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Question No. 1

Roger was an attorney who lived, and practiced from his home, in E County, Pennsylvania. In early 2011, he was offered a job as a salaried corporate counsel with Gusher Oil Company, headquartered in G County, Pennsylvania, about 150 miles away from Roger’s home. His agreement with Gusher was that he could work mostly from his home in E County, but he would need to travel frequently to Gusher’s head office, and he would pay his own travel and meal expenses from the generous salary Gusher paid him, which reflected his choice not to relocate to G County. He was also permitted to do some private legal work from Gusher’s offices. In 2011, Roger made 50 trips between his home and Gusher’s corporate office. He ceased all private legal work from his home office after he began working for Gusher.

During his time at Gusher’s offices, Roger became acquainted with Ann, a finance officer with Rerun Industries, a large corporation headquartered in the same building. Ann asked Roger to do some estate planning for her, and among the options discussed, Ann suggested the idea of some kind of trust, which she had been told would “avoid probate” while maintaining her control over her property during her life. She also wanted a standard will to provide for her 19-year old daughter, Claire, her only child. Ann had divorced Claire’s father years earlier and had never remarried. Ann told Roger to wait before he drafted the will, so she could consider some specific bequests.

Roger and Ann spoke about a number of things along with her estate planning, and sometimes would socialize together. At one such time in November 2011, Ann said, “as my lawyer, what do you think about this?” She proceeded to reveal that she had become aware that Rerun’s Chief Financial Officer was providing distorted information about Rerun’s financial picture to its Board of Directors, to paint an overly optimistic picture to enhance Rerun’s publicly traded stock price. Ann was worried that this would be discovered, and that if she were questioned by auditors or stock regulators she might have
some liability. Roger told her he would research the issues and advise her in the near future. Ann told Roger to “make sure to bill me for this.”

Roger drafted a document called “AnnTrust” which provided that Ann’s savings accounts, stocks and bonds be placed into the trust, appointed Ann as the Trustee and the sole beneficiary during her life of the income and profits from the trust property, and named Claire as the substitute beneficiary to receive the corpus of the trust upon Ann’s death. The trust named Ann’s friend, Diana, as trustee upon Ann’s death, and provided that the trust could be revoked at any time. A $100,000 life insurance policy owned by Ann with her estate as beneficiary was not included in the trust.

The will which Roger prepared devised all her estate to Claire, and named Diana as Executrix. It also contained a statement specifically requested by Ann:

“It is my wish that my Executrix would consider donating some portion of the estate funds to charities such as G County Homeless Shelter, as I was unable to give as generously as I would have liked during life. Nevertheless, my daughter’s needs and desires are of primary importance.”

Ann properly signed the Will and the “AnnTrust” document in Roger’s office. All of the property identified in the “AnnTrust” was properly transferred into the trust. Unfortunately, a few weeks later, Ann was killed in an automobile accident on her way to work.

1. When Roger, a cash-basis taxpayer, prepared his tax return for the year 2011, he wanted to deduct all of his mileage, meal, and hotel costs for his 50 trips from his home to Gusher headquarters. Would this be proper under the Internal Revenue Code?

2. Is the structure of the “AnnTrust” proper under Pennsylvania law regarding trusts?

3. After Ann’s death, the Director of G County Homeless Shelter saw that Ann’s will was filed and made a claim for a share of the $100,000 insurance in the estate. Diana asked Roger whether this claim should be honored. How should Roger advise her?

4. A few months after Ann’s death, an investigator from the Securities and Exchange Commission contacted Roger, wanting to discuss anything he might know about Rerun’s financial picture and stock price, which had recently fallen greatly when its financial projections were not realized. Under the Pennsylvania Rules of Professional Conduct, may Roger reveal the statements that Ann made to him about Rerun’s financial picture?
1. Roger may not deduct these travel expenses because they were personal in nature and were essentially commuting expenses to his employment.

Section 162 of the Internal Revenue Code, “Trade or business expenses”, provides for a deduction of “all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.” Subsection (a)(2) specifies the inclusion of “traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business.”

In Commissioner v. Flowers, 326 U.S. 465, 66 S. Ct. 250 (1946), the Supreme Court upheld a Tax Court determination that travel expenses for a corporate counsel who chose to continue residing in Jackson, Mississippi, while traveling often to the Mobile, Alabama, offices of his employer, Gulf, Mobile and Ohio Railroad, were not deductible. The Court identified three factors needed to satisfy the requirements of 26 U.S.C.A. §23(a)(1)(A), which was the predecessor to section 162 (a)(2):

1. The expense must be a reasonable and necessary traveling expense . . . . This includes such items as transportation fares and food and lodging expenses incurred while traveling.
2. The expense must be incurred “while away from home.”
3. The expense must be incurred in the pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade.

The Flowers Court focused on the lack of any connection between the travel expenditures incurred from the taxpayer’s personal choice to maintain his home in Jackson, thus requiring him to travel over 200 miles between the cities to work for his employer, and the business of the employer. The court held that the exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors to obtain the deduction. Id. 328 U.S.at 474. The court found that the travel expenses incurred by Flowers by commuting to work from such a distance were not necessary for his employer’s business and concluded that the expenses were entirely personal and non-deductible.

Subsequent to the Court’s decision in Flowers, it was established that a taxpayer may be in the trade or business of being an employee, and limited exceptions to the Flowers rule have evolved where the expenses are necessitated by the exigencies of an employee’s occupation without regard to the demands of the employer’s business. See Hantzis v. C.I.R, 638 F.2d 248 (1st Cir. 1981), cert. denied, 452 U.S. 962, 101 S. Ct. 3112 (1981); Carlson v. Wright, 181 F. Supp. 568 (D.C. Idaho 1959). Such expenses must be essential to the continuance of an employee’s occupation to be deductible. Noland v. C.I.R., 269 F.2d 108 (4th Cir. 1959), cert. denied, 361 U.S. 885, 80 S. Ct. 156 (1959). Here, the travel expenses would not be deductible because they were not required by the business of Gusher nor were they essential to Roger’s continued employment, but rather were motivated solely by the convenience afforded Roger.
The most recent guidance from the IRS regarding daily transportation expenses from the taxpayer’s residence to a work location is found in Revenue Ruling 99-7. This ruling reiterates the general principle of non-deductibility of a taxpayer’s costs of commuting from the taxpayer’s residence to a place of business or employment, but provides clarification of the standards under which a taxpayer may deduct expenses for travel to “temporary” work locations, or from a home office to one or more work locations. None of these situations applies to the facts of this case.

Roger chose to maintain his home in E County for personal convenience which was not essential to Roger’s continued employment or the needs of Gusher, and as a result, his travel, lodging, and meal expenses incurred while at Gusher headquarters in G County are not deductible expenses under Section 162 of the IRC.

2. The AnnTrust was a valid Revocable Inter-Vivos Trust, also known as a “Living Trust,” even though Ann was both Trustee and Beneficiary.

The Pennsylvania Probate Estates and Fiduciaries (PEF) Code recognizes instruments commonly known as “Living Trusts,” as Ann suggested. The definition of such a trust is set forth in the Code at 20 Pa. C.S.A. 711 (3) as an “Inter-Vivos Trust” defined as: “an express trust other than a trust created by a will, taking effect during the lifetime or at or after the death of the settlor.”

Trusts are a recognized form of will substitute in Pennsylvania. “A trust may be created by a declaration by the owner of property that he or she holds property as trustee for another, or by a transfer of the legal title to the property to a third party on certain terms.” 11 Summary of Pennsylvania Jurisprudence 2d, 30:1, citing Petition of Accchione, 425 Pa. 23, 227 A.2d 816 (1967) and In Re Eshbach’s Estate, 197 Pa. 153, 46 A. 905 (1900). Pennsylvania caselaw defined the requirements of a valid trust as including three elements: 1) a definite subject, 2) a certain or ascertained object; and 3) sufficiently declared terms of the trust. In Re Thompson’s Estate, 416 Pa. 249, 206 A.2d 21 (1965)

In 2006, the PEF Code adopted the standards of the Uniform Trust Code (UTC) sections 401-402 regarding the manner and requirements for creation of a “trust.” 20 Pa. C.S.A. 7731-7732. Specifically, a trust may be created by (1) transfer of property under a written instrument to another person as trustee during the settlor’s lifetime or by will or other written disposition taking effect upon the settlor’s death; or (2) written declaration, signed by or on behalf and at the direction of the owner of property as required by section 7732 (relating to requirements for creation-UTC 402) that the owner holds identifiable property as trustee. . . . 20 Pa. C.S.A 7731.

“A trust is created only if: (1) the settlor has capacity to create a trust; (2) the settlor signs a writing that indicates the intention to create the trust and contains provisions of the trust; (3) the trust has a definite beneficiary… (4) the trustee has duties to perform; and (5) the same person is not the sole trustee and sole beneficiary of the trust.” 20 Pa. C.S.A. 7732(a),

Here, the requirements for a trust were met because there was a written declaration of the creation of a trust which included specific property to be included in the trust, a designation of beneficiaries and the trustees to administer the trust. There is no legal objection to a person being constituted a trustee for one’s self for life, and also for the remainderman. Erdman’s Estate, 352 Pa. 546, 42 A.2d, 546,548, citing Fox’s Estate 264 Pa. 478, at 479-480, 107 A. 863 at 864.
The Uniform Law Comment to Section 7732 states that:

“Subsection (a) (5) addresses the doctrine of merger, which, as traditionally stated, provides that a trust is not created if the settlor is the sole trustee and sole beneficiary of all beneficial interests. The doctrine of merger has been inappropriately applied by the courts in some jurisdictions to invalidate self-declarations of trust in which the settlor is the sole life beneficiary, but other persons are designated as beneficiaries of the remainder. The doctrine of merger is properly applicable only if all beneficial interests, both life interests and remainders, are vested in the same person, whether the settlor or someone else. An example of a trust to which the doctrine of merger would apply is a trust of which the settlor is sole trustee, sole beneficiary for life, and with the remainder payable to the settlor’s probate estate.”

This requirement is satisfied in the AnnTrust by the designation that Ann receive the income from the trust for life, with Claire designated as the beneficiary of the corpus of the trust property after Ann’s death. Therefore, Ann was acting as trustee not only for herself but also for Claire who would be the beneficiary after Ann’s death. The AnnTrust was a valid “Living Trust,” which would, to the extent of the trust assets, have “avoided probate.”

3. **Roger should advise Diana that Ann’s language regarding the Shelter was merely a precatory statement of her testamentary intentions, and the Shelter has no right to any portion of her estate unless the Executrix chooses to distribute to it.**

The document drafted for Ann, which included the provision regarding the G County Homeless Shelter, was in writing and was signed at its end. This meets the basic structural requirements of a will. See 20 Pa. C.S.A. 2502.

Words which are not mandatory as to a particular disposition are considered “precatory,” and therefore not enforceable by a purported or possible beneficiary. *In Re Lindsay’s Estate*, 311 Pa. 536, 166 A. 848 (1933). The Supreme Court in the case, *In Re Estate of Corbett*, 430 Pa. 54, 241 A.2d 524 (1968) discussed the use of the word “wishes” with respect to a reference in the testator’s will to his “charitable wishes” and stated:

“..the word ‘wish’, (or, in this case, ‘wishes’) is generally classified as precatory. However, such a word may be mandatory when expressive of an intention of the testator to be carried out without the intervention of another’s will and when used ‘in direct reference to the estate.’”

Additionally, the Court in *Corbett*, citing *Stinson’s Estate (No.1)*, 232 Pa. 218, 221, 81 A. 207 (1911), recognized the rule that:

when precatory words are used merely for the purpose of advising or influencing, or as expressive of a wish or desire that the legatee make a certain use of the testator’s bounty, they are not obligatory upon those to whom they are addressed; but when used to express his manifest intention to control or direct, they are mandatory, and will be so construed in saying what effect is to be given to them. (citations omitted)
In this fact pattern, Ann’s provision regarding the Shelter was significantly uncertain regarding the prospect of any gift to be made to it. This is merely a precatory statement, expressing a wish that the Executrix would make a donation to the Shelter if it would not adversely impact her daughter Claire’s needs or desires. Moreover, the Shelter was simply listed as an example of a charity to which a donation might be made thus furthering the uncertain nature of any donation to Shelter. The G County Homeless Shelter will be unable to assert that Ann’s will left them any definite legacy.

4. Roger was required to maintain Ann’s confidential statements to him despite her death, as it is unlikely that any exception to the confidentiality rule applies.

Despite their social friendship, Ann’s conversation with Roger about her potential liability for her knowledge of the Chief Financial Officer’s misstatements began with the words “as my attorney,” and constituted a request for Roger to provide legal services to which he consented. She ended by telling Roger “bill me,” thus further establishing a lawyer-client relationship. Pennsylvania Rule of Professional Conduct 1.6 Confidentiality of Information, sec. (a) requires that:

A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

The obligation to maintain the confidentiality of such information survives the attorney-client relationship, and also survives the client’s death. See R.P.C. 1.9(c)(2). It was clear that Ann’s conversation with Roger constituted an Attorney-client discussion, despite the social relationship they also maintained, as she prefaced the conversation with the statement “as my attorney” and noted her obligation to pay Roger after they discussed her concerns about her liability for the distortions of financial information by her superior at Rerun Inc. She engaged Roger’s legal services regarding her potential liability for knowing that the CFO has presented distorted information about Rerun’s financial picture to its Board of Directors, and her admission to Roger that she did know of the distortions is information which relates to the representation.

The commentary to Rule 1.6 states: “The confidentiality rule applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” See also Dworkin v. General Motors Corp., 906 F. Supp. 273, 277 (E.D. Pa. 1995). It also refers to the duty not to reveal information specifically applicable to Former Clients in Rule 1.9(c)(2).

The exceptions set forth in sections (b) and (c) of Rule 1.6 would permit disclosure in limited circumstances, none of which appear to apply. Section (b) permits disclosure in order for the lawyer to comply with Rule 3.3 Candor to the Tribunal, but the circumstances are limited to the correction of false statements or evidence presented to a court or other tribunal. Ann’s statements to Roger were merely her own suspicion or possibly a recognition that her superior was distorting the financial information of Rerun Inc. She had made no false statement herself, nor presented any testimony or evidence to any tribunal.

Section (c) permits the lawyer to reveal information “to the extent that the lawyer reasonably believes necessary:
None of these circumstances apply to the information given by Ann to Roger. Her suspicion or knowledge of the misstated financial information was not her own criminal action; it was not prospective at the time of Roger being questioned, and there is no issue of a controversy between Roger and Ann, nor a disciplinary matter regarding Roger, nor a sale of a law practice. Ann’s statements to Roger cannot be revealed under the Rules of Professional Conduct because none of the exceptions which would permit the confidential information provided by Ann to be disclosed are applicable.
Question No. 1: Grading Guidelines

1. **Federal Income Tax - travel and meal expenses commuting from home to work not deductible**

   Comments: Candidates should recognize the concept of deductible expenses for travel as inapplicable to commuting to a distant work location from home.

   5 points

2. **Trusts - Elements of Living Trust**

   Comments: Candidates should recognize the required features of a valid trust, and the validity of a “living trust” structured as set forth in the narrative.

   6 points

3. **Will provisions - precatory rather than mandatory provision**

   Comments: Candidates should recognize the language of the provision as the testator’s suggestion rather than a mandatory provision, not binding upon Executrix.

   3 points

4. **Professional Conduct - confidentiality**

   Comments: Candidates should recognize that an attorney has an obligation of confidentiality for information relating to the representation that continues beyond client’s death, and the inapplicability of any exception.

   6 points
Art and Barb borrowed money from C County Credit Company (Credit), which thereafter placed a valid lien on Art and Barb’s new automobile in 2009. Art was in a serious accident and missed a substantial amount of time from work. Due to his inability to work he had lost income, and many of his bills including his vehicle loan became delinquent. Credit filed a lawsuit to collect the delinquent loan which Art and Barb did not defend. A default judgment was entered against Art and Barb and in favor of Credit in the Court of Common Pleas of C County, Pennsylvania, and the judgment became final in December 2010.

Joe, Art’s friend and an employee of Credit, called Art in March 2011 and told him that Credit had violated a federal statute (Statute) in relation to their loan. The Statute permits an action to be brought either affirmatively or as a defense by a debtor in state or federal court to rescind a loan agreement and recover damages for a lender’s failure to make accurate material disclosures in connection with a loan. Art and Barb retained Attorney Wiley, who promptly filed a lawsuit against Credit on their behalf in the Court of Common Pleas of C County, seeking damages and a rescission of the loan agreement between his clients and Credit based upon a violation of the Statute. The violation of the Statute was clearly apparent on the loan document and Attorney Wiley, who specialized in commercial litigation, easily found the violation.

Joe’s supervisor, Al, was irate when the sheriff served a copy of the lawsuit on Credit and after investigation, suspected that Joe leaked information to Art and Barb. Al ordered Joe to a conference room at Credit’s office where he questioned Joe extensively. Al had been directed by his boss to locate any leaks of information and in doing so to do whatever was needed to protect Credit’s assets and business. Al became frustrated when Joe did not admit he was the source of the information leak. Al left the room and told Joe he would be back after he checked some
records. Al locked the door and planned to keep Joe secluded from outside parties for the rest of the workday. Al hoped that keeping Joe secluded would intimidate him and that he would then confess to leaking the information to Art and Barb. Joe attempted to leave the room so that he could go to his desk and obtain his regular, required medications but found that the door was locked. When Al returned to the room after four hours, he found Joe unconscious on the floor, and Joe was taken to the hospital. Joe had a seizure that had been caused, according to opinions from several medical experts, by his inability to take his regular medications. Al was unaware of Joe’s need to take medication.

Al fabricated a story that Joe was stealing money from the company and that he had a seizure when confronted by Al with the accusation of theft. After Joe’s release from the hospital, a police officer, based upon information received from Al, arrested Joe for theft. The case went to trial but the jury found Joe not guilty. Al had a guilty conscience and came forward and told Joe’s attorney that he fabricated the theft story to cover his misdeed so that Credit would be protected from liability. Joe’s medical bills for his hospitalization were not reimbursed by his insurance, and his attorney costs in the criminal case exceeded $50,000.

1. Based upon the stated facts, what legal defense should Credit raise to the rescission lawsuit brought by Art and Barb, with what pleading should Credit first raise its defense, and what is the likely outcome of the defense raised by Credit?

2. Based on the stated facts, other than defamation and intentional infliction of emotional distress, what intentional tort claim(s), if any, should Joe file in a civil action, who should the claim(s) be filed against, and what is Joe’s likelihood of success?

3. After Joe files a civil lawsuit, he seeks to obtain in discovery the disclosure of any potential liability insurance coverage that may be available to the defendant(s) and financial information relating to the net worth of the defendant(s). Is Joe entitled to the information he is seeking and, if so, how can Joe use the information in his civil lawsuit?
Question No. 2: Examiner’s Analysis

1. Credit should raise the legal defense of res judicata or claim preclusion as new matter which should be filed as part of its answer to the complaint seeking recission of the loan agreement. The Court will likely rule in favor of Credit.

Credit loaned Art and Barb money which was secured by a valid lien upon their vehicle. Due to non-payment of the loan, a lawsuit was filed to collect on the delinquent loan. Art and Barb did not defend the lawsuit and a default judgment was entered against them and became final. Art and Barb could have defended the action and raised any defenses available to them or any legal or factual defenses they would have to the loan. They did not do so. In Zimmer v. Zimmer, 457 Pa. 488, 326 A.2d 318 (1974), the Pennsylvania Supreme Court reasoned that when a judgment by default becomes final, all rules in regard to conclusiveness of judgments apply.

“Res judicata, or claim preclusion, prohibits parties involved in prior, concluded litigation from subsequently asserting claims in a later action that were raised, or could have been raised, in the previous adjudication.” Wilkes ex rel. Mason v. Phoenix Home Life Mut. Ins. Co., 587 Pa. 590, 902 A.2d 366 (2006), citing R/S Financial Corporation v. Kovalchick, 522 Pa. 584, 716 A.2d 1228, 1230 (1998).

The Pennsylvania Superior Court in the case of In Re Estate of Hillegass, 322 Pa. Super. 139, 469 A.2d 221 (1983), while discussing res judicata stated:

In order for a subsequent action to be wholly barred, it must share with the earlier judgment a concurrence of four elements:

(1) an identity of the thing sued upon;
(2) an identity of the cause of action;
(3) an identity of the person and parties to the action; and
(4) an identity of the quality or capacity of the parties suing or sued.  
(Citations omitted)

The primary inquiry is whether the controlling issues in the current case were or could have been decided in a prior proceeding between the same parties where those parties had the opportunity to litigate those issues. The Court in Stuart v. Decision One Mortgage Company, LLC, 975 A.2d 1151 (Pa. Super. 2009) stated that “res judicata applies not only to claims that were made but also to claims that could have been made.” (Citations omitted)

In both the lawsuit based upon the loan default and the lawsuit based on the federal statute, the subject matter that served as the basis of each lawsuit was the vehicle loan transaction. Thus, the subject matter of the two lawsuits was identical. Moreover, the underlying basis for the cause of action in both cases involves the validity of the loan. It would have been proper for Art and Barb to file a counter-claim or other appropriate request to challenge the validity of the loan in the first lawsuit based on a violation of the federal statute. Art, Barb and Credit would be the same parties to both actions and thus there is a common
identity of those parties. All parties to the loan collection lawsuit participated in that action in their own names and not as a nominal party, and the same parties would participate in the action based on the federal statute in their own names.

Since the four prong test for res judicata has been met it would serve as a valid defense for Credit to raise in this case. Credit should raise the defense of res judicata as new matter which would be part of its answer. Pa. R.C.P. No. 1030.

The logic in applying res judicata or claim preclusion is that Art and Barb had their opportunity to raise all defenses in the loan collection action. Although the facts indicate that Art and Barb were not told that there was a violation of the federal statute until after the judgment was entered, Art and Barb did nothing to defend the action. Art and Barb did not take the contract documents or lawsuit to an attorney for a review. Art and Barb could have raised the federal statute issue as a defense in the loan collection action. The violation of the federal statute was apparent on the face of the loan document and easily discovered by Attorney Wiley who was an experienced commercial litigator. It is unfair to force Credit to go through another lawsuit to address an issue that could have been raised in a prior action which has already resulted in a judgment against Art and Barb.

2. Joe should file a civil lawsuit against Al and Credit raising the intentional tort claims of false imprisonment and malicious prosecution.

Joe was an employee of Credit. Al, Joe’s supervisor, suspected that Joe was the source of the leak of information to Art and Barb. In order to put pressure on Joe he was taken to a conference room and interrogated by Al. When Joe did not confess Al left him in the conference room. Al’s intention was to secure Joe in the room with the hope that if he sat long enough he would eventually confess to his involvement with the information leak.

The room was locked by Al when he left. Joe tried to leave the room to take his medication but was unable to leave the room. Joe had a seizure which was related to his inability to take his medication that he had in his office desk. When Al returned to the conference room four hours later he found Joe to be unconscious. Al fabricated a story stating that Joe was suspected of theft and when confronted by Al with the theft allegation, had a seizure. When Joe was released from the hospital he was arrested based upon information supplied to the police officer by Al. The case went to trial and a jury acquitted Joe. After the acquittal Al came forward and admitted that the theft story was a fabrication. Al told Joe’s attorney that he fabricated the story to protect Credit from liability.

First, locking Joe in the conference room constitutes the intentional tort of false imprisonment. False imprisonment is an intentional tort that consists of three general elements:

(a) intent to confine another within boundaries fixed by the actor;
(b) defendants’ act directly or indirectly results in the confinement of another; and
(c) the person must be conscious of the confinement or harmed by it.

The tort of false imprisonment has been generally characterized, especially in cases involving police action or other detention for a possible crime, as the unlawful detention of another. See Renk v. City of Pittsburgh, 537 Pa. 68, 641 A.2d 289 (1994), Cohen v. Lit Bros, 166 Pa. Super. 206, 70 A.2d 419 (1950). Here there is no police action, but the detention of an employee by Al for four hours was improper and lacked legal authorization.

In order to be responsible for the tort of false imprisonment in Pennsylvania it must be proven that Al acted with the intent to confine a party such as Joe. Here, Al after interrogating Joe in a conference room, left the room and locked it, intending to keep Joe secluded from outside parties for the rest of the workday. The fixed boundaries element of false imprisonment has been met by locking Joe in the room. Joe was left in the room for approximately four hours, and Joe’s freedom of movement was restricted due to him being locked in the conference room. Additionally, Joe was fully conscious of his confinement. He tried to leave the room to take his medication which was left in his office desk. Since he was unable to leave the conference room and take his medication he became unconscious after suffering a seizure. Joe was harmed by being restrained in the room because he suffered a seizure and Joe was conscious of his confinement because he tried to open the door and found it locked.

There was not consent to the confinement. Arguably Joe went into the conference room voluntarily but never consented to be locked in the conference room. Joe did nothing illegal or improper to justify his confinement. Thus, false imprisonment, an intentional tort, should be included in the civil lawsuit brought by Joe against Al.

Joe should also include the intentional tort of malicious prosecution in the complaint against Al. The underlying claim addressed by this tort is the criminal prosecution initiated by Al against Joe which was based upon false information. The theft story was made up to cover any potential damages that may have come from locking Joe in the conference room. The alleged theft was a total fabrication by Al. This is not a case of mistaken judgment but rather a manufactured case created to protect Credit’s interest. The matter was wrongfully turned over to the police in an effort to cover up Al’s improper action.

The tort of malicious prosecution generally has three elements:

(a) the criminal proceedings were instituted by defendant against the plaintiff without probable cause;
(b) with malice; and
(c) the plaintiff in the tort action must have prevailed in the criminal case.

Kelley v. General Teamsters, Chauffeurs and Helpers Local Union 249, 518 Pa. 517, 544 A.2d 940 (1988). Malice may be inferred from the absence of probable cause. Id.

A private person can be charged with responsibility for institution of criminal proceedings by a police officer where it appears that the person’s desire to have the proceedings initiated, expressed by direction, request or pressure, was the determining factor in the officer’s decision to commence prosecution or that the information furnished by the person on which
the officer acted was known to be false. *Bradley v. General Accident Insurance Company*, 778 A.2d 707 (Pa. Super. 2001). Here, the police officer only acted based upon the false information provided by Al. Additionally, there was clearly no probable cause for the charge since Al fabricated the story. Finally, Joe was found not guilty in his criminal trial.

Special damages are a necessary element of the action of malicious prosecution. *Lynch v. Johnston*, 76 Pa. Cmwlth 8, 463 A.2d 87 (1983). Here, Joe had to retain the services of an attorney and incurred in excess of $50,000 in expenses in defending the criminal action. The economic damages would be recoverable in the malicious prosecution action.

Credit would also be an appropriate defendant in the civil lawsuit filed by Joe. Al was an employee of Credit. Al was Joe’s supervisor, who after being served with the civil complaint filed by Art and Barb, ordered Joe into a conference room at Credit’s office location. Al’s overall goal was to aid and protect Credit in the lawsuit. The locking of the conference room was motivated by a desire to get Joe to confess that he was the source of the information leak, thus protecting Credit’s interest from future leaks. Additionally, the fabricated story was made up by Al to protect Credit from possible liability for his conduct when he found Joe unconscious, together with protecting himself from any allegation of wrongdoing.

So long as an employee’s conduct is considered within the scope of his employment and authority, the employer is liable for the torts committed by the employee. *Lunn v. Boyd*, 403 Pa. 231, 169 A.2d 103 (1961). Employers have even been found liable vicariously for an intentional tort such as assault committed by employees while acting within the scope of their employment where the employer gave the employee authority or made it the employee’s duty to act in the particular matter in which the employee was engaged when the wrong was committed. *Orr v. William J. Burns Int’l Detective Agency*, 337 Pa. 587, 12 A. 2d 25 (1940). However, an act done for a purely personal reason or in an outrageous manner is not considered to be within the scope of employment. *Lunn*, 169 A.2d at 104.

Here Al was directed to find the source of the leaked information and in doing this to do what needed to be done to protect Credit’s assets and business. Al locked Joe in a room in an attempt to obtain a confession, and he made the false allegation with respect to theft to protect himself and Credit from liability. His actions with respect to the false imprisonment claim appeared to be within the scope of his employment and authority since they were in furtherance of the directions given to him by his boss to locate the source of the leaked information. Although his actions with respect to the malicious prosecution claim might be viewed as outrageous, the fact that he was directed to do whatever it takes to protect Credit’s assets could support a finding that Credit consented to and authorized such action thereby making Credit liable for his actions.

Thus, in the civil lawsuit Joe should include the intentional torts of false imprisonment and malicious prosecution against Al and Credit since he has met the elements to pursue and prove those torts. Joe would have a good likelihood of being successful in the lawsuit against Credit for false imprisonment and be able to collect damages related to this tort. Additionally, Joe will possibly be successful in the lawsuit against Credit for malicious prosecution depending on whether his actions were found to be outrageous and outside the scope of his employment.
3. In Joe’s lawsuit against Al and Credit the defendants would be required to supply Joe with insurance information relative to any amount of liability insurance coverage available. Since both malicious prosecution and false imprisonment are intentional torts, financial information relative to the defendants’ financial condition would be required to be produced because punitive damages may be recoverable. Evidence regarding the defendant’s financial condition would be admissible at trial but the evidence as to the existence of any liability insurance would likely not be admissible.

Once a lawsuit has been filed against Al and Credit, Joe can have his attorneys submit interrogatories to defense counsel requesting information about available liability insurance. Pa. R.C. P. No. 4003.2 is applicable to this issue. The rule states as follows:

A party may obtain discovery of the existence and terms of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of such disclosure admissible in evidence at trial. For the purposes of this paragraph, an application for insurance shall not be treated as part of the insurance agreement.

The rule codifies the decision of the Pennsylvania Supreme Court in Szarmack v. Welsh, 456 Pa. 293, 318 A.2d 707 (1974) which permitted the discovery of insurance information.

Although the existence of liability insurance is discoverable, it is not admissible at the trial of this matter to prove wrongful conduct since it would not be relevant to the issue of wrongdoing. Pa. R.E. 411. While evidence of insurance may be admissible to prove such things as agency, ownership or control, there is nothing in the facts to indicate that proof of insurance was required for such purposes. However, under the exception to Pa. R. E. 411, whereby evidence of insurance may be admitted for a purpose other than liability, an argument can be made that the existence and amount of insurance should be admissible to determine an appropriate amount of punitive damages. Under Pa. R.E. 403 the court would need to determine whether although the evidence with respect to insurance is relevant for proving punitive damages, its probative value is outweighed by various considerations including the danger of unfair prejudice. Whether insurance exists or not would be highly prejudicial to defendants if admitted at trial. The intent of allowing discovery of insurance is to promote a resolution or settlement of the matter and the existence of insurance would likely not be admissible in trial in this case. A plaintiff may not want to pursue a claim against defendants who have no insurance, so whether insurance exists may well determine whether a lawsuit continues to be pursued.

The torts of malicious prosecution and false imprisonment are both intentional torts. As such, in addition to compensatory damages punitive damages may be claimed, and a jury may well award punitive damages meant to punish defendants. A defendant’s financial situation would be relevant to the award, and specifically the amount of punitive damages. Pa. R.C.P. No. 4003.7 states as follows:
Rule 4003.7 – Punitive Damages – A party may obtain information concerning the wealth of a defendant in a claim for punitive damages only upon order of court setting forth appropriate restrictions as to the time of discovery, the scope of discovery and the dissemination of the material discovered.

Thus, if punitive damages were claimed, based upon the above rule information regarding the defendants’ wealth would be discoverable as limited by an order of court. The purpose of admitting evidence relating to wealth goes to awarding the amount necessary to serve the purposes of punitive damages, which are to both punish and deter.

Where conduct justifying punitive damages has been established, the wealth of a defendant is relevant at trial to set punitive damages. Feld v. Merriam, 506 Pa. 383, 485 A.2d 742 (1984). In assessing punitive damages, the jury must consider not only the character of the act underlying the claim and the harm suffered by the plaintiff, but also the wealth of the defendant. Sprague v. Walter, 441 Pa. Super. 1, 656 A.2d 890 (1995), appeal denied, 543 Pa. 695, 670 A.2d 142 (1996). It is likely that financial information obtained regarding defendants’ wealth could be used in trial to assess punitive damages and therefore would be admissible.
Question No. 2: Grading Guidelines

1. **Res Judicata/New Matter**

   Comments: The candidate is expected to identify res judicata as the applicable defense that should be raised as new matter in the Answer filed by defendant. The candidate should discuss the defense of res judicata in conjunction with the facts.

   6 points

2. **False Imprisonment and Malicious Prosecution**

   Comments: The candidate should identify both torts and discuss the elements needed to prove both false imprisonment and malicious prosecution in conjunction with the facts. The candidate should also discuss the standard for the liability of an employer for the tortious acts of an employee in conjunction with the facts.

   11 points

3. **Insurance Coverage/Net Worth**

   Comments: The candidate should discuss the use of discovery to obtain liability insurance and financial information relating to defendants’ net worth. The candidate should recognize the distinction between insurance information and financial worth information relating to potential admissibility at trial.

   3 points
Question No. 3

John and Elizabeth met in Chicago, Illinois, and immediately fell in love. They relocated to C County, PA, on March 5, 2012, where they set up permanent residence, and set a date for their wedding ceremony for July 5, 2012, in C County, PA. Just before the wedding John became anxious because he knew he was impotent and his condition, which he was born with, could not be corrected through any medical procedures. John did not communicate his condition to Elizabeth because he did not want to jeopardize the impending wedding. However, he was feeling increasingly guilty just days before the wedding, and he decided to confide in Elizabeth’s Maid of Honor, Kelley, who he had become friends with. Kelley knew that the couple were a great match and reassured John that Elizabeth truly loved him, and she believed that Elizabeth would understand. John asked Kelley not to tell Elizabeth, and she agreed. The wedding went off as planned without Elizabeth knowing of John’s condition.

Two days after the wedding, Kelley, who was now second guessing her decision not to convey John’s secret to Elizabeth, told Elizabeth about John’s condition. Elizabeth became infuriated and confronted John who admitted everything to Elizabeth. When Elizabeth told him to get out of the house and that she didn’t want anything to do with him anymore, John became despondent and went on a drinking binge. He consumed multiple shots of tequila at a local bar over a couple hour period of time. The more he drank the angrier he got that Kelley had told on him. John figured that since Kelley ruined his life he was going to take hers.

John drove his car to Kelley’s house and nearly caused three accidents on the way due to his drunken condition. When he arrived, he stumbled towards the trunk of his car where he opened the trunk and pulled out his .357 revolver which he left in his trunk a week earlier after target shooting. He proceeded to fumble while loading six bullets, which he believed to be functional, into the gun and stumbled up to Kelley’s front door. When Kelley answered the
door, John pointed the gun at her head and mumbled, “I told you not to tell her. You are dead.” He pulled the trigger but the gun did not fire. While still pointing the gun at Kelley’s head he pulled the trigger a second time with the same result. When John saw a car coming down the street he went back to his car, threw his gun in the trunk, and fled the scene.

Kelley immediately called the police and told them what had happened. The C County police stopped John moments later on a local highway, ordered him out of his car and placed him under arrest relative to the incident with Kelley. The police had John’s vehicle towed to the police station impound yard due to the fact that John was being taken to the police station for booking and the vehicle was blocking the lane of travel and creating a danger to passing motorists. The next day, the police, without securing a search warrant, decided to search John’s vehicle to try to locate the gun. As a result of the search, they found a revolver which fit the description given by Kelley. Inside the gun were six bullets with two of the bullets showing evidence that the primer had been struck which indicated to the police that someone tried to fire the gun. Subsequent testing revealed the bullets could not be fired because of a moisture build up which John was not aware of at the time of the incident with Kelley.

1. If Elizabeth wants to have the marriage declared void, what action, other than for a Declaratory Judgment, should she initiate via Complaint in the C County Court of Common Pleas, and when should the Complaint be filed in order to establish proper jurisdiction?

2. (a) Is there sufficient evidence to support the filing of a charge of attempted murder against John relative to the incident with Kelley at her home?

   (b) Would either the fact that the bullets were inoperable thereby making the gun impossible to fire or the fact that John was intoxicated be viable defenses to a charge of attempted murder against John?

3. If John’s counsel challenges the warrantless search of his vehicle in C County on the basis that the gun and bullets were seized in violation of his rights under the Fourth Amendment to the United States Constitution, and the Commonwealth defends on the basis of this being a proper inventory search, how would the Court likely rule on the admissibility of this evidence?
Question No. 3: Examiner’s Analysis

1. An action in annulment should be filed in the Court of Common Pleas of C County upon the expiration of six months from the date that John and Elizabeth became permanent residents of C County.

   In all cases where a supposed or alleged marriage has been contracted which is void or voidable under the Divorce Code, either party to the supposed or alleged marriage may bring an action in annulment to have it declared void. 23 Pa. C.S.A. Section 3303(a). Under the Divorce Code the marriage of a person shall be deemed voidable and subject to annulment where either party to the marriage was at the time of the marriage and still is naturally and incurably impotent unless the condition was known to the other party prior to the marriage. 23 Pa. C.S.A. Section 3305(a) (4). “In all cases of marriages which are voidable, either party to the marriage may seek to obtain an annulment of the marriage but, until a decree of annulment is obtained from a court of competent jurisdiction, the marriage shall be valid.” 23 Pa. C.S.A. Section 3305(b)

   As applied here, John knew before the marriage to Elizabeth that he was impotent and that his condition could not be corrected through any medical procedures. John failed to disclose these facts to Elizabeth prior to the marriage, and Elizabeth did not learn of John’s condition until after the marriage had already occurred. Because Elizabeth did not know of John’s naturally and incurable impotent condition prior to the time that they were married she would have grounds to file an action in annulment to have the marriage declared void and would likely be able to secure an annulment on these grounds.

   In order to be able to file the Complaint in the Court of Common Pleas of C County, Elizabeth is going to have to make sure that the Court has jurisdiction over the action. Courts of Common Pleas have original jurisdiction in cases of annulment of void or voidable marriages pursuant to 23 Pa. C.S.A. Section 3104(a). However, no spouse is entitled to commence an action for annulment under the Divorce Code unless at least one of the parties has been a bona fide resident of the Commonwealth of Pennsylvania for at least six months immediately previous to the commencement of the action. 23 Pa. C.S.A. Section 3104(b). A “bona fide residence” means domicile which requires actual residence coupled with the intention to remain there permanently or indefinitely. Zinn v. Zinn, 327 Pa. Super. 128, 475 A.2d 132 (1984).

   As applied here, John and Elizabeth relocated from Chicago, Illinois, to C County, Pennsylvania, on March 5, 2012, where the facts indicate that they set up permanent residence. Accordingly, once six months have elapsed from the establishment of their permanent residence the Court of Common Pleas of C County will have jurisdiction to hear the action. Therefore, the action should be brought once six months have elapsed from March 5, 2012.

2(a). There is sufficient evidence to support the filing of a charge of attempted murder against John relative to the incident with Kelley.

   “A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime.” 18 Pa. C.S.A.

When John arrived at Kelley’s residence, John removed his .357 revolver from the trunk of his car and proceeded to load it with six bullets which he believed to be operable. In addition, he believed the gun was operable having used it a week earlier for target shooting. John proceeded to Kelley’s home and when Kelley arrived at the doorway he expressly stated to her, “I told you not to tell her. You are dead.” He then proceeded to pull the trigger two consecutive times while the gun was pointed at Kelley’s head. The gun was obviously a deadly weapon and Kelley’s head would clearly be determined to be a vital part of her body. It is clear from the facts that John had the specific intent to take Kelley’s life and by pulling the trigger of the gun twice while it was pointed at Kelley’s head this would constitute a substantial step towards the commission of that killing. Accordingly, there is sufficient evidence to support the filing of a charge of attempted murder against John.

2(b). Neither the fact that the bullets were inoperable thereby making the gun impossible to fire nor the fact that John was voluntarily intoxicated will be viable defenses to the charge of attempted murder filed against John.

It is not a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the crime attempted. 18 Pa. C.S.A. Section 901 (b). The fact that an accused misapprehended circumstances, thereby making it impossible for him to commit the crime attempted, is not a defense to an attempt crime. Commonwealth v. Lopez, 439 Pa. Super. 625, 654 A.2d 1150 (1995). “If one forms intent to commit a substantive crime, then proceeds to perform all the acts necessary to commit the crime, and it is shown that completion of the substantive crime is impossible, the actor can still be culpable of attempt to commit the substantive crime.” Commonwealth v. Henley, 504 Pa. 408, 474 A.2d 1115 (1984).

At the time that John loaded the revolver he believed that both the gun and the bullets were operable and he intended to shoot Kelley with the gun. The fact that the bullets were actually inoperable due to their apparent exposure to moisture will not provide him with a defense to the attempted murder charge.

Voluntary intoxication is not a defense to a criminal charge, nor may any evidence of such condition be introduced to negate the element of the intent of the offense, except that evidence of such intoxication may be offered by the defendant whenever it is relevant to reduce murder from a higher degree to a lower degree of murder. 18 Pa. C.S.A. Section 308. Pennsylvania courts have indicated that an actor should not be insulated from criminal liability for acts which result from a mental state which is voluntarily self-induced. Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990) citing Commonwealth v. Hicks, 483 Pa. 305, 396 A.2d
In Commonwealth v. Bridge, 495 Pa. 568, 435 A.2d 151 (1981), the Court stated that there is a natural repugnance against one voluntarily depriving himself of his or her faculties, and then seeking to excuse his or her behavior because of the absence of those faculties.

Voluntary intoxication is not a defense to the crime of attempted murder. The court in Commonwealth v. Williams, 730 A.2d 507 (Pa. Super. 1999) addressed the applicability of an intoxication defense to a charge of attempted murder and stated:

The only legal significance of the voluntary consumption of alcohol is when it is relevant to reduce murder from a higher degree to a lower degree of murder. In an attempted murder case the lowering of the degree is logically impossible. There is simply no such crime as attempted second or third degree murder.

* * *

Murder of the second or third degree occurs where the killing of the victim is the unintentional result of a criminal act. Thus, an attempt to commit second or third degree murder would seem to require proof that a defendant intended to perpetrate an unintentional killing which is logically impossible. (citation omitted)

As applied here, John consumed a significant amount of alcohol prior to going to Kelley’s residence and he did so voluntarily. Even if he were deemed to be intoxicated as evidenced by his erratic driving, inability to walk steadily and his fumbling while loading his gun, this would not provide him with a viable defense to the charge of attempted murder under 18 Pa. C.S.A. Section 308.

3. The Court will likely rule that the search was not a proper inventory search and rule that the evidence is inadmissible.

The United States Supreme Court has recognized that inventory searches constitute a well defined exception to the warrant requirement of the Fourth Amendment. South Dakota v. Opperman, 428 U.S. 364, 96 S. Ct. 3092 (1976). “The purpose of an inventory search is not to uncover criminal evidence. Rather, it is designed to safeguard seized items in order to benefit both the police and the defendant. So long as the search is pursuant to the caretaking functions of the police department, the conduct of the police will not be viewed as unreasonable under the constitution.” Commonwealth v. Woody, 451 Pa. Super. 324, 679 A.2d 817, 819 (1996) The Court in Commonwealth v. Hennigan, 753 A.2d 245 (Pa. Super. 2000) citing the United States Supreme Court’s decision in South Dakota v. Opperman, supra, outlined the analysis for evaluating the propriety of an inventory search as follows:

A warrantless inventory search of an automobile is different from a warrantless investigatory search of the same. An inventory search of an automobile is permitted where: (1) the police have lawfully impounded the automobile; and (2) the police have acted in accordance with a reasonable, standard policy of routinely securing and

In determining whether a proper inventory search has occurred, the first inquiry is whether the police have lawfully impounded the automobile, *i.e.*, have lawful custody of the automobile. *Opperman*, 428 U.S. at 368, 96 S.Ct. 3092. The authority of the police to impound vehicles derives from the police's reasonable community care-taking functions. *Id.* Such functions include removing disabled or damaged vehicles from the highway, impounding automobiles which violate parking ordinances (thereby jeopardizing public safety and efficient traffic flow), and protecting the community's safety. *Id.* at 368-369, 376 n. 10, 96 S.Ct. 3092.

The second inquiry is whether the police have conducted a reasonable inventory search. *Id.* at 370, 96 S. Ct. 3092. An inventory search is reasonable if it is conducted pursuant to reasonable standard police procedures and in good faith and not for the sole purpose of investigation. (citations omitted)

As applied here, the police received a call from Kelley regarding the incident with the gun. Shortly thereafter, the police pulled John over on a local highway and placed him under arrest. Because the police were going to take John to the police station for booking and the vehicle would be blocking a lane of travel and creating a dangerous condition, the police decided to impound the vehicle.

In order for the police to conduct a proper inventory search of the vehicle they must first be in lawful possession of the vehicle. In this case, the police were arguably in lawful possession of John’s vehicle because he was now under arrest, unable to move the vehicle on his own and the vehicle had to be removed and impounded for the safety of the public. Thus, the police were in proper possession of the vehicle. Next, in order for the police to conduct an inventory search they have to act in accordance with a reasonable standard policy of routinely securing and inventorying the contents of the impounded vehicle and the search of the vehicle cannot be for the sole purpose of investigation. Here, there is no indication in the facts that the police had a standard inventory procedure regarding vehicles or that the police intended to conduct an inventory of the contents of the vehicle. On the contrary, the express intention of the police was to search the vehicle for the gun. Because the search was not within the inventory search exception and the police failed to secure a warrant, the fruits of that search, namely the gun and bullets would likely be suppressed. If a standard inventory procedure was in place and the search was conducted in accordance with that procedure it is likely that the search would not have been determined to be unconstitutional.
Question No. 3: Grading Guidelines

1. **Family Law - Annulment**

   Comments: The Candidate is expected to identify annulment as the proper challenge to the validity of the marriage and explain that impotence is a ground upon which the marriage can be deemed to be voidable. Further, the candidate is expected to recognize that there is a six month residency requirement in the Commonwealth of Pennsylvania in order to establish jurisdiction in the Court of Common Pleas.

   5 Points

2(a). **Criminal Law - Attempted Murder**

   Comments: The Candidate is expected to recognize that the evidence supports the filing of a charge of attempted murder against John. The candidate should explain and apply the crimes of criminal attempt and homicide and conclude that an attempted murder charge against John is supported by the evidence.

   6 Points

2(b). **Criminal Law - Defenses**

   Comments: The Candidate is expected to discuss the defenses of impossibility and intoxication to criminal offenses in Pennsylvania, apply those principles to the charge of attempted murder and conclude that the defenses would likely be unsuccessful.

   3 Points

3. **Vehicle Inventory Searches**

   Comments: The Candidate is expected to discuss the law regarding vehicle inventory searches under the Fourth Amendment and conclude that the search of the vehicle in this instance was likely not lawful as it was conducted for investigative rather than inventory purposes.

   6 Points
Question No. 4

In January 2011, Patrick began working as Director of Government Relations at Big Co., reporting to Don, who was the CEO. Big Co. is a corporation with over 250 employees in C City, Pennsylvania. Shortly after he began working at Big Co., Patrick met Pam, who also worked for Big Co. as executive assistant to Don. Pam, Patrick, and Don all worked in the same suite of offices and interacted frequently at work. Pam and Patrick began dating, and they announced their engagement in July of 2011.

Don required Pam to wear short skirts and high heels to work. The only dress code for other employees was no shorts, flip flops or blue jeans. Pam’s performance evaluations were good, but in September 2011, after Don verbally told her that the evaluations would be better if her skirts were shorter and tighter, Pam filed a sex discrimination complaint against Big Co. with the appropriate administrative agency. Don received a copy of Pam’s complaint, and three weeks later Don terminated Patrick’s employment at Big Co., despite his excellent performance reviews, the most recent of which was received one month before his termination. Patrick then filed an administrative charge with the appropriate administrative agency, claiming retaliation in violation of Title VII of the Civil Rights Act of 1964 and, after receiving a right to sue letter, filed suit in federal district court.

1. Will Patrick be able to establish a cause of action for retaliation under Title VII of the Civil Rights Act of 1964?

Prior to Patrick’s employment at Big Co., he was a C City Councilman. He was defeated for re-election in 2010 but hoped to run for office in the future. As a Councilman, Patrick had headed the C City budget committee and was responsible for setting the budgets for each of the divisions of the city government.
The C City Tribune (“Trib”) is a daily newspaper published and distributed to approximately 100,000 subscribers in C City, Pennsylvania. On May 5, 2012, the Trib published an article about financial mismanagement in C City. The reporter, Rita, based the article on a public hearing held two days earlier, at which former city employees testified that under Patrick’s leadership there was little financial oversight of C City programs, and one witness strongly implied that Patrick had taken bribes from contractors during his term as a Councilman. Other witnesses testified to improved financial results and fiscal integrity since Patrick left office. No charges had ever been filed against Patrick for his work on C City Council, and the claim that he had taken bribes from contractors was untrue.

Rita was under a tight deadline for the article about C City finances, and she did no independent research but rather quoted all of the hearing witnesses, and presented their testimony accurately. Patrick’s reputation was severely damaged as a result of the article; old friends told him they didn’t want to be seen with him, and his plan to run for elective office had to be abandoned after several focus groups indicated that they didn’t trust him. Patrick filed suit for defamation against the Trib and Rita in state court in C City.

2. **What defense to Patrick’s action, based on the United States Constitution, should be asserted by the Trib and Rita, and what is the likelihood of success of the defense?**

3. **What common law defense to Patrick’s action should be raised under Pennsylvania law by defendants, and what is its likelihood of success?**
1. **Patrick will be able to establish a cause of action for retaliation under Title VII.**

Title VII provides, in pertinent part:

> Other unlawful employment practices

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this subchapter... or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C. §2000e-3(a).

This prohibition is known as the “anti-retaliation” provision. There is no statutory listing of the acts prohibited as retaliation, but courts have interpreted actionable retaliation to be actions that “…might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Burlington Northern & Santa Fe Railroad Co. v. White*, 548 U.S. 53, 62, 68, 126 S. Ct. 2405 (2006). The Supreme Court has further held that certain “third-party reprisals” were included as prohibited actions, and concluded that a reasonable employee might be dissuaded from engaging in protected activity if she knew her fiancé would be fired as a result thereof. *Thompson v. North American Stainless, L.P.*, 131 S.Ct. 863, 178 L.Ed 2d 694 (2011).

The elements of a *prima facie* case of retaliation may be established through direct or indirect proof. Assuming that there is no direct proof of retaliation, the elements of indirect proof are: 1) protected activity; 2) the employer took action that a reasonable employee or job applicant would find to be materially adverse in that it may have dissuaded a reasonable employee from making or supporting a charge of discrimination; and 3) there is a causal connection between the [protected] activity and the adverse action. *Moore v. City of Philadelphia, et. al.*, 461 F.3d 331, 340-341 (3d Cir. 2006).

Here, Patrick and Pam were engaged to be married. Don was the CEO of the company and the boss of both Patrick and Pam. They all worked together in the same suite of offices and interacted frequently at work. Pam filed a claim of sex discrimination under Title VII as a result of Don’s demands and comments to her, satisfying the first prong of a *prima facie* case. Three weeks after Don became aware of Pam’s complaint, he took action against Patrick by terminating him. This action would satisfy the second prong of a *prima facie* case because it likely would be viewed as materially adverse to a reasonable employee, in that a reasonable employee might be dissuaded from filing a discrimination complaint if she knew her fiancé would be terminated as a result thereof. Finally, with respect to the third prong, courts have looked at an employer’s likely knowledge of the complaint and the timing of the action to circumstantially establish a causal connection between the protected activity and the adverse action. Here, it is clear that Don was aware of the discrimination action filed by Pam, and because both Patrick and Pam worked with him in the same suite of offices, it is highly likely
that Don knew of their relationship. Evidence that the protected activity was followed closely by the adverse action constitutes additional circumstantial evidence to establish causation. *Gordon v. N.Y. City Board of Education*, 232 F.3d 111 (2d Cir. 2000). The fact that the protected activity by Pam was followed so closely by the termination of Patrick by Don will likely support a causal connection between Pam’s protected activity and Patrick’s termination.

In *Thompson v. North American Stainless, L.P.*, *supra*, the United States Supreme Court, in addressing the right of third parties to bring an action under Title VII, recognized that under 42 U.S.C. §2000e-5(f)(1) a Title VII action may be brought by a person claiming to be aggrieved. The Court held that third parties who fall within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for the complaint are included among such aggrieved persons. *Id. at 870*. In that case, the Court found that the fiancé of an employee who had filed a Title VII claim was within the zone of interests and found that he had standing to sue for his own dismissal stating:

... we conclude that Thompson falls within the zone of interests protected by Title VII. Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from their employers’ unlawful actions. Moreover ... Thompson is not an accidental victim of the retaliation ... To the contrary, injuring him was the employer’s intended means of harming Reglado. Hurting him was the unlawful act by which the employer punished her. In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue.

Under the circumstances set forth, it is likely that Patrick will be able to establish a cause of action for retaliation in violation of Title VII.

2. **The Trib should raise its privilege under the First Amendment of the United States Constitution. The defense is likely to be successful.**

Defendant’s principal defense is that the article at issue is constitutionally privileged. The First Amendment’s Speech and Press Clause prohibits the abridgement of “freedom of speech or of the press.”

The United States Supreme Court has, through a series of cases, imposed limitations on state law actions for defamation, based on the First Amendment freedoms of speech and press. In *New York Times, Inc. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964), the Court stated that recovery [for defamation] by a public official required a showing that the otherwise defamatory statement was made with “actual malice”, that is, with knowledge that it was false or with reckless disregard for its falsity. Subsequently, in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975 (1967), the Court extended the limitation on defamation actions to “public figures” as well; however, this limitation has not been extended to private individuals. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997 (1974). The standard, as enunciated by the Court, is that plaintiff must prove that the defendant published a defamatory falsehood with knowledge of its falsity or with reckless disregard for the truth. This standard requires a showing that the defendant entertained serious doubts as to the truth of his publication, or had a high
degree of awareness of its probable falsity.  *Harte-Hanks Communications v. Connaughton,* 491 U.S. 657, 688, 109 S.Ct. 2678 (1989).  A “…failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard.” *Id.* at 688.

In *Rosenblatt v. Baer,* 383 U.S. 75, 86 S. Ct. 669 (1966), the standard for public officials was applied to the discharged supervisor of a county facility where the matter addressed by the defamatory statement was still a matter of public concern. Here, the article in question resulted from a current public hearing, referred to Patrick’s recent time as an elected official of C City, and related to the financial management of public programs. Accordingly, for purposes of this action, Patrick would likely be considered a “public official,” even though he was not in office at the time of the article’s publication.

Since Rita quoted directly from the testimony of witnesses at the City Council public hearing, and there is no evidence that she entertained serious doubts as to the truth of the testimonial statements, it is unlikely that Patrick will be able to prove actual malice even though Rita failed to investigate the allegations. Therefore, the Constitutional defense is likely to succeed.

3. **Defendants should raise the common law fair report privilege, and this defense will likely be successful.**

The fair report privilege in Pennsylvania “…protects the press from liability for the publication of defamatory material if the published material reports on an official action or proceeding.” *Weber v Lancaster Newspapers,* 878 A.2d 63, 72 (Pa. Super. 2005), *appeal denied,* 591 Pa. 666, 916 A.2d 634 (2007). The privilege is included in the Restatement (Second) of Torts, at §611: “The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete …”

In the case of *Medico v. Time, Inc.,* 643 F.2d 134 (3d Cir. 1980), *cert. denied,* 454 U.S. 836, 102 S. Ct. 139 (1981), Time magazine published an article about the link between organized crime and a Pennsylvania Congressman. The article referenced FBI materials that had been collected in the course of a criminal investigation by the Department of Justice. The trial court granted summary judgment for the magazine, which was affirmed by the Court of Appeals. The affirmance was based on the fair report privilege, and justified as in the public interest. In its Opinion, the court stated:

…the law has long recognized a privilege for the press to publish accounts of official proceedings, or reports even when these contain defamatory statements. So long as the account presents a fair and accurate summary of the proceedings, the law abandons the assumption that the reporter adopts the defamatory remarks as his own. The privilege thus permits a newspaper or other press defendant to relieve itself of liability without establishing the truth of the substance of the statement reported. *Id.* at 137, 138.
Here, it is clear that the statements quoted in Rita’s article that implied that Patrick had taken bribes from contractors were defamatory, and it is also clear that Patrick sustained damage as a result thereof. However, Rita accurately reported the testimony that was presented at the public hearing. Because the testimony was accurately reported by Rita and the Trib, their article should be protected by the fair report privilege.
Question No. 4: Grading Guidelines

1. **Title VII- Unlawful Retaliation**

   Comments: Applicants should demonstrate an understanding of the anti-retaliation provisions of Title VII, and apply the law to the facts to reach a well-reasoned conclusion.

   10 points

2. **Constitutional Law**

   Comments: Applicants should demonstrate an understanding of the protection of the press under the First Amendment to the United States Constitution with respect to defamation actions, and apply the law to the facts to reach a well-reasoned conclusion.

   5 points

3. **Defamation/ Fair Report Privilege**

   Comments: Applicants should demonstrate an understanding of the fair reporting privilege, as used by media defendants in defamation actions, and should apply the law to the facts to reach a well-reasoned conclusion.

   5 points
Greg divided a tract of land that he owned in Sunny Township, Pennsylvania, into separate lots pursuant to a recorded subdivision plan (“the Plan”). Greg later recorded a separate Declaration of Restrictions (“the Declaration”) which stated in part: “The lots in the Plan are subject to the condition that they shall be used for residential purposes only. This restriction shall inure to the benefit of all grantees, their heirs, successors and assigns.”

Greg sold Lot 1 in the Plan to Robin, who hired Ted, the owner of a well-established and profitable architectural and contracting firm, to design and construct a house on the lot. The construction agreement stated that the ceilings in the bedrooms and living areas of the house would be 9′-6" in height and required Robin to deposit the $250,000 construction price into an account with a neutral party pending completion of construction. To conceal ductwork, electrical wiring, and structural beams, Ted built the ceilings in the bedrooms and living areas of the house to only 8′-10" in height.

Greg later conveyed the other lots in the Plan to grantees by valid deeds which expressly referred to the Declaration. Within a short period of time, Greg’s original grantees properly conveyed the lots to new grantees. Lot 2, on which Ted had constructed a house for the original grantee, was conveyed to Lilly and Marshall by a deed expressly stating that the conveyance of Lot 2 was “subject to all restrictions of record.” A vacant parcel known as Lot 3 was conveyed to Barney. Barney’s deed to Lot 3 made no mention of the Declaration.

Lilly had a written two-year employment contract with Happy Feet Ballet (Ballet), a dance company located in nearby Big City, Pennsylvania, paying her $100,000 per year to be Ballet’s principal dancer. Ballet wrongfully terminated the contract at the start of its second year.
Marshall operated a delivery service. When Ted’s precision laser saw broke, he entered into a valid written contract to pay Marshall $1,000 to transport the saw to its manufacturer for repairs and to return it to Ted in seven days. Two days later, as Marshall was about to begin transporting the saw to the manufacturer, Ted told Marshall, “I really need my saw back on time. If it isn’t back on time, my business will be shut down and I’ll lose $5,000 in profits for each day that I don’t have it.” Despite Ted’s warning, Marshall delivered the saw to the wrong manufacturer. As a result, Ted was forced to close his business for ten days until the delivery error could be corrected and the saw repaired and returned to Ted. The manufacturer completed the repair of the saw in one day. When his business was forced to close due to Marshall’s failure to deliver the saw as stated in their agreement, Ted suffered an emotional breakdown.

1. Although Ted certified that construction was completed, Robin refused to authorize the neutral party to release any monies to pay Ted. Ted filed suit for breach of contract asserting that he was entitled to the entire $250,000 contract price. Robin’s defense is that she does not have to pay Ted because the ceilings were not built to the height specified in the construction agreement. Assume that testimony during trial demonstrated that the ceilings could be raised to the height specified in the contract at a cost of $15,000. How should the court rule?

2. Barney started construction of a winery on Lot 3. Lilly and Marshall want to stop Barney’s construction of a winery. What relief should they seek, and what legal theory, if any, supports their right to relief?

3. After Ballet terminated her contract, Lilly asked her agent to find her a job with another company. The only offer that Lilly’s agent received was for an as-needed substitute member of a ballet company in Seattle, Washington, at $25,000 per year. Lilly declined the offer preferring to remain at home with Marshall and her baby daughter. If Lilly sued Ballet for breach of contract, what argument should Ballet raise to limit Lilly’s damages, and how would such argument be evaluated by the fact finder?

4(a). Ted filed suit against Marshall alleging breach of contract. If Marshall is found liable for the breach, what must Ted demonstrate to recover his lost profits, and what is his likelihood of success?

4(b). Can Ted recover damages for emotional distress based upon Marshall’s breach of contract?
Question No. 5: Examiner's Analysis

1. Because Ted substantially performed the contract, the court should rule that Robin was not discharged from her obligation to pay Ted; however, Ted’s recovery should be reduced by the damages caused by his partial breach of the contract.


“The doctrine of material breach is simply the converse of the doctrine of substantial performance. Substantial performance is performance without a material breach, and a material breach results in performance that is not substantial.” Gen. Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296, 318 n. 8 (3d Cir.2001), quoting, E.A. Farnsworth, Farnsworth on Contracts, § 8.16, at 442 (1990). The doctrine of substantial performance is “intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent or unimportant omissions or defects.” Sgarlat v. Griffith, 349 Pa. 42, 46, 36 A.2d 330, 332 (1944). Thus, Robin’s duty to pay Ted can only be discharged if Ted’s failure to construct the ceilings as specified in the contract constitutes a material breach. If Ted has substantially performed the contract and is not in material breach, then Robin’s duty to perform is not ended and she will be required to pay the $250,000 contract price, less the amount of damages caused by Ted’s failure to perform exactly as required under the contract. See, J.E. Murray, Jr., Murray on Contracts, § 118 A, at 776 (4th ed. 2001).

In determining whether a contractual breach is material, Pennsylvania courts look to the factors set forth in Section 241 of the Restatement (Second) of Contracts. Those factors include: the extent to which the injured party will be deprived of the benefit which he reasonably expected; the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; the extent to which the party failing to perform or to offer to perform will suffer forfeiture; the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. Widmer Engineering, Inc. v. Dufalla, 837 A.2d 459, 468 (Pa. Super. 2003), appeal denied, 578 Pa. 701, 852 A.2d 313 (2004), quoting, Restatement (Second) of Contracts, § 241. Whether a breach of contract is material is generally a question of fact for a jury to decide. Forest City Grant Liberty Ass’n v. Genro II, Inc., 438 Pa. Super. 553, 652 A.2d 948, 951 (1995).
In this case, there are no facts which suggest that Robin was truly deprived of a reasonably expected benefit because the ceilings in the house were constructed eight inches less than promised in the contract. Additionally, Robin can be adequately compensated for any lost benefit by not having the ceilings constructed as specified by having the cost to raise the ceilings deducted from the contract price. Further, if Robin’s duty to perform was excused, Ted would suffer a forfeiture of the entire $250,000 contract price, an amount clearly disproportionate to any loss suffered by Robin. Finally, Ted can argue that he deviated from the contract specifications for legitimate reasons related to the construction - to conceal ductwork, electrical wiring, and structural beams.

Based upon the application of the Restatement factors for determining the materiality of a breach to the stated facts, the court in this case would in all likelihood conclude that Ted’s failure to construct the ceilings as specified constituted substantial performance and not a material breach of contract. Therefore, Robin was not relieved of her duty to pay Ted. Ted’s claim for the entire $250,000 contract price, however, would be reduced by $15,000, the amount of the damages suffered by Robin due to Ted’s partial breach of the contract, or by the diminution in the value of the house resulting from Ted’s failure to construct the ceilings as specified.

2. Lilly and Marshall should seek injunctive relief to prevent Barney from constructing a winery on Lot 3 on the basis that the Declaration restricting the use of the lots in the Plan for residential purposes only is enforceable as an equitable servitude.

Covenants affecting real property are mainly of two kinds. A restriction which is binding only upon the covenantor, and which is not intended to be a continuing charge on real estate, is classified as a personal covenant. Those restrictions that are so closely connected with real estate that their benefits and burdens pass to subsequent purchasers and assignees of the real estate are classified as covenants running with the land. DeSanno v. Earle, 273 Pa. 265, 117 A. 200 (1922). Restrictive covenants running with the land that are enforceable in equity traditionally are referred to as equitable servitudes. R. Boyer, H. Hovenkamp, S. Kurtz, The Law of Property: An Introductory Survey, § 10.3 (4th ed. 1991). Pennsylvania law provides that an action in equity seeking injunctive relief is available to enforce a restrictive covenant in a deed or recorded plan. Peters v. Davis, 426 Pa. 231, 238, 231 A.2d 748, 752 (1967); Doylestown Township v. Teeling, 160 Pa. Cmwlth. 397, 635 A.2d 657 (1993), appeal denied, 539 Pa. 697, 653 A.2d 1234 (1994).

To qualify as an equitable servitude, the restriction concerning the use of the land must satisfy several requirements. First, the restriction must touch and concern the land. This requirement generally involves the imposition of some benefit or burden upon the land by some restriction of its use. Goldberg v. Nicola, 319 Pa. 183, 178 A. 809 (1935); William B. Stoebuck & Dale A. Whitman, The Law of Property, § 8.15 (3d ed. 2000). In this case, the restriction in the Declaration governing the use of the lots within the Plan touches and concerns the land because it imposes a benefit or burden on the lots by prohibiting any use other than for residential purposes.

The second factor in determining whether a restriction concerning the land is enforceable as an equitable servitude is the intention of the creator of the restriction. DeSanno v. Earle,
supra, 273 Pa. at 270, 117 A. at 202. Intent may be ascertained from the language of the restriction in light of the surrounding circumstances. Gey v. Beck, 390 Pa. Super. 317, 568 A.2d 672 (1990). Neither formal nor specific technical language is needed to create an equitable servitude. See, Logston v. Penndale, Inc., 394 Pa. Super. 393, 576 A.2d 59 (1990), citing Electric City Land & Improvement Co. v. Westridge Coal Co., 187 Pa. 500, 41 A. 458, 462 (1898). Nevertheless, the use of certain terms and language normally indicates that a covenant running with the land is intended. In this case, the restriction on the use of the lots in the Plan’s Declaration states that it “shall inure to the benefit of all grantees, their heirs, successors and assigns.” Language stating that a particular restriction is binding upon the grantees’ heirs and assigns is considered to be “generally decisive of the question” whether a covenant is intended to run with the land. Leh v. Burke, 231 Pa. Super. 98, 107, 331 A.2d 755, 760 (1974); Restatement (Third) of Property (Servitudes), § 2.2, comment d (2000). Further, the addition of the word “only” after “purposes” is another indication that a servitude was intended. Id.

The final factor\(^1\) needed to enforce a covenant as an equitable servitude is that the party against whom the covenant is to be enforced had notice of the restriction. See, J.E. Krasnowiecki, Real Property Law and Practice, § 8.2, at 288 (2\(^{nd}\) ed. 2008). In this case, Barney did not have actual notice of the Declaration requiring that his lot be used for residential purposes only. Further, no reference to the restriction was included in his deed to Lot 3. Barney, however, cannot use either the absence of actual notice of the restriction or the lack of any reference to the restriction in his deed to avoid compliance with the restriction on the use of the property. Longstanding Pennsylvania case law provides not only that a property owner had the duty to become aware of the recorded restrictions in his chain of title but also that the property owner would be bound by such restrictions in the absence of actual notice. Finley v. Glenn, 303 Pa. 131, 138, 154 A. 299, 301 (1931); accord, Doylestown Township v. Teeling, supra.; see also, Pa. Stat. Ann. tit. 21, §§ 356-57. Because the restriction here was in the recorded Declaration, Barney will be deemed to have constructive notice of the restriction and the restriction can be enforced against him.

In conclusion, Lilly and Marshall should seek injunctive relief to prevent Barney from constructing a winery on Lot 3 because the restriction in the Declaration requiring all lots within the Plan to be used for residential purposes only is enforceable as an equitable servitude.

3. Ballet should argue that Lilly’s damages should be reduced because she failed to make reasonable efforts to mitigate her damages. Ballet’s argument will not be successful if Lilly is considered to have made a reasonable effort to mitigate her lost salary.

Under Pennsylvania law, a party who suffers a loss due to a breach of contract has a duty to make reasonable efforts to mitigate losses. Bafile v. Borough of Muncy, 527 Pa. 25, 30, 588 A.2d 462, 464 (1991). The duty to mitigate damages prevents a party from recovering damages which the injured party could have avoided without undue risk, burden or humiliation.

\(^1\) Because an equitable servitude evolved under common law into an interest in land, some commentators include an instrument which complies with the Statute of Frauds as another necessary element. R. Boyer, H. Hovenkamp, S. Kurtz. The Law of Property: An Introductory Survey, supra. In this case, the written and recorded Declaration would satisfy the writing requirement.
The duty to mitigate is not necessarily an absolute defense, but rather concerns the amount of damages that a plaintiff can recover. A failure to reasonably attempt to mitigate damages reduces a party’s recovery by the amount of loss that could have been avoided by reasonable mitigation. State Pub. Sch. Bldg. Auth. v. W.M. Anderson Co., 49 Pa. Cmwlth. 420, 423, 410 A.2d 1329, 1331 (1980); Restatement (Second) of Contracts § 350, comment. b.


In a breach of employment contract context, an injured party’s failure to mitigate lost wages would reduce his damages by any amount which might have been earned through reasonable diligence in seeking other employment. Delliponti v. DeAngelis, 545 Pa. 434, 681 A.2d 1261 (1996). (citation omitted). “An employee, however, need not accept employment that is substantially different from the original employment to mitigate damages.” J.E. Murray, Jr., Murray on Contracts, § 122, at 801 (4th ed. 2001). Further, a person ordinarily cannot be forced to go to another locality to obtain work at his chosen occupation in order to mitigate damages. Williams v. National Organization, Masters, Mates & Pilots of America, Local No. 2, 384 Pa. 413, 423, 120 A.2d 896, 901 (1956). Thus, the burden is upon the breaching party to prove that other substantially equivalent positions were available to the injured party and that the injured party failed to use reasonable diligence in attempting to secure those positions. Delliponti v. DeAngelis, supra, 545 Pa. at 443, 681 A.2d at 1265.

In this case, the facts state that Lilly sought other employment opportunities, but the only job offer that she received following Ballet’s wrongful termination of her contract was as an as-needed substitute member of a ballet company, not as a principal dancer. Additionally, the salary for this new position was substantially less than she was earning as Ballet’s principal dancer. Finally, the as-needed substitute position was at a location out of state and far away from Lilly’s family.

The trier of fact will have to carefully consider all of these circumstances in determining whether the other employment opportunity offered to Lilly was substantially similar to her previous position and thus made her failure to take the new position an unreasonable effort to mitigate her damages due to Ballet’s breach of her contract.

4(a). **Ted will not recover his daily lost profits due to Marshall’s failure to deliver the saw to the manufacturer because these damages were not reasonably foreseeable.**
When there has been a breach of a contract, courts generally award damages to place the non-breaching party in as good a position as he would have been had the contract been performed. *Lambert v. Durallium Products Corp.*, 364 Pa. 284, 287, 72 A.2d 66, 67 (1950). “The interest protected in this way is called the ‘expectation interest’ . . . [and] is sometimes said to give the injured party the ‘benefit of the bargain.’” Restatement (Second) of Contracts § 344, comment a.

It is well-settled law in Pennsylvania that lost profits are recoverable upon proper proof in a breach of contract action. Lost profits may be recovered if: (1) “there is evidence to establish the damages with reasonable certainty;” (2) the damages “were the proximate consequence of the wrong,” and (3) the damages “were reasonably foreseeable.” *Delahanty v. First Pennsylvania Bank, N.A.*, 318 Pa. Super. 90, 120, 464 A.2d 1243, 1258 (1983). A plaintiff bears the burden of proving lost profits. *Id.* at 118, 464 A.2d 1257.

Proof of damages need not be mathematically precise, but the evidence must establish the fact “with a fair degree of probability.” *Exton Drive-In, Inc. v. Home Indemnity Co.*, 436 Pa. 480, 488, 261 A.2d 319, 324 (1969). Lost profits, however, “cannot be recovered where they are merely speculative,” and Pennsylvania courts are reluctant to award them when a business venture is not established. *Delahanty v. First Pennsylvania Bank, N.A.*, *supra*, 318 Pa. Super. at 120-121, 464 A.2d at 1258-59. Here, the facts state that Ted’s architectural and contracting firm was “well-established and profitable.” Since his firm was not a new and untried business, Ted should be able to demonstrate that his lost profits are reasonably certain and not “too speculative, vague, or contingent upon some unknown factor.” See *Spang & Co. v. U.S. Steel Corp.*, 519 Pa. 14, 26, 545 A.2d 861, 866 (1988).

It can also likely be established that the lost profits resulted from the breach because the loss was the consequence of Marshall’s error in delivering the saw. The more pressing question is whether Ted can establish that his lost profits were reasonably foreseeable. Based upon the principles established in the famous case of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng.Rep. 145 (1854), Pennsylvania law makes a distinction between general damages and consequential damages. *Fort Washington Resources, Inc. v. Tannen*, 901 F.Supp. 932 (E.D. Pa. 1995). General damages are those ordinary damages that arise “naturally, i.e. – according to the usual course of things, from [the] breach of the contract.” *Hadley v. Baxendale, supra*. They are damages that any reasonable person would contemplate or foresee occurring if he breached the contract. The knowledge that such damages could arise from a breach is imputed to a reasonable person. *See*, J.E. Murray & T. Murray, *Contract Law for the 21st Century Lawyer*, §34-7, at 213 (2010).

Consequential damages are damages arising out of special circumstances. They are intended to cover those collateral losses, such as expenses incurred or gains prevented, which result from a breach of contract. *See*, J.E. Murray, Jr., *Murray on Contracts*, § 118 A, at 775-76 (4th ed. 2001). Consequential damages only can be recovered if “it can be shown specifically that the defendant had reason to know of the circumstances responsible for the special damage and to foresee the injury.” *Ebasco Services, Inc. v. Pennsylvania Power & Light Co.*, 460 F. Supp. 163, 213 n. 62 (E.D. Pa. 1978). (citation omitted). Thus, to recover consequential damages, an injured party must prove that the damages were “within the contemplation of the parties at the time they made the contract.” *Taylor v. Kaufhold*, 368 Pa. 538, 546, 84 A.2d 347,
Here, there is nothing in the facts to suggest that a reasonable person would have foreseen at the time of the formation of the contract the lost profits that Ted would suffer if the saw was not delivered on time. See, e.g., Macchia v. Megow, 355 Pa. 565, 50 A.2d 314 (1947). Thus, it is doubtful that the lost profits fall into the category of being damages arising generally or ordinarily from the breach. Further, although Ted did inform Marshall about the lost profits if Marshall did not deliver the saw to the right place at the right time, these special circumstances giving rise to the lost profits were not communicated to Marshall until two days after the formation of their contract and as he was about to begin transporting the saw to the manufacturer. Since the foreseeability of possible consequences from a breach must be determined at the time of the contract’s formation, Marshall’s subsequent acquisition of that knowledge is legally irrelevant. Murray on Contracts, supra, § 120 A, at 785. Because Marshall did not have prior notice of “the special circumstances under which the contract was actually made,” Hadley v. Baxendale, supra, Ted’s lost profits are not recoverable as consequential damages.

Accordingly, Ted’s lost profits from the unavailability of his saw would not be recoverable because they were not reasonably foreseeable and were not contemplated by the parties at the time of the making of the contract.

4(b). Ted cannot recover damages for emotional distress.

As a general rule, damages for emotional distress ordinarily are not recoverable in a breach of contract action in Pennsylvania. There are two exceptions to this general rule. The first is where the emotional distress is accompanied by bodily harm. The second is where the breach is of such a kind that serious emotional disturbance is a particularly likely result. Rodgers v. Nationwide Mut. Ins. Co., 344 Pa. Super. 311, 496 A.2d 811 (1985); Rittenhouse Regency Affiliates v. Passen, 333 Pa. Super. 613, 615, 482 A.2d 1042, 1043 (1984). For a case to fall under the latter exception, not only must the contract be one whose breach is recognized as being likely to cause emotional distress, see, e.g., RESTATEMENT (SECOND), supra, § 353, comment a, “but the defendant’s conduct must be something close to outrageous.” Rodgers v. Nationwide Mut. Ins. Co., supra, quoting, Harrison v. Nationwide Mutual Fire Insurance Co., 580 F.Supp. 133, 135-36 (E.D. Pa. 1983).

In this case, it is doubtful that Ted could sustain a claim for emotional distress damages under the two exceptions to the general rule. Marshall’s breach did not cause bodily harm to Ted. Additionally, the contract here is not one whose breach is recognized as being particularly likely to cause emotional distress. Finally, Marshall’s conduct in breaching the contract, though upsetting to Ted, hardly seems to be labeled as outrageous.
Question No. 5: Grading Guidelines

1. **Substantial Performance/Material Breach of Contract**

Comments: Candidates should recognize that the duty of a party to perform when there has been a breach of contract by the other party is dependent upon whether the breach is material or conversely whether the breaching party has substantially performed under the contract. Candidates should apply the factors for determining materiality of breach/substantial performance to the stated facts and arrive at a well-reasoned conclusion concerning the disposition of the competing legal claims asserted by the parties.

5 Points

2. **Enforcement of an Equitable Servitude**

Comments: Candidates should recognize that the Declaration restricting the use of the lots in the Plan is enforceable as an equitable servitude. Candidates shall identify the elements necessary for an equitable servitude to be binding upon successive owners and apply the elements to the stated facts. Candidates should conclude their analysis by discussing the specific relief to enforce the restriction.

5 Points

3. **Duty to Mitigate Damages for Breach of Contract**

Comments: Candidates should recognize that a party who suffers a loss due to a breach of contract has a duty to mitigate damages. Candidates should discuss the stated facts in relation to the standards required for mitigation of damages.

3 Points

4. **Damages for Breach of Contract**

Comments: Candidates should recognize that the award of damages for breach of contract generally is to fulfill the injured party’s expectation interest. Candidates should discuss the criteria generally applicable for recovery of damages in a contract action and should reach a well-reasoned conclusion regarding whether lost profits can be awarded based upon the stated facts. Candidates should discuss whether damages for emotional distress can be recovered for a breach of contract under the facts of this question.

7 Points
Question No. 6

Farm Corporation (“Farmco”), a Pennsylvania corporation, owns extensive land that it leases for farming. It also sells farm equipment. Farmco has approximately 1,000 shareholders. Pete, Farmco’s president, oversees Farmco’s land operations.

In 2009, Pete was approached by Gasco about leasing a 300 acre parcel of Farmco land to Gasco for a new type of deep well natural gas drilling. Pete, acting within the scope of his authority, signed a lease with Gasco that required Gasco to begin paying minimum monthly royalty payments commencing July 1, 2011.

In June of 2011, Gasco contacted Pete indicating regulatory issues had delayed its operations. Gasco requested an amendment to the lease to allow Gasco to withhold and accrue royalty payments until July 1, 2013. Gasco offered to pay interest on the accrued royalty payments at 12% per annum and to make a lump sum payment of all accrued payments plus interest on July 1, 2013. Pete agreed to the Gasco amendment.

At the August 2011 annual board meeting Pete reported his actions relative to the lease. A group of shareholders holding a small number of Farmco shares, who had previously expressed displeasure with the lease, demanded that Farmco file suit against Pete to immediately recover the payments that Farmco would have received from Gasco arguing that Pete’s consent to the amendment adversely affects Farmco’s cash flow. The board formed a special litigation committee of directors who are not Farmco employees to review the demand. After consulting with Farmco’s accountant and business consultant the committee, in March of 2012, reported that although the amendment will affect cash flow it will not impede operations and that the interest that will be earned is well above market rates ultimately resulting in a windfall to Farmco. The committee also concluded Pete had acted in the best interests of Farmco in
consenting to the amendment. Based on the report the board concluded that it should deny the request to sue Pete because it was not in the best interest of Farmco to do so. The minority shareholders filed a derivative action seeking damages from Pete.

Kitty, also a minority shareholder of Farmco, runs a mail order greeting card business. She has submitted a written request to Farmco’s board asking for the names and addresses of all Farmco shareholders. Kitty’s request indicates that she would like the list so she can solicit the shareholders to purchase greeting cards from her business.

Fred recently visited Farmco to purchase a tractor. Fred operates a boat storage facility and desired a tractor to move boats around his facility. Fred explained to Farmco’s manager that he knew nothing about tractors and needed a tractor that could pull boats up and down a steep hill on a paved road. Although tractors sold by Farmco are designed for use on dirt surfaces, Farmco’s manager assured Fred that a Tractor 1000 would meet Fred’s needs. The manager prepared a sales agreement and typed on the next to last page of the ten page agreement, in small type, “Farmco disclaims all implied warranties, including warranty of merchantability and fitness for a particular purpose.” Fred did not notice this language when he signed the contract. Farmco promptly delivered the Tractor 1000. After using the tractor Fred has determined that although it works properly as a tractor it is incapable of pulling the boats up the paved hill.

1. On what substantive basis should the Farmco board move to have the derivative action filed by the minority shareholders dismissed?

2. Must Farmco comply with Kitty’s request?

3. Other than the warranty of good title, what implied warranties under the Uniform Commercial Code are potentially available for Fred to assert against Farmco with respect to the tractor, and will Fred be able to prove what is required to establish a breach of each warranty?

4. Will the added language in the sales contract prevent Fred from successfully pursuing any implied warranties that might apply?
Question No. 6: Examiner’s Analysis

1. The Farmco board should move to dismiss the derivative action arguing that its decision not to pursue an action against Pete was supported by and is consistent with the business judgment rule.

Pennsylvania law allows a board of directors to move to dismiss a derivative action filed by a minority group of shareholders if the directors are independent, not interested in the subject of the business judgment, and act on an informed basis, in good faith and with the honest belief that their action is in the best interests of the corporation, i.e., in accordance with the business judgment rule. See, Cuker v. Mikalauskas, 547 Pa. 600, 692 A.2d 1042 (1997). Without considering the merits of the underlying action being challenged, the court should evaluate the validity of the board’s decision and, if satisfied that it was made in accordance with appropriate standards, terminate the litigation. Id.

In Cuker the issue was “whether the business judgment rule permits the board of directors of a Pennsylvania corporation to terminate derivative lawsuits brought by minority shareholders.” Id. at 606, 1045. The Pennsylvania Supreme Court explained:

The business judgment rule insulates an officer or director of a corporation from liability for a business decision made in good faith if he is not interested in the subject of the business judgment, is informed with respect to the subject of the business judgment to the extent he reasonably believes to be appropriate under the circumstances, and rationally believes that the business judgment is in the best interests of the corporation. . . . It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Absent an abuse of discretion, that judgment will be respected by the courts. . . . (citation omitted)

* * *

Without considering the merits of the action, a court should determine the validity of the board’s decision to terminate the litigation; if that decision was made in accordance with the appropriate standards, then the court should dismiss the derivative action prior to litigation on the merits.

Id. at 606, 1045. In Cuker, minority shareholders had filed a derivative action because the corporation’s board had refused to file suit against an officer of the corporation. The Court recognized that “[d]ecisions regarding litigation by or on behalf of a corporation, including shareholder derivative actions, are business decisions as much as any other financial decisions.” Id. at 611, 1048. The Court indicated that without considering the merits of the action the court should determine the validity of the board’s decision to terminate the action looking at whether the decision was made in accordance with appropriate standards. If the court concluded that the standards have been met then the suit should be dismissed without further analysis. Factors
bearing on the court’s decision include the independence and disinterestedness of the board, the adequacy of its investigation and whether it rationally concluded that the action of the board was in the best interest of the company. *Id. at* 1048

In the instant case, prior to making a decision to seek termination of the shareholder derivative suit the board formed a special litigation committee consisting of outside directors (directors not employed by Farmco). The committee consulted with the company’s outside accounting firm and business consulting firm and received a report indicating that any cash flow problems created by the actions taken by Pete did not impede operations and that the interest that will be earned on the delayed royalty payments is well above market rates. The committee also concluded that Pete had acted in the best interests of the corporation when he agreed to the amendment and that it was not in the best interest of the company to bring suit. Based on this information the board is justified in seeking the dismissal of the suit as its decision is based on a rational belief that it was in the best interest of the company to do so and its decision was based upon sound independent information from a committee of directors who had no direct interest in the outcome of the claim against Pete and for whom there is no evidence of any relationship with Pete. The board would be acting in good faith and will have reasonably concluded that the suit should be dismissed. The court should grant the board’s request for dismissal without reviewing the merits of Pete’s actions.

2. **Farmco does not need to comply with Kitty’s request because the purpose of her request does not reasonably relate to her interest as a shareholder of Farmco.**

Section 1508 of the Pennsylvania Business Corporation Law of 1988 (the “BCL”) requires Pennsylvania business corporations to keep complete and accurate books and records of account, minutes of the proceedings of the incorporators, shareholders and directors and a share register giving the names and addresses of all shareholders and the shares owned by each. *15 Pa. C.S.A. §1508(a).* Section 1508 also provides:

(b) Every shareholder shall, upon written verified demand stating the purpose thereof, have a right to examine, in person or by agent or attorney, during the usual hours for business for any proper purpose, the share register, books and records of account, and records of the proceedings of the incorporators, shareholders and directors and to make copies or extracts therefrom. A proper purpose shall mean a purpose reasonably related to the interest of the person as a shareholder.

(c) If the corporation . . . refuses to permit an inspection sought by a shareholder . . . the shareholder may apply to the court for an order to compel the inspection. The court shall determine whether or not the person seeking inspection is entitled to the inspection sought. The court may summarily order the corporation to permit the shareholder to inspect the share register . . . and to make copies or extracts therefrom, or the court may order the corporation to furnish to the shareholder a list of its shareholders as of a specific date on condition that the shareholder first pay to the corporation the reasonable cost of obtaining and furnishing the list . . . .
Farmco must maintain a shareholder list with addresses and shares held by each shareholder. Kitty also has a right to the list if requested for a purpose related to her interest as a shareholder. Farmco should be able to defend its position if it decides not to provide the list because Kitty has not requested the list for a purpose related to her interest as a shareholder. Kitty wants the list for her mail order business. She does not intend to use the list to advance any purpose related to her interest as a shareholder.

Courts have found a legitimate purpose where a shareholder list was requested to allow the recipient to influence shareholders to vote in a certain way at an upcoming shareholder meeting or to inform shareholders regarding a proposed action by the board. Susquehanna Corp. v. General Refractories Co., 250 F. Supp. 797 (M.D. Pa. 1966); Goldman v. Trans-United Industries, Inc., 404 Pa. 288, 171 A.2d 788 (1961). Solicitation of the list to advance Kitty’s personal mail order business does not appear to be in furtherance of the interests of Kitty as a shareholder of Farmco and, therefore, the board could deny her request.

3. The implied warranties of merchantability and fitness for particular purpose are potentially available to Fred, and he would likely be able to establish the elements for breach of the implied warranty of fitness for particular purpose.

Article II of the Pennsylvania Uniform Commercial Code on Sales (the “Code”) 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 tractor sold by Farmco to Fred is a good under the Code.

There are two implied warranties potentially available under the Code in connection with the tractor purchased by Fred. Section 2314 of the Code imposes an implied warranty of merchantability. 13 Pa. C.S.A. §2314. If certain facts exist, Section 2315 of the Code imposes an implied warranty that a good is fit for a particular purpose for which a buyer has purchased the good. 13 Pa. C.S.A. §2315.

The implied warranty of merchantability arises when a merchant sells a good that was not “merchantable”, thus causing damages to the buyer. See, White and Summers, Uniform Commercial Code, 4th Ed., §9-7, 13 Pa.C.S.A. §2314. Farmco is a merchant under the Code because it deals in goods such as the tractor that it sold to Fred. 13 Pa. C.S.A. §2104. The Code indicates that goods such as the tractor in this case are not merchantable if they would not pass without objection in the trade or are not fit for the ordinary purpose for which they are made and used. See, White and Summers, Uniform Commercial Code, 4th Ed., §9-8; 13 Pa. C.S.A. §2314(b)(1)(3). It is unlikely that Fred would be able to assert a successful claim under this warranty because the tractor performs as a tractor is designed to perform and is not defective or nonworking. Instead, the tractor cannot perform in the manner in which Farmco’s sales manager said it would perform. If it were on a farm the tractor would most likely be fully functional.
The implied warranty of fitness for particular purpose arises if the seller knew of the buyer’s particular purpose for buying the good, knew that the buyer was relying upon the seller’s expertise in selecting an appropriate good to meet the buyer’s needs, the buyer, in fact, relied on the seller’s expertise and the good failed to meet those needs. See, White and Summers, Uniform Commercial Code, 4th Ed., §9-10; 13 Pa. C.S.A. §2315. Farmco’s manager clearly knew of the particular purpose that Fred had for the tractor; i.e., that it had to be able to pull boats up a steep hill on a paved road. It also appears that Fred was relying on the manager to select an appropriate tractor and that the manager was aware of Fred’s reliance on the manager to select an appropriate tractor. Accordingly, Fred should be able to establish the elements to support a claim under the implied warranty of fitness for particular purpose because the tractor did not meet Fred’s stated needs.

4. The disclaimer language in the sales contract most likely will not bar Fred’s implied warranty claim because the language was not conspicuously displayed in the contract.

Section 2316 of the Code provides, in part:

(b) Implied warranties of merchantability and fitness.--Subject to subsection (c), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “There are no warranties which extend beyond the description on the face hereof.” 13 Pa. C.S.A. §2316.

The purchase agreement provided, “Farmco disclaims all implied warranties, including warranty of merchantability and fitness for a particular purpose.” Generally, language such as this adequately disclaims both of the implied warranties if the language is conspicuously set forth in the sales agreement. If the language meets the test of being conspicuous then the implied warranties would be effectively disclaimed. Quinn, Uniform Commercial Code Commentary and Law Digest, 2nd Ed., §2-316[A][3][c].

The Code requires that the disclaimer language be in writing and conspicuous. The primary reason for the conspicuous requirement is to avoid a fine print waiver by a buyer. The Code defines conspicuous to mean a term “so written, displayed or presented that a reasonable person against which it is to operate ought to have noticed it.” 13 Pa. C.S.A. 1201(b)(10). Factors to be considered in determining if a waiver is conspicuous include the disclaimer’s placement in the document, the size of the disclaimer’s print and whether the disclaimer was highlighted by being in bold print or capitalized letters or a different color. See, Woolums v. National RV, 530 F. Supp.2d 691 (M.D. Pa. 2008). In the instant case the disclaimer appeared on the next to last page of a ten page contract in small print. It was not brought to Fred’s attention and Fred was not aware of its inclusion in the contract. If disclaimer is raised as a defense by Farmco, Fred has a strong argument that the disclaimer should not apply because it was not conspicuous.
Question No. 6: Grading Guidelines

1. **Corporations—Business Judgment Rule**

The candidates should recognize that the facts pose a business judgment rule situation and discuss the standards to be met by the board to successfully dismiss the minority shareholder derivative action.

6 points

2. **Corporations—Record Request by Shareholder**

The candidates should recognize that shareholders can request certain corporate records if the purpose is related to their interest as a shareholder and should discuss whether or not Kitty’s request complies with the rules governing the right to obtain records.

4 points

3. **Sales—Implied Warranties of Merchantability and Fitness**

The candidates should identify the two implied warranties that might come into play under the Uniform Commercial Code and the applicability of each to the facts presented.

7 points

4. **Sales—Effect of a Non-conspicuous Disclaimer**

The candidates should discuss the existence of the disclaimer and its effectiveness given its placement within the sales agreement.

3 points
Supply Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination
July 24 and 25, 2012

PERFORMANCE TEST
July 24, 2012

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

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Memorandum

To: Applicant  
From: Susan Suite  
Date: July 24, 2012  
Re: Farmers Market Corporation v. Rapacious Insurance Company  
Our Client File No. 63501001

Our client, Rapacious Insurance Company (“Rapacious”), issued a fire and casualty insurance policy to Farmers Market Corporation (“FMC”), which operates a farmers’ market type shopping center in Madison. The market consists of a large warehouse building with a number of stalls or cubicles that local farmers rent from FMC to display and sell their produce. There are stalls for fruits, vegetables, meat and meat products, crafts, and other related items. All stalls are equipped with an existing walk-in-freezer and also include such other property and equipment as FMC is required to install pursuant to the terms of the lease with a particular tenant.

FMC filed a claim with Rapacious, alleging a loss when a tenant that had operated a stall for the sale of meat and related products moved out during the middle of the night removing a variety of equipment. Rapacious’ general counsel, Sarah Stone, Esquire, has asked us to opine on whether several pieces of equipment that were removed by the tenant of FMC are covered under the insurance policy that had been issued to FMC. Stone’s letter, with a copy of a summary of the policy, the claims adjuster’s report, and the tenant lease are in the file attached to this memorandum.

Please prepare for my signature, a formal opinion of counsel letter directed to Attorney Stone addressing the issues raised in her letter. I have also attached a memorandum which explains how to prepare an opinion letter.

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 opinion letters

The following instructions for drafting opinion letters should be followed by all firm attorneys:

The document should follow the format of a formal business letter. Neither our letterhead nor the client’s inside address is required, as this information will be added later by administrative staff. The letter should be dated and directed to the person asking for our opinion.

I. The subject line should succinctly identify the subject matter(s) of the letter, and the client’s file number.

II. The letter should begin with a short statement of its purpose, such as, “You have asked our opinion regarding . . . .”

III. If there is more than one issue, the letter should be divided into sections, one for each issue presented.

A. Each issue to be addressed should be separately stated as a question and should be followed by a conclusion. Words such as “probably”, “possibly” and “not likely” may be used to qualify your conclusion when the outcome is less than certain if you explain in your discussion why uncertainty exists.

B. The question and conclusion should then be followed by a reasoned discussion supporting your conclusion, which applies legal principles to the facts relevant to that question. Seemingly contrary authority should be distinguished. Cite the legal authorities relied upon using a short form of citation (Bluebook format is not required).

IV. The letter should conclude with an appropriate closing and the signature of the assigning partner.

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RAPACIOUS INSURANCE COMPANY  
5440 Bering St.  
Nome, Alaska 99999

July 18, 2012

Susan Suite, Esquire  
Suite & Sauer, P.C.  
123 Pepper Street  
Madison, PA 19998

Re: Claim of Farmers Market Corporation

Dear Ms. Suite:

I am the general counsel of Rapacious Insurance Company (“Rapacious”). On behalf of Rapacious, I am retaining your firm to provide us with guidance on several issues of Pennsylvania law. Rapacious is an Alaska insurance company licensed by the Pennsylvania Insurance Department to issue policies in Pennsylvania, and is registered with the Corporation Bureau to do business in your state.

Rapacious issued a fire and casualty insurance policy to Farmers Market Corporation (“FMC”). A summary of the relevant terms is attached. On the night of July 2, 2012, a tenant of FMC’s, Marvin’s Organic Meats, in breach of its lease, abandoned its premises and removed various pieces of equipment, causing physical damage. FMC has filed a claim under the policy for the value of the equipment and the cost of the repair. As you can see from the attached adjuster’s report, there are various types of equipment involved.

Although I have decided to reimburse our insured for the cost of the repairs of the damages, I am uncertain as to our responsibility to pay for the items that were taken, and I would like your opinion as to whether the items claimed by FMC are covered under the policy.

I expect your opinion will be both reasoned and unqualified, or if qualified, will state why an unqualified answer cannot be given.

Very truly yours,

Sarah Stone

Sarah Stone, General Counsel
FIRE AND CASUALTY INSURANCE POLICY

SUMMARY OF IMPORTANT TERMS

Term of Coverage: 12:01 A.M. 9/1/11 through 11:59 P.M. 8/31/13

Insured: Farmers Market Corporation

Insured Location: Farmers Market Shopping Center, Demeter Street, Madison, PA 19998

Covered Losses: All casualty, damages, and/or losses to real estate, fixtures, furnishings, equipment, and other personalty located at the insured location caused by fire, storm, vandalism, arson, theft and all other causes except acts of war or rebellion

Exceptions: Property of a tenant of Farmers Market Corporation, including but not limited to inventory, personal property and such other property that may lawfully be removed by a tenant is excluded from coverage under this policy.

Limit of Coverage: $1,500,000.00

Other provisions: Policy shall be interpreted and enforced in accordance with the law applicable to the insured location. Policy shall be interpreted as if both parties had equal bargaining power and each participated in the drafting.
FARMERS MARKET STALL LEASE AGREEMENT

THIS LEASE AGREEMENT (this “Lease”) is made as of August 1, 2011, by Farmers Market Corporation (the “Landlord”) and Marvin’s Organic Meats (the “Tenant”).

1. Demise and Basic Provisions. In consideration of Tenant’s payment of the Rent of $500.00 per month on the first day of each month, Landlord leases the Premises known as Stall 13, including the existing walk-in freezer and such other equipment set forth in Paragraph 2 of this lease which has been requested by Tenant, in Landlord’s shopping center on Demeter Street, Madison, Pennsylvania, to Tenant for the Term of five years beginning August 1, 2011.

2. Additional Equipment. Landlord shall install at its expense three refrigerated display cases which are required by Tenant to operate its meat business. The cases will be similar in appearance to those used by several other vendors so that the market has a uniform appearance. Any equipment provided under this Paragraph which has not been removed by Tenant prior to the expiration or termination of this lease shall become the property of Landlord.

3. Maintenance and Repairs. At all times during the Term of this Lease, Tenant shall be responsible for, and shall cause to be performed at Tenant’s expense, all routine maintenance and repairs needed to keep the Premises in functional order and in substantial compliance with all laws, ordinances and regulations applicable to Tenant’s use of the Premises.

4. Improvements and Alterations. Tenant shall not make any improvements or alterations to the premises without Landlord’s permission. All alterations and improvements shall be made at Tenant’s sole cost and in furtherance of Tenant’s business. Tenant may install a stove with exhaust hood at Tenant’s expense and to Tenant’s specifications. Tenant may remove only such of its trade fixtures as will not cause or result in damage to the Premises.

5. Events of Default. The following shall constitute Events of Default by Tenant under this Lease: (a) Failure by Tenant to pay any installment of Basic Rent or Additional Rent when due under the terms of this Lease; and (b) Failure by Tenant to occupy the Premises and operate a retail meat and meat products business thereon during the term of this lease.

6. Landlord’s Remedies. Upon the occurrence of any Event of Default, Landlord may terminate this Lease, effective at such time as may be specified by notice to Tenant, and demand possession of the Premises from Tenant. Tenant shall remain liable for (1) any previously unpaid rent, (2) accelerated rent that would be due for the remaining term of the lease, and (3) for any other losses Landlord may suffer by reason of such Event of Default.

IN WITNESS WHEREOF, Landlord and Tenant have executed this Lease, intending it to take effect as of the day and year first mentioned above.

LANDLORD:  TENANT:

Jay Lee  Marvin Jenkins
Jay Lee, President  Marvin Jenkins
RAPACIOUS INSURANCE COMPANY

ADJUSTER’S REPORT

The undersigned adjuster was assigned to investigate the claim filed by Farmers Market Corporation for theft and damages which allegedly occurred at Stall 13 of its Demeter Street, Madison, Pennsylvania, shopping center on the night of July 2, 2012. The loss was caused when the tenant apparently moved out during the night.

The reported loss consisted of two categories: (a) physical damages, and (b) loss of equipment including the walk-in freezer, a stove with hood, and 3 display cases. Your insured claims that the damages are covered by the policy, as are all of the listed equipment, because the latter became its property as a matter of Pennsylvania law upon installation.

Description of loss:

Walk in Freezer: This item consisted of a steel insulated freezer unit 6’ wide by 10’ long by 7’ high, with steel door. It was bolted to a special concrete pad, and directly connected to the building’s electrical and plumbing systems. Floor bolts were cut as were electrical and plumbing connections which had not been capped off. The front framework of the stall had been removed to facilitate the removal of the freezer, which would have to have been accomplished with a crane of some sort and a large flatbed truck. I estimate the replacement cost of the freezer at $65,000.00, and the cost of reinstalling and reconnecting, including replacement of the front of the stall at $20,000.00.

Stove with hood: This is a standard industrial or commercial gas stove with ovens, and an attached exhaust hood. The hood had been vented through a hole in the ceiling which was covered by the exhaust fan. The stove had been bolted to the floor, and connected to the building’s gas line. The stove with the hood and exhaust fan assembly had been removed, leaving a hole in the ceiling and holes in the floor where the bolts had been fastened. The bolts and electrical lines had been cut, and the gas line disconnected. I estimate the cost of replacement of the stove and hood at $2,500.00, and the repair costs at $3,500.00.

Display cases: There were three refrigerated cases for displaying meat and related products, each six feet long with glass fronts, stainless steel tops, and sliding rear doors for access. They matched the display cases in the other stalls, giving a uniform appearance to the market. Each case was self-contained and was plugged into nearby electrical outlets. The display cases were bolted to existing brackets in the floor of the stall. The brackets, which are found in all of the stalls, are of a basic design that is intended to permit any display cases that may be used in connection with a tenant’s business to be easily attached and removed. The removal of the display cases did not cause any damages to the premises. Estimated replacement cost is $3,000.00 per unit.

Sam Adjuster
LIBRARY
Appellants, representing the estate of Joseph P. Cattie, Sr., the original lessor, brought an action in trespass against the defendant-corporation, lessee, for the value of machinery and equipment removed by the lessee after the termination of the lease between Cattie and the corporation. At the conclusion of the jury trial the Court below directed a verdict for the corporation. After plaintiffs’ motion for a new trial was dismissed, judgment was entered on the verdict and plaintiffs took this appeal.

***

Accepting plaintiff-appellants’ evidence and all reasonable inferences therefrom the facts may be thus summarized: Cattie (the decedent) and his two brothers each owned one-third of the stock of the defendant-corporation, of which Cattie was the president and active manager. The corporation occupied certain land and buildings at the northwest corner of Gaul and Letterly Streets in Philadelphia. The land and buildings were owned by Cattie until his death on July 3, 1950, and had been leased to the corporation since January 1, 1921, under various written leases. After Cattie’s death the corporation continued in possession of the premises until December 21, 1951, at which time the lease was terminated on notice from the present appellants. At that time the machinery and equipment which are the subject of this lawsuit were removed from the building by the corporation. Among the equipment removed was a craneway (which is in the nature of a track approximately 20 feet high) which rested upon columns embedded in a concrete foundation on the floor and a tram rail system (similar to the craneway but consisting of a single railed track running throughout the building) which was supported by cross beams embedded in the walls of the building. It is conceded by plaintiffs (as well as by defendant) that the craneway and the tram rail system were fixtures.

In order to remove the craneway and the tram system from the building, it was necessary to cut them up with acetylene torches and remove them piece by piece. The equipment was thus totally destroyed and was sold for scrap. The value of this equipment just before its destruction was estimated to be in excess of $69,200. The
corporation sold the metal as scrap for $10,414.02.
Appellants claim the value of the equipment and machinery before its destruction and sale, namely, $69,200 (as well as the value of certain other machinery which is presently irrelevant).

The question raised by this appeal is whether the equipment at the time of its removal was the property of the defendant-lessee-corporation or of the plaintiffs-lessee-appellants. As between landlord and tenant the rule is well settled in Pennsylvania that where a tenant attaches to real estate fixtures and equipment necessary for the operation of its business, such items become ‘trade fixtures’, and a presumption arises that the tenant is entitled to remove them during or at the termination of its lease. (Citations omitted). At the trial appellants admitted that the machinery and the aforesaid equipment were installed by the defendant-lessee-corporation at its ‘sole’ expense for use in its business operations. It is also clearly settled that ‘The same sound policy of the law which favors a tenant in the matter of the removal of trade fixtures requires that in the construction of an agreement containing words whose meaning is doubtful the construction of the words most favorable to the tenant shall prevail. Nothing short of the clearest expression of an agreement by the parties to that effect\(^1\) can justify the extension of the grasp of the landlord so as to cover chattels, or personal property brought upon the premises by the tenant, in pursuance of the business for which the premises were leased.\(^{\text{Citations omitted}}\).

\(^1\) Italics throughout, ours.

In the present case the written leases between Cattie and the corporation made no mention of these fixtures. Likewise, appellants have not offered any evidence to support their claim or to rebut the presumption that the tenant was entitled to remove the fixtures. On the contrary, Joseph P. Cattie, Jr., one of the appellants, testified that on November 19, 1951, on behalf of his father’s estate, he had offered the corporation $20,000 for the equipment in question in order ‘to leave it in the [father’s] estate.’ From the lack of evidence to rebut the presumption on the one hand and appellants’ admissions on the other hand, it is evident that the trial Court committed no error in directing a verdict for the defendant-lessee-corporation.

* * *

Judgment affirmed.
Superior Court of Pennsylvania

C. Ernest LEHMANN

v.

David KELLER and Edna Keller, Appellants

Opinion

David and Edna Keller appeal from the order declaring C. Ernest Lehmann the owner of certain oil and gas property and enjoining the Kellers from interfering with Lehmann's use of this property. Our principal task in this Opinion is to determine what possessory rights the lease of oil and gas wells creates in the derricks, casings and other pumping equipment attached to the wells at the time the wells are leased.

* * *

. . . We further conclude that possessory rights to the attached equipment are governed by the law of fixtures. Items of equipment that constitute fixtures are part of the leasehold estate; thus the parties' interests in the fixtures are identical to their interests in the leasehold estate. Because we cannot conclude, based on this record, whether the disputed equipment constitutes fixtures or personalty, we remand this matter for further proceedings consistent with this Opinion.

On May 9, 1974, Edna Keller (then Edna Lehmann) executed and delivered to her brother, C. Ernest Lehmann, a lease granting him the right to drill for oil and gas on certain property that Edna had inherited from their father. At the time of the conveyance, there were twelve oil and gas wells existing on Edna's property. Each of those wells was rigged with equipment for pumping.

The lease provided, in pertinent part, that Edna would “grant, demise and let unto [Lehmann] all the oil and gas in, and under [her property]; also the said tract of land for purpose of operating thereon for said oil and gas..., and all rights convenient for such operations.” Lease, attached to Lehmann's Complaint in Equity, Docket Entry No. 7. Lehmann paid one dollar in consideration of the lease and promised to deliver to Edna, throughout the duration of the lease, [a percentage] of all oil produced, [a percentage] of all gas revenues and a free supply of gas for domestic use. The parties' rights regarding the derricks, casings and other equipment attached to the wells at the
time of the conveyance were not addressed in the agreement. The term of the lease was for one year “and as much longer as oil or gas can be produced in paying quantities.”

Id.

After the conveyance, Lehmann operated two of the existing wells and drilled nineteen new wells. He used the equipment that was in place prior to the conveyance to pump the two older wells. The remaining ten old wells were either plugged or left dormant.

From 1974 until 1990, the relationship between the parties was amicable. In 1990, however, Lehmann's relationship with Edna and her husband, David Keller, deteriorated and David began interfering with Lehmann's use of the leased property. . . . David's conduct continued for several years and, in 1995, Lehmann sued to enjoin the Kellers from interfering with his rights under the lease and to establish his possessory rights to the leased property.

* * *

Having concluded that Lehmann did not acquire title to the disputed property through adverse possession, we next consider what the parties' possessory rights are in the derricks, casings and other equipment attached to the land at the time of the conveyance. We remand for further proceedings on this question.

Possessory rights regarding chattels that are attached to leased realty are determined by classifying the chattels as either fixtures or personal property (Citation omitted). “A fixture is an article ... of personal property which has been so annexed to the realty that it is regarded as part and parcel of the land.” (Citation omitted). When a fixture is attached to leased property by the lessor, the fixture becomes part of the leasehold estate and cannot be removed during the duration of the lease. (Citation omitted). Chattels that remain personal property, however, are not part of the leasehold and can be freely removed by their owner. (Citation omitted).

Items of equipment attached to oil and gas wells have traditionally been classified as trade fixtures. (Citation omitted). Under Pennsylvania law, there is a strong presumption that trade fixtures installed by a lessee remain the lessee's personal property. (Citation omitted). This rule is premised on the notion that lessees install trade fixtures for their own benefit and do not intend for the chattels to become part of the real estate. (Citation omitted). Lehmann argues that the
The trade fixture rule should be applied in this case to determine the ownership of the disputed oil and gas equipment. We disagree. The trade fixture rule is not implicated here because the disputed equipment was installed by the lessor. We conclude that general fixture principles, rather than the trade fixture rule, should determine the parties' rights to chattels which are affixed to a leasehold estate by the lessor.

Chattels used in connection with real estate can fall into one of three categories. (Citation omitted). First, chattels that are not physically attached to realty are always personalty. (Citation omitted). Second, chattels which are annexed to realty in such a manner that they cannot be removed without materially damaging either the realty or the chattels are always fixtures. (Citation omitted). The third category consists of those chattels that are physically connected to the real estate but can be removed without material injury to either the land or the chattels (Citation omitted). When a chattel falls into the third category, its status as a fixture or as personalty depends upon the “objective intent of the [owner] to permanently incorporate [the] chattel into real property, as evidenced by the proven facts and surrounding circumstances entered into evidence.” (Citation omitted). Because the facts were not sufficiently developed at trial to allow us to conclude whether the disputed equipment constitutes fixtures or chattels, we are constrained to remand.

On remand, the trial court must first determine which of the three categories includes the disputed equipment. Category one is eliminated in this case because the equipment is physically attached to the wells. Thus, the trial court must determine whether or not the removal of the equipment would materially damage either the equipment or the wells. If the answer to this question is yes, then the equipment is in category two and constitutes fixtures. If the court answers this question in the negative, then the equipment falls into category three.

If the court concludes that the equipment belongs in the third category, then the required inquiry is whether Edna manifested an intent at the time of the conveyance to treat the equipment as part of the land to which it is attached. We emphasize that her intent must be determined on an objective basis. As the supreme court stated, “‘it is not so much what a particular party intended his legal rights to be, as it is what intended...”
use of the property was manifested by the conduct of the party.’” (Citations omitted). Factors the court may consider in making this determination include: (1) the length of time which the chattels have been attached to the realty (Citation omitted); (2) whether the chattels are essential to the purpose for which the realty is used, (Citation omitted); and (3) whether the parties to the lease treated the chattels as part of the leasehold estate. (Citation omitted). These factors, of course, are not exclusive; the court may consider any other objective manifestations of Edna's intent (Citation omitted).

Based upon the foregoing analysis, we conclude that this case must be remanded for further proceedings consistent with this Opinion.
**INSTRUCTIONS**

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

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

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

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

The applicant is assigned as an associate in the firm of Suite and Sauer to draft a reasoned opinion letter for attorney Suite addressed to the general counsel of an insurance company client regarding whether certain claims by the insured are valid.

The facts must be extracted from the memorandum assigning the task, the general counsel’s letter, the lease, Terms of Insurance, and the adjuster’s report. To respond to this assignment, the applicant must analyze and reason from the cases in the library.

The applicant has been given a memorandum detailing how to prepare an opinion of counsel letter.

Format 2 Points

It is important for a lawyer to follow instructions. For example, lawyers who do not follow court rules or the procedural orders of judges may find their pleadings or briefs returned as unfiled, or even if filed, disregarded. Accordingly, the applicant is expected to organize his or her opinion letter in accordance with the given instructions.

Issue 1: Walk in Freezer 5 Points

Rapacious issued a fire and casualty policy to FMC, covering all real estate, furnishings, fixtures, equipment, and other property located at the insured’s location from damages or loss caused by theft or other causes, excepting a tenant’s personal property, inventory, and other property that could lawfully be removed by a tenant.

An article of personal property that is so attached to realty that it is regarded as part of the land is classified as a fixture. *Lehmann*

Chattels which are annexed to realty in such a manner that they cannot be removed without materially damaging either the realty or the chattels are always fixtures. *Lehmann*

When a fixture is attached to leased property by the lessor, the fixture becomes part of the leasehold estate and cannot be removed during the duration of the lease. *Lehmann*

The freezer was installed by FMC, the lessor, and therefore cannot be classified as a trade fixture. *Lehmann*

The freezer could not be removed without materially damaging the realty because the floor bolts had to be cut and the front framework of the stall had to be removed to permit
a crane to lift the freezer onto a truck. The removal of the freezer by the tenant caused extensive damage to the premises.

The freezer was a fixture that could not be lawfully removed by the tenant during the lease and thus is covered under the insurance policy.

**Issue 2: Stove and Hood**

6 Points

When a tenant attaches fixtures and equipment necessary for the operation of its business to real estate, such items are classified as trade fixtures. *Cattie*

The stove with hood, which was necessary for the operation of tenant’s business, was installed on the premises by the tenant and thus was a trade fixture.

There is a presumption that a trade fixture remains the personal property of the tenant and can be removed by the tenant during or at the termination of the lease. *Lehmann, Cattie*

There must be a clear expression of agreement between the parties to permit a landlord to overcome the presumption in favor of the tenant and retain a trade fixture. *Cattie*

The lease between the parties prohibits the removal of a trade fixture if such removal will cause damage to the premises.

Removal of the stove with hood caused damage to the premises including a hole in the ceiling and holes in the floor where the bolts holding the stove had been secured.

Even though the stove with hood was a trade fixture, it was not permitted to be removed by the tenant under the terms of the lease because its removal resulted in damage to the premises.

The stove with hood is covered under the insurance policy because it could not lawfully be removed by the tenant.

**Issue 3: Display Cases**

7 Points

The display cases were affixed to the real estate by the landlord at its expense.

The display cases were removable without causing any damages.

The trade fixture rule is not applicable where the property was installed by the landlord. *Lehmann.*

Where a chattel is physically connected to the real estate but can be removed without material injury to either the land or the chattel, its status as a fixture or as personalty
depends upon the objective intent of the owner to permanently incorporate the chattel into the real property. *Lehmann*

The intent is evidenced by the facts and surrounding circumstances demonstrating the intended use of the property. The focus is on the intended use of the property as manifested by the conduct of the party. *Lehmann*

Factors to consider include: (1) the length of time which the chattels have been attached to the realty; (2) whether the chattels are essential to the purpose for which the realty is used; and (3) whether the parties to the lease treated the chattels as part of the leasehold estate. *Lehmann*

In this case the following facts support a finding that there was no intent to incorporate the display cases into the realty: (1) the display cases were not a part of the existing stall, (2) the display cases were recently installed by the landlord based on the needs of the particular tenant, (3) a refrigerated display case is not necessarily essential for use of the stall by a future vendor depending on the displayed product, (4) the cases are easily removable, (5) the display cases are intended to become the property of the Landlord only if Tenant fails to remove them, and (6) presumably the landlord was recouping the cost of the display cases as part of the rent since the display cases were listed as part of the consideration for the rent.

The circumstances do not clearly establish an objective intent of the landlord to permanently incorporate the display cases into the real property, so the display cases would likely be considered to be the personal property of the tenant.

Chattels that are personal property are not part of the leasehold and can be freely removed by their owner. *Lehmann.*

The display cases were not covered by the insurance policy because they were the personal property of the tenant, and the tenant was able to lawfully remove the display cases from the premises.