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July 24, 2012

Re: Farmers Market Corporation v. Rapacious Insurance Company
Legal Opinion Letter
Client File No. 63501001

Dear Ms. Stone:

You have requested our opinion regarding whether certain items that were taken from your insured, Farmers Market Corporation ("FMC"), are covered under the terms of a fire and casualty insurance policy that Rapacious Insurance Company ("Rapacious") issued to the insured. Recently, a tenant of FMC, Marvin's Organic Meats ("Marvin's"), breached its lease and abandoned the premises. During that process, it removed several pieces of equipment, including a walk-in freezer, a stove with a hood, and display cases. The removal of some of the items caused physical damage to the premises. The policy that Rapacious issued to FMC reimburses the insured for all casualty, damages, or losses to real estate, fixtures, furnishings, or equipment, caused by vandalism or theft. The policy also excepts property of a tenant of FMC, including but not limited to inventory, personal property, and such other property that may be lawfully removed by a tenant. In order to determine whether FMC is entitled to reimbursement for the loss of the equipment, it is necessary to determine whether Marvin's was entitled to remove the property from the FMC premises.

I. Walk In Freezer

Issue:

Was Marvin's authorized to remove the walk-in freezer from the premises?

Conclusion:

The walk-in freezer was part of the leasehold, and Marvin's was not entitled to remove it. Therefore, Rapacious must reimburse FMC for its removal and any damages caused as a result of its removal.

Analysis:

Under Pennsylvania law, possessory rights regarding chattels that are attached to a leased realty are determined by classifying the chattels as either fixtures or personal property. Lehman v. Keller, Superior Court of Pennsylvania at 10. 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." Id. 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." Id. Fixtures can either be considered general fixtures or trade fixtures. 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 the lease. *Cattie v. Joseph P. Cattie & Brothers, Inc.*, Supreme Court of Pennsylvania, at 8. Where the disputed equipment is installed by the lessor, its classification must be analyzed using general fixture principles. Under the law of general fixtures, where a chattel is annexed to realty in such a manner that it cannot be removed without materially damaging either the realty or the chattel, the chattel constitutes a fixture that may not be removed by the tenant. *Lehman* at 10-11. Since FMC installed the freezer, this issue must be analyzed under the law of general fixtures. Paragraph 1 of the lease specifically referred to the walk-in freezer and states that FMC was renting the walk-in freezer to Marvin's, in addition to the stall. The lease also states that the Tenant may not alter the premises without the Landlord's permission. FMC clearly installed the walk-in freezer and prohibited Marvin's from removing it without permission. The freezer was also annexed to the realty in such a manner that it could not be removed without materially damaging the realty, as evidenced by the fact that it could not be removed without cutting wiring, bolting, and plumbing connections. In addition, a flatbed or crane of some sort was required in order to remove the fixture. In total, this caused at least $20,000 in damages, as well as the cost of the freezer. Since FMC installed the freezer, and it could not be removed without serious damage to the premises, absent an exception in the lease (of which there is none), Marvin's was not entitled to remove it.

**II. Stove with Hood**

**Issue:**

Was Marvin's authorized to remove the stove with the hood?

**Conclusion:**

Under the law of trade fixtures, Marvin's was presumed to be permitted to remove the stove and exhaust hood, however, the presumption may be rebutted by showing evidence that the stove could not be removed without resulting in damages to the premises.

**Analysis:**

Under Pennsylvania law, when a tenant attaches to real estate fixtures and equipment necessary for the operation of its business, the fixtures become trade fixtures, and a presumption arises that the tenant was entitled to remove them. *Cattie*, at 8. Where an agreement between the parties addresses the removal of the fixtures, however, the presumption can be overcome. Compare *Id.* (holding that where parties made no mention of fixtures in lease, they were removable). The installation of the hooded stove was necessary for the operation of Marvin's meat business, and according to the lease, Marvin's installed it. The stove thus constitutes a trade fixture and may presumptively be removed by Marvin's. Here, Paragraph 4 of the lease contemplated installation of the stove, as well as its removal. The paragraph explicitly states that the Tenant may remove only such of its trade fixtures as will not cause or result in damage to the premises. Here, the stove had been bolted to the floor and connected to the building's gas. The removal also left a hole in the ceiling and holes in the floor where the bolts had been fastened. The bolts and
electrical lines had been cut. The costs to repair the property totaled to $3500. Thus, its removal seriously damaged the premises. Even though Marvin's was generally entitled to remove trade fixtures, the terms of the lease prevented it from doing so if it would cause or result in damage to the premises. Since removal of the fixtures caused damage to the premises, Marvin's was not entitled to remove the stove and hood, and Rapacious must reimburse FMC for the loss caused by removal.

III. Display Cases

Issue:

Was Marvin's authorized to remove the display cases?

Conclusion:

FMC likely displayed an objective intent to treat the equipment as removable at the option of the tenant, therefore permitting the tenant to remove the display cases when it vacated the premises.

Analysis:

Under the Pennsylvania law of fixtures, where a chattel is installed by the landlord that is physically connected to the real estate but that can be removed without material injury to either the land or the chattel, whether the chattel constitutes personal property depends upon the objective intent of the owner to permanently incorporate the chattel into the real property, as evidenced by the proven facts and circumstances entered into evidence. Lehman at 11. Courts may consider the length of time which the chattels have been attached to the realty, whether the chattels are essential to the purpose for which the realty is used, and whether the parties to the lease treated the chattels as part of the leasehold estate. Here, the lease specifies that FMC was to install at its expense three refrigerated display cases which were required by Marvin's to operate its meat business. Since FMC installed the cases, we must look to the law of general fixtures. Here, the display cases were installed by FMC for Marvin's and therefore had not been installed on the premises for an appreciable amount of time. They were also essential to Marvin's business in order to preserve the meat. Finally, they were easily removable from the property. They were bolted to existing brackets in the floor of the stall, and the basic design was intended to permit them to be removed. Their removal also caused no damage to the premises. FMC also displayed an objective intent to allow Marvin's to remove the cases from the property in Paragraph 2 of the lease, when it stated that if the three display cases had not been removed by the Tenant prior to the expiration or termination of the lease they shall become the property of the Landlord. Since FMC treated the display cases as removable at the option of the tenant, Marvin's could lawfully remove the display cases and Rapacious is not required to reimburse FMC for their loss.

I hope that this letter will help you to get a sense of your rights and liabilities in this matter. Please do not hesitate to contact me should you have any further questions about your obligations.

Sincerely,
Susan Suite, Esq.
Question No. 1: Sample Answer

1. Under the Internal Revenue Code (IRC), Roger cannot deduct his mileage, meal, and hotel costs. To be deductible Roger's mileage, meal, and hotel costs must be ordinary, necessary expenses, and incurred in the course of conducting Gusher's business. The rule is a cash-basis taxpayer realizes an expense in the year it is paid. An employee's normal commuting expenses to and from work are not deductible. An employee may deduct expenses that are ordinary and necessary to conducting business, including travel expenses incurred in the course of conducting the employer's business. Here, the facts indicate Roger and Gusher agreed he could work mostly from his home. In addition, they agreed he would "pay his own travel and meal expenses," and the facts imply Roger agreed to do this in the process of negotiating the agreement because he received a "generous" salary. Therefore, an IRS officer would most likely find that Roger's mileage, meal, and hotel costs were commuting expenses, and not ordinary, necessary expenses incurred in the course of conducting Gusher's business because the intent of the parties reflected in their agreement was for Roger to pay them for his own convenience in not moving to a new home closer to Gusher's office ("which reflected his choice not to relocate to G County"). In addition, an IRS officer would most likely find hotel expenses in this case are part of Roger's commuting expenses. Therefore, Roger cannot deduct them.

2. The structure of the "AnnTrust" is proper under Pennsylvania law regarding trusts because the trust document names a trustee, provides an ascertained beneficiary and contains trust res. Under PA law regarding the creation of trusts, the general rule is that a trustee owes a fiduciary duty to the beneficiaries of a trust and must not breach that duty by using trust funds for him or herself. However, a settlor may create an inter vivos trust in which the settlor is both the trustee and beneficiary during her lifetime and then provide for a successor beneficiary upon the settlor's death. In order to create a proper trust under PA law, the trust must appoint a trustee, the beneficiaries must be ascertained and the trust must contain some trust property, called the res. Here, Roger drafted an inter vivos trust for Ann which she may control during her lifetime and which she may also benefit from. During her lifetime, Ann has the authority to use the income and profits from the trust property. The trust does not fail merely because Ann is both the trustee and beneficiary under the trust instrument as well as the settlor, as Claire is provided as a successor beneficiary, making the trust appropriately formulated. In addition, after Ann's lifetime, a successor trustee has been named in Diana, the executrix of the will so the trust will never be without a trustee or beneficiary. Lastly, because the trust instrument names the property to be included in the trust, namely savings, stocks and bonds of Ann, the trust has appropriate res. Therefore, because the trust includes a trustee, beneficiary and res, the trust is properly formed.

3. Roger should advise Diana not to honor the Homeless Shelter's claim for a portion of the $100,000 because the will contained mere precatory language. The third issue is whether the language in the will was sufficient to establish the homeless shelter as a beneficiary to the will, such that the Shelter could succeed in a claim to recover the proceeds. Under Pennsylvania law, mere precatory language is insufficient to obligate an estate to honor the testator's request. Language such as "I hope that", or "It would be nice if", or "I wish my executor/trix to consider" does not create an enforceable obligation under the will. Here, Ann had a valid will. Ann was
the testator of the will and inserted a provision stating merely "It is my wish that my executrix would consider donating some portion of the estate to charities..." This is mere precatory language because it does not create an affirmative direction for the disposition of estate property. Instead, it reflects only a mere desire that such disposition be made. Therefore, Roger should advise Diana that she does not have to honor the Homeless Shelter's claim because the will contained only mere precatory language.

4. Under the Pennsylvania Rules of Professional Conduct, Roger may not reveal the disclosures that Ann made to him, where the circumstances suggest that Ann's statements about the Chief Financial Officer were made in the confidence of a client-lawyer relationship. The idea of attorney-client confidences is specifically laid out under the Pa. Rules of Professional Conduct with respect to information relating to the representation. This is to foster candid discussion and honest communications between the lawyer and a client, creating an environment where the client is free to speak to the lawyer without fear of later repercussion or discovery. Note also that the holder of the privilege is the client, not the attorney, so only the client may waive this privilege and allow the attorney to speak. In addition, the duty to protect confidential communications survives termination of the attorney-client relationship and even survives the death of the client. There are, however, exceptions to this, such as when the lawyer learns of threatened future action by the client or another to commit an act of substantial bodily harm or if the client intends to cause substantial financial ruin to another. Here, Ann's statements to Roger about the CFO's distortion of information to the Board of Directors of Rerun is probably protected by the confidentiality rule. It is first important to establish whether Ann was confiding in Roger as an attorney or as a friend. At the time when Ann made her statements, the two had already begun an attorney-client relationship. Roger was already advising Ann on some estate planning matters. Though they would sometimes socialize together, she began her discussion with Roger in November 2011, "as my lawyer." There is also no indication that there was anyone else around, and suggests that Ann was seeking legal advice that would be protected under the Pa. Rules of Professional Conduct. Furthermore, she told Roger to bill her for the advice. This suggests that Ann was seeking legal advice concerning her potential liability for her awareness of the distorted financial information provided by the CFO. Furthermore, Ann's statements about the CFO related to the representation and do not seem to fall within any exception that would allow Roger to speak to the investigator from the SEC. Ann herself was not planning to cause financial ruin (in fact, she wanted to avoid it). Ann's privileged statements to Roger thus cannot be revealed to the investigator under the Pa. Rules of Professional Conduct.
Question No. 2: Sample Answer

1. Credit should assert the legal defense of claim preclusion because there is already a default judgment with respect to the loan that is final. Claim preclusion, or res judicata, is a doctrine which precludes a party from bringing a claim of action that has already been brought and decided. Claim preclusion applies when the claim involves the same parties (plaintiff and defendant), same claim, and is a final judgment. A claim is considered to be the "same claim" when it arises from a transaction or occurrence of the same underlying cause of action in the first action. In the default judgment, Credit sued Art and Barb for a delinquent loan, which resulted in a default judgment. The facts explicitly state that the judgment is final and the parties are the same in the second suit because it involves Art and Barb against Credit, which were the same parties in the first suit. This would also be considered the same claim because it involves a transaction or occurrence that is the same as the underlying cause of action in the first instance. This is because the default judgment involved the delinquency of the loan and Art and Barb's current suit involves the recission of the loan. Their current claim could have been raised as a defense in the initial suit. As a result, because the second suit involves the same parties and claim, and the initial suit was final, the court will likely hold that claim preclusion applies. Under PA law, a first response from a defendant can either be in preliminary objections or in their answer, and is due within 20 days of the service of process. Affirmative defenses are raised in an Answer under the heading of New Matter. Because Credit is asserting that there is already a final and binding judgment, and that claim preclusion applies, Credit should raise its defense in the answer as New Matter.

2. Joe would likely succeed in a claim of false imprisonment against Al and Credit. Joe would also likely succeed in a claim of malicious prosecution.

   To support a claim of false imprisonment plaintiff must prove defendant intended to confine plaintiff to a bounded area and plaintiff was confined to such a bounded area, without consent and means of escape and with awareness.

   Al intended to confine Joe to a bounded area by locking Joe in a conference room, intending to do so for the entire day, away from other employees, to induce a confession. Joe became aware of this confinement (after initially consenting to be in the room) when he attempted to leave and was unable to do so, causing him to be unable to reach his needed medications. It is clear Al had the requisite intent and Joe suffered the confinement, so Joe would likely succeed.

   Malicious prosecution is a tort where plaintiff must prove defendant caused a wrongful criminal proceeding against plaintiff, he did so maliciously, and that plaintiff succeeded in the criminal proceeding against him. Plaintiff must also suffer damages.

   Al maliciously fabricated a scenario of theft against Joe to cover his misdeed of effectively causing the seizure and to protect his employer from liability. He told a police officer this and caused a criminal proceeding for theft against Joe. Joe was ultimately found not guilty of theft at the proceeding maliciously caused by Al. Therefore, Joe would likely succeed in his
claim of malicious prosecution against Al and may recover his attorney's fees and other damages from Al.

Credit may be held vicariously liable for the false imprisonment of Joe by Al and possibly for the malicious prosecution.

An employer may be held vicariously liable for the torts of its employees if the employee was acting within the scope of his employment and authority. Usually, an intentional tort of an employee is outside of the scope of the employment and the employer will not be liable.

However, Al may be found to have been acting within the scope of his employment and authority when he confined Joe. Al was instructed by Credit that he should do "whatever was needed" to protect Credit's business and assets. Joe's confinement and prosecution were actions taken by Al in response to this directive. He was trying to get Joe to confess to leaking financial information and to protect the company from liability for the consequences of his own actions. Therefore, Al was likely acting within the scope of his employment and Credit will be held vicariously liable for his intentional torts.

3. Joe may obtain discovery concerning the potential liability insurance and financial net worth of the defendants because such information is relevant to his case. Joe may not use insurance information at trial to show liability but may use liability insurance at trial for other purposes such as if ownership over the insured thing is in dispute, as that is a permissible use of liability insurance under the rules of evidence. Under the Pennsylvania rules of evidence, discovery is open to any information relevant to the proceeding at hand. This includes information that will be inadmissible at trial. Financial net worth and liability insurance are particularly discoverable because knowledge of such things can facilitate settlement or abandonment of claims, freeing up the court system to deal with other disputes. The financial net worth of a party to an action is not admissible in the case in chief, but could be introduced in estimating punitive damages. Under these rules, then, Joe can obtain discovery of the potential defendants net worth and any liability insurance, and may use the liability insurance for disputed ownership and financial net worth in the calculation of punitive damages.
Question No. 3: Sample Answer

1. If Elizabeth wants to have the marriage declared void, she should initiate an action for an annulment, and the Complaint should be filed no earlier than September 5, 2012 in order to establish proper jurisdiction. In Pennsylvania, there are two ways to "terminate" a marriage: annulment or divorce. Whereas a divorce is appropriate on the basis of events that occur after the marriage has already begun, an annulment is the proper action for "terminating" a marriage based on circumstances and/or events that took place at some point before and up through and including the marriage ceremony itself. An impediment may either render the marriage void or voidable. A void marriage is no marriage at all; the impediment results in there having never been a valid marriage at all. A voidable marriage, on the other hand, may be affirmed by the spouses. That is, the impediment that renders the marriage voidable may be waived. For a voidable marriage, the spouse seeking the annulment must in fact do so in order to terminate the marriage, which is otherwise a valid one. Incurable impotence of the other spouse is an impediment that renders a marriage voidable. This impediment is a grounds for an annulment when the impotent spouse did not disclose this information before the marriage. Here, before John and Elizabeth's marriage on July 5, 2012, John knew that he was impotent and that his condition was one that could not be corrected. His failure to inform Elizabeth of his condition had the effect of rendering his marriage with her voidable. Although Elizabeth could have chosen to waive this impediment--just as John had hoped she would and just as Kelley seemed to suggest that Elizabeth would--if Elizabeth wants to have her marriage declared void, she will be able to do so. At the time Elizabeth married John, she had not been informed of his condition of incurable impotence, and John's failure to communicate that information is a sufficient impediment to enable Elizabeth to obtain an annulment. In order to establish proper jurisdiction, Elizabeth must wait until September 5, 2012, before filing the Complaint. In Pennsylvania, the courts of common pleas do not obtain jurisdiction over a spouse seeking a divorce or annulment until that spouse has become domiciled in the state of Pennsylvania. Domicile requires that the spouse establish physical presence within the state for at least six months, and domicile generally requires physical presence with the intent to remain for the indefinite future. The facts indicate that John and Elizabeth set up "permanent residence" in Pennsylvania on March 5, 2012, which should be the date from which that six month period should begin. Elizabeth would have to wait until September 5, 2012, before filing her Complaint. The C County Court of Common Pleas will not have jurisdiction to enter an annulment until September 5, 2012, and Elizabeth should therefore wait until that time before filing her Complaint.

2(a). There is sufficient evidence to support the filing of a charge of attempted murder against John with regard to the incident at Kelley's home. In order to be guilty of attempt, a specific intent crime, one must have the specific intent to perform the underlying, incompleted offense. Attempt will be shown where the defendant takes a substantial step towards the completion of the offense, which involves something greater than mere preparation. With regard to murder, attempted murder is only possible for first degree murder. The specific intent for first degree murder requires malice aforethought, a certain wickedness and hardness of heart that seeks to unlawfully take the life of another. This can be found by showing that the defendant pointed a deadly weapon at a vital part of the victim's body. The evidence here indicates that John did have the specific intent to commit first degree murder. The facts indicate that while at the bar,
some time before John arrived at Kelley's house, he developed the intention to take Kelley's life, thinking that "since Kelley ruined his life he was going to take hers." The facts further indicate that he began to stew over this as he continued to drink and as he drove to Kelley's house. The malice aforethought required for first degree murder is shown by the fact that John pointed the gun, a deadly weapon, at Kelley's head, a vital part of her body. Proof of John's intent to commit first degree murder is further supported by the fact that he pulled the trigger twice. Because John had the specific intent to commit first degree murder, attempt can thus be shown. Here, knocking on Kelley's door, pointing the gun at her head, and pulling the trigger is undoubtedly a substantial step in the commission of the offense. As such, there is sufficient evidence to support the filing of a charge of attempted murder.

(b). The fact that the bullets were inoperable will not provide a defense to John. John's intoxication probably would not be a viable defense. Under the PA Crimes Code, while legal impossibility is a defense (i.e. what the defendant tried to do was not actually illegal), factual impossibility is not a defense to any crime. Here, John believed the bullets to be functional and loaded them into his gun. What he attempted to do, i.e. kill Kelley, was illegal. The only reason Kelley was not shot was because of the presence of facts unknown to John - that his bullets were not operational. Therefore, factual impossibility is no defense. Also under the PA Crimes Code, voluntary intoxication is not a defense to a criminal charge and can only be used to reduce a charge of first-degree murder to a lower degree of murder. Voluntary intoxication will thus not be a successful defense for John to the charge of attempted murder.

3. Assuming the Commonwealth responds with no other argument in favor of a legal search, and John presents no other constitutional violation, the Court will likely rule the search and seizure in John's car inadmissible as an inventory search because it was not done under a prescribed uniform system of inventorying impounded cars. Under the Fourth Amendment to the United States Constitution, searches and seizures of a person's property by a government official usually require a warrant. There are numerous exceptions to this, however. One such exception is the inventory search. In an inventory search, the police can utilize established procedures where, upon receipt of an arrested individual's lawfully impounded car, the police may systematically search the car to conduct an inventory of everything being received. At the same time, however, such a system must be an established procedure used by the police during all intakes of vehicles. In the present case, the police validly impounded John's car because it was blocking a lane of travel and posed a danger to passing motorists. At the same time, it appears that, after impoundment, the police decided to specifically search John's car without a warrant, not to create an inventory of everything being received, but instead to search for evidence related to John's crime. Such a search, outside of a routine police procedure, violates the inventory search exception to the Fourth Amendment's warrant requirement. To conclude, the Court, absent different constitutional theories, will likely rule the evidence inadmissible as not conforming to the inventory search exception.
Question No. 4: Sample Answer

1. Patrick will be able to establish a retaliation claim under Title VII. Big Co. is an employer covered by the statute since they have more than 15 employees. A person can bring a claim for retaliation when they are subject to an adverse action including termination or any unfavorable changes to their terms or conditions of employment as a result of their opposition or participation in a Title VII claim. Opposition is when a party actually files a claim for a cause of action under Title VII and participation is when the party participates in any investigation or case that has been brought forth. The retaliation cause of action was created to protect parties who brought forth discrimination claims or participated in the investigation of claims by others. Courts have held that a fiancé's retaliation claim is valid because the firing of one's fiancé would be a deterrent to a reasonable person when bringing a claim. Here, Patrick is being terminated, not for his participation or opposition to a sexual harassment claim, but for his fiancé's opposition to sexual harassment. After his fiancé filed her claim, Patrick suffered an adverse employment action - he was terminated. This is the type of adverse action that Congress sought to prevent when it drafted the retaliation statute. Patrick will meet his prima facie case, because he can establish that there was opposition to a Title VII prohibited activity - sexual discrimination on the part of his fiancé and that as a result he suffered from an adverse employment action. Patrick will be able to show that there was a connection between the adverse action and his fiancé's claim since he has within a month of his termination received an excellent performance review. Because Patrick received an excellent performance review and was subject to an adverse employment action only after his fiancé filed a sexual harassment claim, he can establish a sufficient claim that a fact finder may determine retaliation.

2. A defamation action requires that the defendant(s) made a false statement about the plaintiff, that the statement was published (known to the world beyond merely the plaintiff and defendant), and that the plaintiff suffered harm. Under New York Times v. Sullivan, however, defendants have some protection based on the 1st Amendment, U.S. Constitution, as applied to the states by incorporation in the 14th Amendment. If a plaintiff is a public figure, whether the action alleged to have been taken is a matter of public or private interest, the plaintiff must show that the defendant acted with malice. Malice in this context means that the defendant either knew the statement was false, or entertained serious doubts about its truth but published it anyway. One who republishes a defamatory statement is equally liable. Patrick can show that Rita made a false statement in her article, that Patrick had taken bribes from contractors. This statement was published, distributed to eyes and ears beyond the plaintiff and defendant, when the Trib published her story. And as a republisher, the Trib is equally liable for the defamation. Further, Patrick suffered harm from the statement; his reputation was damaged, old friends did not want to be seen with him, and he had to abandon his plans to run for re-election. However, under the Sullivan standard, Rita can raise the defense of freedom of speech. Patrick was a public figure - he had been an elected public official; and he planned to run for re-election. Therefore, to prevail Patrick would have to show that Rita, and the Trib, acted with malice in publishing the statement that he had taken bribes. He cannot show that Rita knew the statement was false, because she didn’t - nor can he show that she acted with serious doubts as to its falsity, because she didn't. The claim sounded credible, in light of the other testimony at the hearing. She may have been reckless, in publishing under the tight deadline without further investigation - but as
she did not actually have doubts as to the story's truth, she did not act with malice. In conclusion, Rita and the Trib should be able to assert a 1st Amendment freedom of speech defense, because Patrick cannot show that Rita, and the Trib, acted with malice when they published the statement even though it was both false and damaging.

3. The Trib and Rita could assert their privilege as members of the press to report on public hearings, in defense to being liable as republishers. The issue here is what common law defense to Patrick's action the defendants could raise, and the likelihood of success. One who republishes a defamatory statement is also liable for defamation. However, members of the press are privileged to report on public hearing proceedings, even if they contain defamatory content, provided they report on hearings accurately. Here, Rita, as a reporter for the Trib, presented the testimony of the hearing accurately. Thus Rita and the Trib could assert they were privileged as being members of the press, to republish defamatory statements made at a public hearing since they reported them accurately. The defense should be successful since they met the required elements.
1. The court should rule that Ted's breach of the contract to build the ceilings at 9'6" in height was not a material breach, and that Robin was not entitled to withhold payment, but that the payment should be reduced either by the amount it would cost to raise the ceilings, or reduced by the reduction in overall value of the property due to the breach. Common law contract principles apply to service contracts, such as one for construction of a residential home. When a party substantially performs the contract, he is entitled to be paid, minus the amount of diminution in value caused by the breach. Unless the breach is material, or committed in bad faith (meaning the party has not substantially performed), the non-breaching party is not excused from performance, and must pay. Here, there was a specification in the written contract that the ceilings should be 9'6". Instead Ted constructed them 8" lower than specified. This constitutes a breach. However, there are no other facts here suggesting that his performance of building Robin's home was not otherwise satisfactory and according to the contract. A court would probably find that he had substantially completed his performance because the deviation was not large between the ceiling heights and there is no evidence that Ted acted in bad faith (he apparently had a legitimate reason for the difference; that is, he wished to conceal ductwork and other things with a slightly lower ceiling). However, Robin is entitled to get what she contracted for. Thus, the court should rule that she may reduce the contract price either by the cost to raise the ceiling (15,000) or reduce it by the diminution in market value of the home as a result of the breach. Robin's defense of total non-payment because of the ceilings will not be accepted by the court.

2. Lilly and Marshall would like to prevent Barney from constructing a winery on Lot 3. A restrictive covenant is created by imposing a negative restriction on the use of land when the following requirements are met: it is created with intent to run with the land, there is notice of its existence (record notice), and the covenant touches and concerns the land. A covenant will be considered to run with the land if the express language of the covenant demonstrates that intent. Here, the language "inure to the benefit of all grantees, their heirs, successors and assigns" clearly demonstrates intent to run with the land. Furthermore, to touch and concern the land the restriction must be a restriction on the land itself. Restriction to single family homes or to residential purposes are quite common and upheld by courts routinely. Therefore, this restriction properly touches and concerns the land. Finally, there is notice, despite the fact that Barney's deed made no mention of the Declaration. Record notice is provided because Greg recorded the subdivision plan and Declaration of Restrictions. Therefore, a valid restrictive covenant exists upon all the Lots of this subdivision. Because a valid restrictive covenant exists and Lilly and Marshall own property subject to this restriction, they have standing to challenge Barney. They can seek an injunction to enforce the restrictive covenant against Barney and will likely succeed in this action.

3. The Ballet should argue that Lilly had a duty to mitigate her damages and any failure to do so should reduce her relief by the amount that she failed to mitigate. The finder of fact would find for Lilly and against reducing her damages for failure to mitigate. Under Pennsylvania law, when an employment contract is terminated, an employee has a duty to mitigate her damages by taking a job of similar circumstances. Failure to take the similar job will result in a loss of
damages in the amount of forgone income due to failure to mitigate damages. Here Lilly had a contract with a company located near her home, paying her $100,000 per year to be the Ballet's principal dancer that was terminated. The only other job in Lilly's field that she found was one in Seattle, Washington, paying $25,000 as an as-needed substitute dancer. Because of the difference in pay and prestige, the jobs are very different from one another. An even more important difference is that the job in Seattle is across the country from Lilly's family and baby. Because of these differences, it is highly likely that the finder of fact would not determine that these jobs are a similar opportunity and therefore Lilly would not suffer any reduction in damages for failure to mitigate. The Ballet should argue that Lilly had a duty to mitigate her damages and any failure to do so should reduce her relief by the amount that she failed to mitigate. The finder of fact would find for Lilly and against reducing her damages for failure to mitigate.

4(a). Ted will be required to show to a degree of specificity the amount he lost in profits, and will be required to show that Marshall knew of the special damages that would occur if he were to fail to perform his obligations under the contract by the date Ted specified. Ted's likelihood of success will probably not be high. In order to be entitled to receive consequential damages and special losses for breach of a contract, the breaching party must know of the special circumstances giving rise to the damages in advance, and must understand the likelihood that their failure to perform will create such injury. Further, the injured party must show to a specific degree the amount of lost profits. In the facts at hand, Ted did not inform Marshall of his specific situation until after the agreement had already been entered into and two days had passed. The original agreement provided that the saw was to be returned to Ted within 7 days, and in the midst of that time, Ted added facts to inform Marshall of the chance that his business would close if Marshall failed to have the saw back in time. Had Marshall known of the likelihood that Ted, and as a result he, would incur major damages if he made a mistake, maybe he would not have agreed to take the contract. Marshall was not aware that Ted would suffer such significant damage and losses at the time he entered into the contract, and therefore Ted's lost profits will likely not be recoverable.

(b). Ted could potentially recover damages for emotional distress, although it is unlikely. Generally one may not recover damages for emotional distress based upon a breach of contract. To recover for emotional distress the behavior causing the breach would need to be elevated to extreme recklessness likely to cause Ted's emotional distress. However it is very unlikely that a court would hold this way.
1. The Farmco board can seek to have the derivative suit dismissed on the basis that the board's actions in not pursuing the action are protected by the business judgment rule. The business judgment rule is very deferential to corporations and requires that a court not second guess a business decision that was made in good faith and supported by a rational basis. Factors to ascertain a rational basis include a weighing of pros and cons for the company's, or its agent's decision, and an articulable rationale for the decision. Here, Farmco responded to shareholder concerns about Pete's deal by having a group of disinterested board members investigate the transaction. This board committee found that the deal "did not impede operations" and that the interest rate earned was "well above market rates." The committee also found that this would ultimately result in a windfall and that Pete had acted in the best interest of Farmco when he negotiated the deal. Based on this internal investigation, Farmco found that the deal was in its best interests and that it should not pursue the derivative claim. Under the business judgment rule, Farmco's investigation results - the lack of an effect on operations, the interest rate, and the windfall - substantiate a rational basis for not pursuing a derivative suit. Accordingly, the court will not second guess that decision and would dismiss the derivative suit.

2. Farmco does not need to comply with Kitty's request. Under Pennsylvania law, a shareholder has the right to request information from a corporation for a good cause. In order to request information, the request must be in writing. In this situation, Kitty is a minority shareholder of Farmco, and she runs a mail order greeting card business. She requested the information from the corporation in writing, which meets the second requirement a shareholder must meet in order to request information. Nevertheless, Kitty did not meet the first requirement; she does not have a good cause to request such information. A request is for a good cause if it is related to address things such as a waste of assets, director misconduct, or other similar circumstances related to the business of the corporation. In this situation, Kitty just wants the information because she wants to solicit the shareholders to purchase greeting cards from her business. Because this is not a request for information supported by a good cause, Farmco does not have to comply with Kitty's request.

3. Fred could potentially assert the implied warranty of merchantability against Farmco with respect to the tractor, but Fred will likely not be able to prove what is required to establish a breach of this warranty. The Uniform Commercial Code (U.C.C.) applies to the sale of goods. Under the U.C.C. the implied warranty of merchantability is an implied warranty that states that the particular good is in reasonable working condition and is fit for its ordinary purpose. In order for the warranty to apply, a merchant must sell the goods. A merchant is someone who deals in goods of the kind sold. Here, Farmco is a merchant because it deals with goods of the kind sold; it sells farm equipment, including tractors, and a tractor was sold in this instance. The facts indicate that the tractors sold by Farmco are designed for use on dirt surfaces, which in this case would be the tractor's ordinary purpose. In this situation, Fred was trying to use the tractor to operate a boat storage facility and he desired a tractor to move boats around his facility. Because this requires the tractor to pull boats up a paved hill and does not involve using the tractor on dirt roads, this is not an ordinary purpose for which the tractor would normally be used. In order to establish a breach of implied warranty of merchantability, one needs to show that the good does
not comply with the warranty. As a result, there would be no breach here because Fred is unable to show that the tractor was not fit for its ordinary purpose of operating as a tractor pulling things on dirt roads. Thus, Fred would likely not be successful on this claim. Fred could also assert a claim against Farmco for breach of the implied warranty of fitness for a particular purpose. This warranty also exists under the U.C.C. and applies to the sale of goods, and a merchant must sell the good. As stated above, Farmco is a merchant and the tractor is a good. Under the implied warranty of fitness for a particular purpose, a buyer must have a special purpose for buying the goods and he must rely on the seller's special skill and knowledge in selecting the goods for the particular purpose. Furthermore, the seller must know that the buyer has a particular purpose and is relying on the seller's expertise in buying the good for the particular purpose. In this situation, Fred operates a boat storage facility and desired a tractor to move boats around his facility. He explained to Farmco's manager that he knew nothing about tractors, which shows that he was indeed relying on the manager's expertise in purchasing the tractor. He also told the manager that he needed a tractor that could pull boats up and down a steep hill on a paved road, and the manager assured Fred that a Tractor 1000 would meet Fred's needs. This shows that the buyer had a particular purpose, and that the manager knew of that purpose and knew that Fred was relying on manager's expertise to provide him with a good that would meet that purpose. As a result of this representation, Fred signed a contract for the purchase of the tractor and it was delivered to him. In order to recover for breach of the implied warranty of fitness for a particular purpose, the nonbreaching party must show that the good did not live up to the terms of the warranty. Here, the tractor could not pull the boats up the paved hill, resulting in it not being able to meet Fred's stated needs. As a result, Fred will be able to prove what is required to establish a breach of this warranty.

4. The added language in the sales contract will not prevent Fred from successfully pursuing any implied warranties that might apply. In order to successfully ensure that an implied warranty does not apply to a particular contract, those implied warranties must properly be disclaimed. In order to properly disclaim the implied warranty of merchantability and the implied warranty of fitness for a particular purpose, there must be explicit, conspicuous language in the contract that is readily visible by the purchaser that states that the warranty is being disclaimed, and it must mention the term merchantability. Alternatively, to properly disclaim implied warranties, a seller can also include language in the contract that states that the product is being sold "with all faults" or "as is." In this situation, 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." Although this language is sufficient to disclaim both types of warranties under the first option listed above, the language was not conspicuous; it was on the last page of a ten page agreement and it was written in small type. As a result, Fred did not notice this language when he signed the contract. Thus, because the added language in the sales contract was not written conspicuously, despite containing the necessary language, it will not prevent Fred from successfully pursuing any implied warranties that might apply.