned thereon, and neither party shall have any further claim, liability, rights, duties and obligations to or against the other hereunder.

5. **Settlement.** Pursuant to this Agreement, settlement on the Property shall be held no later than December 5, 2007, such time being agreed to be of the essence, at the office of Seller’s counsel at Suite and Sauer, P.C., 123 Pepper Street, Madison, Pennsylvania 19998.

6. **Possession.** Possession of the Property shall be given by Seller to Buyer by delivery of special warranty deed, conveying title to the Property, and keys.

7. **Default.**
   (a) In the event the Seller is unable to deliver title as required by Paragraph 4 above, Buyer's remedy shall be as set forth in paragraph 4(b). Specific performance is hereby waived.

8. **Miscellaneous Provisions.**
   (a) **Applicable Law.** It is the intention of the parties that all questions with respect to the construction of this Agreement and rights and liabilities of the parties shall be determined in accordance with the laws of the Commonwealth of Pennsylvania.

   (b) **Entire Agreement.** This Agreement embodies and constitutes the entire understanding among the parties with respect to the transactions contemplated herein, and all prior or contemporaneous agreements, understandings, representations and statements, oral or written, are merged into this Agreement.

   (c) **Release.** By accepting the deed and completing closing hereunder, Buyer hereby releases all claims which Buyer may have against Seller arising out of this Agreement of Sale.

**IN WITNESS WHEREOF,** the parties hereto have executed this Agreement with intent to be legally bound the day and year first above written.

**Seller:**

**Buyer:**

*Mary Lam*  
*William Wolf*
Exhibit “B”

SPECIAL WARRANTY DEED

THIS INDENTURE is made this 5th day of December, 2007, between Mary Lam (“Grantor”) and William Wolf (“Grantee”).

WITNESSETH that the said Grantor for and in consideration of $500,000.00, the receipt of which is hereby acknowledged, has bargained, granted, sold, released, confirmed and conveyed to the said Grantee, his heirs and assigns, in fee simple:

ALL THAT lot or parcel of ground, situate in the City of Madison, County of Madison, Commonwealth of Pennsylvania, known as Lot 3 as shown on the Subdivision Plan of River Estates, dated March 5, 1945, prepared for Madison River Development Corp. by Frank Fulton, Professional Engineer, and further known as 666 Elm Street.

BEING the same premises which the City of Madison conveyed unto Mary Lam in fee by Indenture dated October 21, 1975, and recorded in book 567, page 89.

AND THE SAID GRANTOR on behalf of herself and her heirs and assigns does hereby warrant specially to and defend the Grantee, his heirs and assigns, the title hereby granted against the claims of all persons claiming by, through or under her.

Witness:  R. R. Hood

By:  Mary Lam

Recorded December 6, 2007
Book 789  Page 456
Madison County Recorder of Deeds
Exhibit “C”

DEED IN LIEU OF CONDEMNATION

THIS INDENTURE is made this 1st day of April, 1960, between Frank Fooledya ("Grantor") and Commonwealth of Pennsylvania, Department of Transportation ("Grantee").

WITNESSETH that the said Grantor for and in consideration of $1.00 and other good and sufficient consideration the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, has granted, bargained and sold, released and confirmed and conveyed to the said Grantee, its successors and assigns, an easement for highway purposes on and over:

ALL THAT lot or parcel of ground, situate in the City of Madison, County of Madison, Commonwealth of Pennsylvania, known as Lot 3 as shown on the Subdivision Plan of River Estates, dated March 5, 1945, prepared for Madison River Development Corp. by Frank Fulton, Professional Engineer, and further known as 666 Elm Street.

Witness: __S. Spacely____

By: ____Frank Fooledya____

Recorded April 2, 1960

Book 322  Page  73

Madison County Recorder of Deeds
LIBRARY
21 P.S. § 6. “Warrant specially” construed

A covenant or agreement by the grantor or grantors in any deed or instrument in writing for conveying or releasing land that, he, they, or it “will warrant specially the property hereby conveyed,” shall have the same effect as if the grantor or grantors had covenanted that he or they, his or their heirs and personal representatives or successors, will forever warrant and defend the said property, and every part thereof, unto the said grantee, his heirs, personal representatives and assigns, against the lawful claims and demands of the grantor or grantors, and all persons claiming or to claim by, through, or under him or them.

21 P.S. § 8. Force and effect of words “grant, bargain,” etc.

All deeds to be recorded in pursuance of this act, whereby any estate of inheritance in fee simple shall hereafter be limited to the grantee and his heirs, the words grant, bargain, sell, shall be adjudged an express covenant to the grantee, his heirs and assigns, to-wit: That the grantor was seized of an indefeasible estate in fee simple, freed from incumbrances done or suffered from the grantor (excepting the rents and services due to the lord of the fee) . . .

21 P.S. § 356. Agreements concerning real property

All agreements in writing relating to real property situate in this Commonwealth by the terms whereof the parties executing the same do grant, bargain, sell, or convey any rights or privileges of a permanent nature pertaining to such real property, . . . shall be acknowledged according to law by the parties thereto or proved in the manner provided by law, and shall be recorded in the office for the recording of deeds in the county or counties wherein such real property is situate.

21 P.S. § 357. Constructive notice as result of recordation

The legal effect of the recording of such agreements shall be to give constructive notice to subsequent purchasers, mortgagees, and/or judgment creditors of the parties to said agreements of the fact of the granting of such rights or privileges and/or of the execution of said releases . . .
Supreme Court of Pennsylvania

CARSEK CORP., Appellant

v.

STEPHEN SCHIFTER, INC.

OPINION OF THE COURT

This is an appeal from the final decree of the Court of Common Pleas of Montgomery County, dismissing the complaint in equity of appellant Carsek Corporation. Appellant had sought reformation of a deed and purchase-money mortgage, or payment to it of some $49,000, or other appropriate relief.

On May 11, 1964, James C. Scully entered into a contract to purchase a 57 acre tract of land in Upper Gwynedd Township, Montgomery County, from the appellee, Stephen Schifter, Inc. (hereinafter Schifter) for the purpose of constructing a housing development thereon. Later Carsek, Inc. (hereinafter Carsek) was incorporated with Scully as its president and Carsek was recognized as Scully’s nominee by appellee. The price agreed upon was $200,000-$25,000 in cash on or before settlement and the balance of $175,000 to be paid in four years time, secured by a purchase-money mortgage. However the Agreement of Sale had one very unusual feature bearing on the purchase price. This was the ‘upset’ provision in Paragraph Seven:

‘Prior to settlement hereunder, Buyer will have prepared by the Registered Engineer who has prepared the plan of subdivision described herein above, a list of ‘quantities’. The ‘quantities’ shall set forth all costs for all street improvements necessary to fully improve all ninety lots as the plan will show. . . . If these ‘quantities’ exceed $160,000, Seller will absorb the amount over $160,000, by deducting the overage amount from the consideration being paid by Buyer for the land at settlement. Except that Seller may contest the ‘quantities’ and the amounts in dollars by providing bid(s) from reliable contractor(s) for the item(s) of the work required, and if it (they) are less than the engineer(s) Buyer will agree to accept this lower price or prices.’

Pursuant to an addendum to the agreement, two double sized lots were conveyed by Schifter to Carsek, on September 11, 1964, for $20,000 to enable Carsek to build sample homes thereon, leaving an unpaid balance of $180,000 under the original agreement.

Meanwhile, shortly after execution of the agreement of sale, Carsek engaged
Bernard V. Pannone, a registered professional engineer, to develop a subdivision plan of the tract. Several plans were prepared and submitted to Upper Gwynedd Township authorities and a plan dated July 27, 1964, containing 90 lots and known as Rexdale, was approved. Pannone calculated the ‘quantities’ of the street improvement required to develop the entire tract in accordance with the plan dated July 27, 1964, and gave those calculations to Carsek’s representative during the summer of 1964. From those calculations Carsek’s representative, Walter Hewchuck, prepared tabulations of the estimated improvement costs for the Rexdale subdivision. The complete estimates for the cost of improving Section One of the development were given to appellee’s agent, E. Thomas Flood, II on December 1, 1964. On that date, settlement, set in the Agreement of Sale to occur no later than December 11, 1964, was postponed until January 11, 1965. A complete tabulation of the total estimated improvement costs for the entire subdivision, totalling $217,230.00, was not submitted to appellee or its agent until some forty-five days after settlement.

The settlement took place on January 11, 1965. Attending were several representatives of Carsek, Flood representing Schifter, and representatives of the title insurance company. The Chancellor found that Scully mentioned to Flood that credit for improvements would be expected and Flood replied that there would not be any problem about it. Carsek paid $5,000 in cash at settlement, and gave a purchase-money mortgage and note for $175,000, receiving in return a deed reciting a $180,000 consideration.

About forty-five days after settlement Carsek requested credit for the projected cost of street improvements above $160,000, but Schifter refused to consider any credit since settlement had already passed. Subsequently formal demand for $49,161.00 was made by Carsek and refused by Schifter.

Appellant then brought suit in equity requesting that the deed and purchase-money mortgage be reformed to reflect the adjusted consideration agreed upon by the parties. The Chancellor held that Paragraph Seven of the agreement of sale required that the cost estimates be submitted prior to settlement, and that, having failed to submit the estimates prior to settlement, plaintiff was not entitled to any relief. We disagree.
In the first place, we cannot agree with the Chancellor that time was of the essence of this contract. . . . Furthermore, appellant’s delay resulted in no harm to appellee. . . . Whereas appellee suffered virtually no harm from a slightly delayed performance, it would work a tremendous forfeiture to deny appellant the relief sought. This Court has always sought to avoid forfeitures, and has interpreted contracts in such a way as to effectuate that purpose. (Citations omitted).

* * *

Nor is appellant’s contract right to a credit against the purchase price extinguished by virtue of the fact that settlement was completed. Appellee urges that the agreement of sale merges into the deed, and that therefore no recovery can be predicated upon the earlier agreement. While appellee states the general rule, that rule is subject to certain exceptions under the umbrella of which the instant situation falls. Merger is said to be the rule, except when the intention of the parties is otherwise, or where the stipulations in the contract sought to be enforced are collateral to the functions performed by the deed. (Citation omitted). Actually, the latter exception is subsumed in the former, since the fact that the stipulations are collateral to the functions of the deed gives rise to the inference that the parties did not intend that the stipulations merge into the deed. Surely the obligation placed upon the vendor in the instant case can be said to be collateral to the main function of the deed. ‘A covenant has been said to be collateral, and therefore one which survives delivery of the deed, if it bears no relation to title, possession, quantity or emblements of the transferred property.’ (Citation omitted). Clauses in the contract dealing with consideration fit within this category.

* * *

Thus, in accordance with the agreement of sale, appellant is entitled to receive credit for improvement costs over $160,000.

* * *
Superior Court of Pennsylvania

John Henry LEH et al.
v.

Ronald K. BURKE et al., Appellants

Opinion

This appeal concerns a covenant in a deed from the plaintiffs Leh Brothers to the additional defendant Margaret Michell requiring the grantee and her assigns to pay a proportionate share of the expenses incurred in paving a road abutting the property conveyed.

* * *

Plaintiffs-appellees compose a partnership, Leh Brothers, which engages in the business of developing land. On May 8, 1961, Leh Brothers conveyed a parcel of land, part of a larger tract destined for further subdivision, to Mr. and Mrs. Michell by general warranty deed. The deed indicated that the parcel was composed of two lots, or purparts, both being distinctly described in the deed. Purpart number one consisted of the southern half of the parcel and purpart number two the northern half. The deed pictured the entire property as being bounded on the east by Bandbury Road, which was in existence on the date of the transfer to the Michells, and on the north by Greenwood Road, which although proposed was not constructed at that time.

Due to the division of the property only purpart two actually fronted on the area reserved for the proposed Greenwood Road.

* * *

The description of purpart two is also followed by a . . . paragraph providing ‘(i)n the event that the surface of Greenwood Road North should ever be paved, or in the event that water lines should be placed thereunder, the Grantees, their heirs or successors in title, shall bear their proportionate share of the expense of such improvements.’ The deed was immediately recorded.

Subsequent to the death of Mr. Michell, Margaret Michell conveyed the two lots separately, purpart one being conveyed to Mr. and Mrs. Lamparelli and purpart two to Mr. and Mrs. Burke. Both deeds were specially warranted, both contained the description of their respective lots and referred to the recorded Leh-Michell deed. Neither deed contained any reservations or restrictions such as those in the prior deed, nor was there any mention of the covenant to share the expense of the road construction. . . . The Burkes . . . never searched their title and never knew of the covenant or any of the other restrictions in their deed.
After Margaret Michell had conveyed away all her interest in the original parcel, Leh Brothers began to take steps to begin construction of Greenwood Road. The Burkes were apprised at various stages of the progress of the plans. Eventually a road was completed meeting the township’s requirements and the Burkes were given notice of their share of the cost. Upon their refusal to pay the amount attributed to them, Leh Brothers instituted suit against both the Burkes and the Lamparellis. Margaret Michell was joined as an additional defendant by the original defendants. The case was heard by a judge without a jury who found for plaintiffs Leh Brothers against the Burkes in the amount of $3,855.20. It was further found that the defendant Burkes were entitled to recover any sums paid on the judgment from the additional defendant Margaret Michell. Finally, the court found in favor of the defendant Lamparellis.

Having decided that the covenant is enforceable against the abutting lot presently owned by the Burkes, it is necessary to establish which of the parties is ultimately responsible for making the payments required by the covenant. It is apparent from the wording of the covenant that it was intended to run with the land rather than bind the parties personally to its dictates.

When a promise to do an affirmative act, such as in this case to make a monetary payment, is found to run with the land, the person in possession at the time the obligation matures is responsible for discharging it.

In spite of this long standing principle of law, the Burkes maintain that should they, as present owners of the property have to discharge the covenant, they are entitled to receive any amount thus expended from their grantor, Mrs. Michell. To support this position, they contend that by virtue of the conveyance Mrs. Michell was required to transfer the property free and clear of any liens or encumbrances, that this covenant constitutes an encumbrance on the land and that she, the grantor, must remove it under the terms of the conveyance. With this contention we disagree.

Initially we note that the original Leh-Michell deed containing the covenant and other restrictions was properly recorded. The deed from Mrs. Michell to the Burkes, although failing to reiterate the covenant,
made specific reference to the prior recorded deed. There was no agreement of sale between the parties requiring the grantor to discharge any lien or encumbrances, known or unknown to the grantee. In such a case a grantee is presumed to be on notice of any features of the conveyance which he might find objectionable and settle the matter with his grantor prior to the transfer. It is true that a purchaser is put on notice of all recorded liens and encumbrances . . . and it is his duty to examine the title about to be conveyed to him and point out to the vendor what lines or defects he demands removed . . .’ (citations omitted). If he fails to make the objection and the transaction has been completed, the grantee may still recover but he is limited to the warranties made in his deed. (Citation omitted).

The deed between Mrs. Michell and the Burkes contains a covenant of special warranty. Under this warranty, the grantor agrees to defend the title to the property against any adverse claimant with a superior interest in the land claiming through the grantor. The warranty is not breached by the existence of liens or encumbrances on the property since it protects only title. (Citation omitted). The grantee is protected against encumbrances created or allowed by the grantor by the expression ‘grant and convey’ contained in the deed. By statute, this language creates an express covenant ‘(t)hat the grantor was seized of an indefeasible estate in fee simple, freed from incumbrances done or suffered from the grantor . . .’ 21 P.S. s 8. ‘This covenant is breached if there is an existing encumbrance created by the grantor at the time the deed is delivered.’ (Citation omitted). Therefore, in order to recover against their grantor under the warranty in their deed, these grantees must show that Mrs. Michell caused or allowed a lien or encumbrance to burden the land at the time of the transfer.

* * *

Mrs. Mitchell neither caused the road to be constructed at the time the Burkes were in possession nor failed to pay any claim made against the land while she held title.

* * *

The order of April 2, 1974 is reversed in so far as it holds that Ronald K. Burke and Dorothy J. Burke are entitled to recover from the additional defendant Margaret B. Michell any sums paid to the plaintiffs-appellees Leh Brothers.
Superior Court of Pennsylvania
LOYAL CHRISTIAN BENEFIT
ASSOCIATION
v.
Harold J. BENDER, et al.

Opinion

This appeal was taken from an order sustaining a motion for summary judgment. For the reasons that follow, we affirm.

On August 28, 1981, appellants, Peach Street Investors, and appellee, Loyal Christian Benefit Association, entered into a written agreement whereby appellants agreed to assign their leasehold interest in approximately 10,500 square feet of land situated at 700 Peach Street in Erie, Pennsylvania in exchange for appellee’s payment of $1,350,000.00.

* * *

The warranty provision of the written assignment included a statement that a real estate tax exemption for the subject property had been granted to the lessor/owner by the treasurer of the City of Erie. This exemption purportedly covered all city, county and school district real estate taxes for the years 1982, 1983 and 1984.

When appellee received 1982 tax bills from the three taxing units, it notified appellants. Appellants disclaimed liability for the tax bill; therefore, appellee paid $9,915.00 for the 1982 taxes. As a result, appellee filed an action for declaratory judgment in Erie County seeking judgment in the amount of $9,915.00 and a decree holding appellants and others liable for 1983 and 1984 real estate taxes.

Appellee’s motion for summary judgment was granted by order dated August 12, 1983. The court ruled as a matter of law that appellants breached the warranty of tax exemption for the years 1982, 1983 and 1984. A money judgment was entered against appellants for $9,915.00, and appellants were further declared liable for 1983 and 1984 real estate taxes. Appellants perfected this appeal from that order.

* * *

Appellants’ first argument is that the tax exemption warranty was included in the agreement by mutual mistake. They contend that both parties relied upon a letter written by Erie City Treasurer Carl Cannavino. This letter, which was dated June 29, 1981, notified appellants’ lessor that an exemption from county, city and school district real estate taxes was granted to the subject property for 1982, 1983 and 1984.

Should both parties to a contract be mistaken as to existing facts at the time of
execution, the party adversely affected by such mistake may be given relief. (Citation omitted). Whether relief is granted depends upon the nature and effect of the mistake. The mistake must relate to the basis of the bargain; it must materially affect the parties’ performances; and, it must not be one as to which the injured party bears the risk. (Citation omitted). If this tripartite test is met, the injured party may acquire reformation of the contract or, as appellants are attempting to do here, avoid the contractual obligations.

* * *

Since the warranty paragraph of the agreement refers to a real estate tax exemption granted by the City Treasurer’s office, both parties executed the contract under the mistaken belief that the property was tax exempt. However, this is not the type of mutual mistake for which appellants can obtain relief.

First, the exemption was not the basic premise on which the contract was formed. This contract involved the assignment of a leasehold interest in 10,500 square feet of land for a purchase price of $1,350,000.00.

A real estate tax exemption valued at $9,915.00 a year for three years pales in comparison to the purchase price.

* * *

With an agreement of this considerable value, the real estate exemption could hardly be a basic premise on which the contract was made. For these same reasons, the mistake does not materially affect the parties’ performances.

Finally, we hold that appellants bore the risk that the property was in fact not tax exempt. Assignors of substantial real estate interests, who had the better opportunity to determine the condition of the property, bear the risk that any warranty on condition will be breached.

* * *

Certainly, the risk of no tax exemption cannot fall upon appellee who was not privy to conditions surrounding the writing and procurement of Cannavino’s letter.

* * *

Order affirmed.
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.
Question No. PT: Examiner’s Analysis and Grading Guideline

The applicant is assigned, as an associate in the firm of Suite and Sauer, to draft a persuasive Memorandum of Law for attorney Suite discussing the defenses to a suit which has been filed against a client of the firm.

The facts are presented in a straightforward manner, but must be extracted from the memorandum assigning the task and the attachments to the Complaint. To respond to this assignment, the applicant must analyze and reason from the cases and statutory provisions.

The applicant has been given a memorandum explaining how to structure the memorandum for attorney Suite.

**Format**

3 Points

It is important for a beginning lawyer to follow instructions. For example, lawyers who do not follow court rules may find their pleadings or briefs returned as unfiled, or even if filed, disregarded. Accordingly, the applicants are expected to organize their Memoranda of Law in accordance with the instructions they are given, such as titling of the sections, proper phraseology of the issues, statement of the bases of the complaint, the content of the argument and a conclusion.

**Issue 1: Breach of Agreement of Sale**

6 Points

The applicant should assert that this cause of action will fail because of the doctrine of merger.

All of the promises set forth in the agreement of sale that are central to the transaction merge into the deed, unless otherwise intended by the parties. *Carsek Corp. v. Stephen Schifter, Inc.*

A covenant is collateral and therefore one which survives delivery of the deed if it bears no relation to title, possession, quantity or emblements of the transferred property. *Carsek*

In this case, transfer of good and marketable title free and clear of certain liens, restrictions, easements and encumbrances is the central purpose of the transaction, and therefore, promises or representations related to the state of title that were set forth in the Agreement of Sale would have merged into the deed.

This case is distinguishable from *Carsek Corp.* where the promise sought to be enforced related to an obligation to reimburse for excess development costs which was collateral to the main function of the transaction.
Further, the release provision of the Agreement of Sale negates any implication that any of the seller’s promises or representations were intended to survive the closing. See, Carsek Corp., supra.

An alternative defense is that even if the provisions of the Agreement of Sale did not merge into the deed, Ms. Lam complied with all of the terms of the Agreement of Sale.

The written contract between the parties required that Ms. Lam deliver title that was good, marketable and insurable except for easements of record, and to deliver a special warranty deed at closing. The easement was of record, title was insured by the Title Company, there was no evidence of adverse title, and a special warranty deed was provided at closing. Ms. Lam did everything that was required of her, so none of the terms of the agreement of sale were breached.

In the alternative, even if title could be found to be defective, Mr. Wolf by settling on the property opted to complete the transaction thereby accepting the title Ms. Lam provided without any abatement of the purchase price. (Agreement of Sale, Paragraph 4(b))

Issue 2: Breach of Special Warranty Deed

The applicant should recognize that the deed is a special warranty deed.

A special warranty deed does not warrant absolutely good title, only that the grantor warrants title against claims and demands of the grantor and all persons claiming by, through or under her. 21 P.S. §6.

The grantor of a special warranty deed only agrees to defend the title to the property against any adverse claimant with a superior interest in the land claiming through the grantor. Leh v. Burke

While the complaint alleges that PennDot had fee simple title, in reality PennDot was only granted an easement. There is no evidence of any possible claim that title conveyed was not good.

Moreover, because it was a special warranty deed, Ms. Lam’s only warranty was that she did not create or allow a claim of title to arise in a third party; which she did not do.

The special warranty is not breached by the existence of liens or encumbrances on the property since the warranty only protects title. Leh v. Burke

Further, the easement in favor of PennDOT, to the extent that it is not a claim of ownership, does not violate any warranties implied by the conveyancing language of the deed by virtue of 21 P.S. §8 which similarly limits the implied warranties.
The covenant created by the conveyancing language is breached only if there is an existing encumbrance created by the grantor at the time the deed is delivered. *Leh v. Burke*

Ms. Lam did not create the easement nor allow it to be created. The easement was created by Frank Fooledya in 1960, well before Ms. Lam owned the property.

Therefore, because PennDOT’s interest, whether an encumbrance or a claim of title, was created before Ms. Lam acquired title to the parcel, she is not in breach of the warranties contained in the deed. See *Leh v. Burke, et al.*

**Issue 3: Mutual Mistake of Fact**

The last cause of action is predicated on the existence of a mutual mistake of fact, namely that both parties were mistaken in their belief that Ms. Lam owned the property in question free and clear of all claims.

Having purchased the property from the City, which had acquired it for back taxes, Ms. Lam mistakenly believed that she owned it free and clear of all claims and encumbrances.

Mr. Wolf, alleged that he likewise mistakenly believed that the title was unencumbered and that he would not have entered into the Agreement of Sale if he had known of PennDot’s interest.

For a mutual mistake of fact to justify recission of a contract, a three part test must be satisfied: (1) the mistaken fact must relate to the basis of the transaction; (2) it must materially affect the performance of the parties; and (3) it must not be one as to which the injured party bears the risk. *Loyal Christian Benefit Association v. Bender.*

In this case, delivery of unencumbered title is central to the purpose of the transaction, and the inability to convey clear and unencumbered title certainly affected the performance by each party.

This case is distinguishable from *Loyal Christian Benefit Association*, where the existence of the tax exemption was not central to the purpose of the transaction, and did not materially affect the performance by either party.

However, the plaintiff cannot establish a right to relief for a mutual mistake because Wolf assumed the risk with respect to any easement since the easement was of record, and Wolf would be chargeable with constructive knowledge of it. 21 P.S. §§356, 357.

Additionally, in this case, unlike the situation in *Loyal Christian Association*, the grantee, being an experienced developer, was in the better position to determine the status of any encumbrances on the property and therefore assumed the risk with respect to any encumbrances.
Further, the agreement itself allocated the risk to the buyer because it required him to accept easements of record. He could and should have searched title before agreeing to accept easements of record.