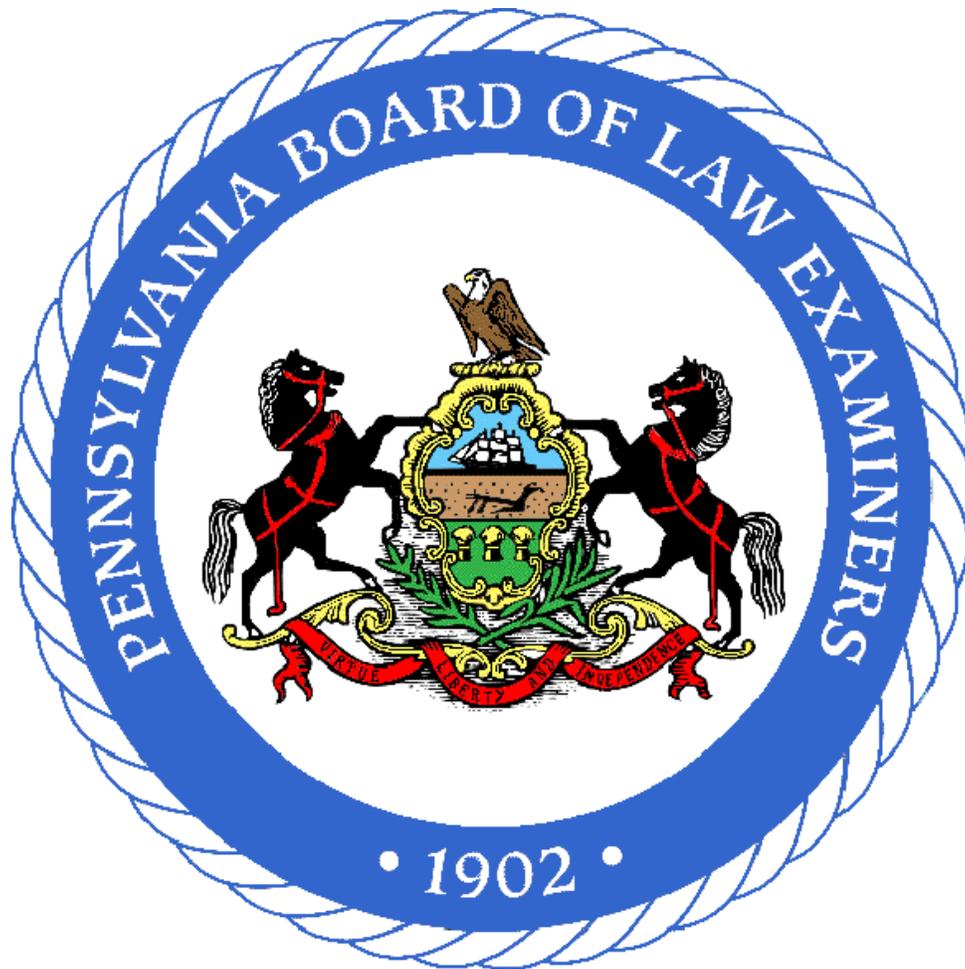


FEBRUARY 2017 PENNSYLVANIA BAR EXAMINATION

Sample Answers



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Performance Test: Sample Answer

Issue 1

TO: Ethan Anderson
FROM: Applicant
DATE: February 21, 2017
CLIENT: Patty Pasternak, client #05152008

SUBJECT: Memorandum of Law

This memorandum will answer three issues that surround Pasternak's claim against Dench. The first issue to be resolved will be whether punitive damages are appropriate in this case. The second issue will be whether Dench has violated 75 Pa.C.S. § 3316 while playing a video game while driving. The final issue will be whether Dench's conduct constitutes negligence per se.

PUNITIVE DAMAGES

In this case, it is to be ascertained whether the conduct of Dench was of such an outrageous nature as to constitute punitive damages. Punitive damages are appropriate when an individual's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton, or reckless conduct. (Rockwell) Wanton misconduct or reckless indifference means that the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. (Rockwell) In Pennsylvania, a punitive damages claim must be supported by evidence sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk. (Rockwell)

In the present case, Dench was driving his motorcycle east on Main Street at a high rate of speed close to the curb when he took out his mobile device to play a game. He tapped the screen in order to collect virtual coins and he tapped the screen again to send a text message to others playing that game that he had collected the coins. (Police Incident Report) When he did so, he took his eyes off the road for at least 5 seconds to look for the next virtual coin on his mobile device which was sitting on his leg. After doing so, he hit the curb and became airborne. He then collided with the driver's side of Pasternak's vehicle. (Police Incident Report) The question becomes whether Dench's conduct can be considered so outrageous as to warrant punitive damages.

Punitive damages claims have been permitted against motorists in narrow sets of circumstances indicating unreasonable actions by defendants in conscious disregard of known or obvious risks which pose a high probability of harm to others. (Rockwell) Courts have allowed punitive damages claims against motorists who otherwise engage in wanton or reckless conduct. (Rockwell) The Rockwell case notes that several trial courts in Pennsylvania have held that the

use of a cell phone alone is not enough to indicate that punitive damages are necessary. Instead there must be some "additional indicia of recklessness" besides the mere use of a cell phone. Thus, the court will have to look at the facts to determine whether the actions of the defendant constitute the type of additional indicators or aggravating factors that could elevate defendant's conduct from mere negligence to the type of willful, wanton, or reckless conduct that would justify punitive damages. (Rockwell) In this case, this is exactly the kind of conduct that is demonstrated by Dench. Dench was not only on his cell phone while he was driving, he took his eyes off the road in order to look for gold coins. Additionally, he engaged with the phone by tapping it several times in order to collect coins and to send text messages regarding the collection of coins. He did not have the phone somewhere where he could easily look back and forth between the road and the phone. The phone was sitting on his lap. In order to use it, he had to take his eyes off the road for a significant amount of time. He was also driving at a high rate of speed. This also goes to show that he was being reckless and that he did not care whether his conduct would harm someone else. When he was looking at his phone, he did not pull over or even slow down. He continued driving at a high rate of speed and close to the curb. It was highly probable that harm would occur when all of these actions were taken together. He even admitted that he knew it was risky to speed and drive so close to the curb while playing, but it was definitely worth it so he could maintain the title of top coin collector. (Police Incident Report) He knew that there was a risk that he could harm someone else. He recklessly disregarded this risk. And the type of risk that he was aware could occur, did in fact occur. He struck another car and seriously injured himself as well as the driver of the other car, Pasternak.

Accordingly, punitive damages are appropriate against Dench because of his outrageous conduct.

VIOLATION OF PA STATUTE

At issue here, is whether Dench's conduct of playing a video game while operating a motorcycle violates a Pennsylvania state statute. Pa.C.S. § 3316 states, "No driver shall operate a motor vehicle on a highway in this Commonwealth while using an interactive wireless communications device to send, read, or write a text-based communication while the vehicle is in motion." The term text-based communication is further defined as "a text message, instant message, electronic mail, or other written communication composed or received on an interactive wireless communication device." (Pa Code section f Definition) An interactive wireless communication device specifically includes a wireless telephone, personal digital assistant, smart phone . . . which can be used for voice communication, texting, emailing, browsing the internet or instant messaging. (75 Pa. C.S. § 102) A motorcycle is specifically included in the definition of motor vehicles. (75 Pa. C.S. § 102) A highway is the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel. (75 Pa. C.S. § 102)

Here, Dench was driving his motorcycle when he took it out of his pocket to collect virtual coins. He tapped the screen to collect the coins. At this point, a text message was received by him telling him that he had collected the coins. He then tapped the screen again in order to let other players know that he had collected the coins. He was using his smart phone to

do this. A smart phone is specifically designated as an interactive wireless communication device, so that part of the statute is met. In order to know that he had collected the coins, he had to read the text message that was sent to him. Although he did not have to compose the message that was sent to other players, he did have to take an affirmative action (tapping the screen) to send it. This meets the criteria of the statute because he read a text-based communication and sent a text-based communication. He did all of this while the vehicle (a motorcycle) was in motion. (Police Incident Report) Furthermore, he was on a highway because he was driving on East Main Street approaching an intersection and Pasternak was driving north on First Street and both of these roads were open to the public for vehicular travel and meet the definition of highway. All elements of the statute are therefore met.

Attorneys for Dench will try to argue that playing a video game does not violate the statute. They will say he was merely playing a game and not using text-based communications as the statute specifically states. However, he did receive an incoming message which said "Congratulations, you got the coin!" (Police incident report) This message was a text message that Dench specifically admitted to reading. (Police Incident Report) He then had to tap the screen again to send another text message which said "I got it!" (Police Incident Report) Although he was playing a video game while he was on his motorcycle, through the course of playing the game itself, Dench sent and received text messages which is clearly prohibited by the statute.

Accordingly, Dench will be held to be in violation of the Pennsylvania statute.

NEGLIGENCE PER SE

The concept of negligence per se establishes the elements of duty and breach of duty where an individual violates an applicable statute, ordinance, or regulation designed to prevent a public harm. However, a plaintiff, having proven negligence per se cannot recover unless it can be proven that such negligence was the proximate cause of the injury suffered. (Schemberg) In order to prove a claim on negligence per se, the following four requirements must be met: (1) the purpose of the statute must be, at least in part, to protect the interest of a group of individuals, as opposed to the public generally; (2) the statute or regulation must clearly apply to the conduct of the defendant; (3) the defendant must violate the statute or regulation; (4) the violation of the statute or regulation must be the proximate cause of the plaintiff's injuries. (Schemberg)

The statute in question in this case is Pa.C.S. § 3316, which states, "No driver shall operate a motor vehicle on a highway in this Commonwealth while using an interactive wireless communications device to send, read, or write a text-based communication while the vehicle is in motion." The first element to look at is whether this statute's purpose is to protect the interest of a group of individuals, rather than the general public. The Schemberg case makes it clear that a group of individuals can be those that are within the zone of danger. (Schemberg) The purpose of the statute is to protect the interest of individuals specifically on the road who may come into contact with the person who is sending, reading, or writing a text-based communication. The statute protects those individuals that are within the zone of danger. The statute therefore meets the first element of negligence per se.

The second element of negligence per se is whether the statute clearly applies to the conduct of the defendant. As stated in issue two above, the conduct of Dench falls within the Pennsylvania statute. He was operating a motorcycle on a highway in the Commonwealth while using an interactive wireless device (his smart phone) to send and receive text messages. Therefore, the second element is met. The third element that must be met is that the defendant must violate the statute. Dench's conduct clearly violated the statute, so that element is met. Finally the violation must be the proximate cause of the plaintiff's injuries. In this case, it was Dench's taking his eyes off the road and looking at his smart phone that caused him to hit the curb and become airborne. This is when he collided with Pasternak's vehicle. The violation of the statute is what caused Dench to hit and seriously injure Pasternak and thus caused Pasternak to be injured. Pasternak sustained a concussion, back and neck injuries, and her vehicle was totaled. (Police Incident Report) She suffered both medical and financial injuries as a result of Dench's conduct. Had Dench not been distracted while playing his game, he would not have hit Pasternak. Therefore, the final element of negligence per se is met.

Dench's attorney will argue that the statute in question is too general to support a negligence per se claim. He will say that the statute is there to protect the general public, and not the interest of a group of individuals. However, the Schemberg case makes it clear that the PA statute here is different from those which were held to protect the general public. The statute in the Schemberg case was help to protect a group of individuals, namely public servants who find themselves in the zone of danger created by the individual preventing the public servant from discharging his or her duty. Similar to that case, the PA statute here only protects a group of individuals, and not the public at large. Therefore, this argument will be invalid.

Accordingly, Dench's conduct can be a basis for a successful negligence per se claim.

Issue 2

INCLUSION OF PUNITIVE DAMAGES

The issue here is whether Patty would be eligible for punitive damages under PA law. According to Rockwell, “[p]unitive damages are appropriate when an individual's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton, or reckless conduct.” To prove wanton misconduct or reckless indifference, the case states that we must show “(1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed, and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk.”

Rockwell discusses circumstances under which punitive damages can accrue in motor vehicle accidents. The key is to show "unreasonable actions by defendants in conscious disregard of known or obvious risks which pose a high probability of harm to others." However, Xander and Platukis, cited in Rockwell, teach us that mere use of a cell phone alone does not give rise to a claim of punitive damages. Instead, when the issue involves cell phone usage, both courts required the presence of “additional indica of recklessness.” Rockwell mentions that in some jurisdictions, the use of a cell phone, “in combination with a violation of a Vehicle Code provision or other recognized rule of the road, creates a triable issue of fact regarding the

recovery of punitive damages.” Other jurisdictions require “other aggravating circumstances” beyond violations of the rules of the road.

Rockwell concluded that the defendant's use of a GPS device did not warrant punitive damages, as there was nothing in the record to suggest that the GPS device was positioned in the lower center console. The court also noted that the defendant then glanced up at the street sign before making a turn at an uncontrolled intersection into oncoming traffic, which is what caused the accident. However, Rockwell specifically states that “[t]exting while driving significantly increases the degree of driver distraction since it requires the motorist to completely divert his or her attention from the roadway as he focuses upon the mobile device” and that “texting poses a much greater risk to pedestrians and other motorists than speaking on a cell phone.” This is clearly applicable to the case here where Dench was staring at his phone to collect coins for his game. He was travelling at a higher speed than allowed under the law, and drove too close to the curb, taking his eyes off the road for at least five seconds, according to the police report, to look for the next coin. Dench admits to the police outright, “I knew it was risky to speed and drive so close to the curb while playing, but it was definitely worth it so I could win the game and maintain the title of top coin collector.” He clearly understood the risk of harm he exposed our client to by taking his eyes off the road to collect coins and sending text messages stating he got the coins. Clearly, he consciously disregarded the risk because he was speeding and hugging the curb, which led to the accident. The Rockwell reckless indifference test is met due to Dench’s outrageous conduct.

For these reasons, we can successfully assert punitive damages

Issue 3

VIOLATION OF PA STATUTE

At issue here, is whether Dench's conduct of playing a video game while operating a motorcycle violates a Pennsylvania state statute. Pa.C.S. § 3316 states, "No driver shall operate a motor vehicle on a highway in this Commonwealth while using an interactive wireless communications device to send, read, or write a text-based communication while the vehicle is in motion." The term text-based communication is further defined as “a text message, instant message, electronic mail, or other written communication composed or received on an interactive wireless communication device.” (Pa Code section f Definition) An interactive wireless communication device specifically includes a wireless telephone, personal digital assistant, smart phone . . . which can be used for voice communication, texting, emailing, browsing the internet or instant messaging. (75 Pa. C.S. § 102) A motorcycle is specifically included in the definition of motor vehicles. (75 Pa. C.S. § 102) A highway is the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel. (75 Pa. C.S. § 102)

Here, Dench was driving his motorcycle when he took it out of his pocket to collect virtual coins. He tapped the screen to collect the coins. At this point, a text message was received by him telling him that he had collected the coins. He then tapped the screen again in order to let other players know that he had collected the coins. He was using his smart phone to

do this. A smart phone is specifically designated as an interactive wireless communication device, so that part of the statute is met. In order to know that he had collected the coins, he had to read the text message that was sent to him. Although he did not have to compose the message that was sent to other players, he did have to take an affirmative action (tapping the screen) to send it. This meets the criteria of the statute because he read a text-based communication and sent a text-based communication. He did all of this while the vehicle (a motorcycle) was in motion. (Police Incident Report) Furthermore, he was on a highway because he was driving on East Main Street approaching an intersection and Pasternak was driving north on First Street and both of those roads were open to the public for vehicular travel and meet the definition of highway. All elements of the statute are therefore met.

Attorneys for Dench will try to argue that playing a video game does not violate the statute. They will say he was merely playing a game and not using text-based communications as the statute specifically states. However, he did receive an incoming message which said "Congratulations, you got the coin!" (Police incident report) This message was a text message that Dench specifically admitted to reading. (Police Incident Report) He then had to tap the screen again to send another text message which said "I got it!" (Police Incident Report) Although he was playing a video game while he was on his motorcycle, which is not specifically a violation of the statute, Dench sent and received text messages by playing the game, and that is clearly prohibited in the statute.

Accordingly, Dench will be held to be in violation of the Pennsylvania statute.

Issue 4

NEGLIGENCE PER SE

The concept of negligence per se establishes the elements of duty and breach of duty where an individual violates an applicable statute, ordinance, or regulation designed to prevent a public harm. However, a plaintiff, having proven negligence per se cannot recover unless it can be proven that such negligence was the proximate cause of the injury suffered. (Schemberg) In order to prove a claim on negligence per se, the following four requirements must be met: (1) the purpose of the statute must be, at least in part, to protect the interest of a group of individuals, as opposed to the public generally; (2) the statute or regulation must clearly apply to the conduct of the defendant; (3) the defendant must violate the statute or regulation; (4) the violation of the statute or regulation must be the proximate cause of the plaintiff's injuries. (Schemberg)

The statute in question in this case is Pa.C.S. § 3316, which states, "No driver shall operate a motor vehicle on a highway in this Commonwealth while using an interactive wireless communications device to send, read, or write a text-based communication while the vehicle is in motion." The first element to look at is whether this statute's purpose is to protect the interest of a group of individuals, rather than the general public. The Schemberg case makes it clear that a group of individuals can be those that are within the zone of danger. (Schemberg) The purpose of the statute is to protect the interest of individuals specifically on the road who may come into contact with the person who is sending, reading, or writing a text-based communication. The

statute protects those individuals that are within the zone of danger. The statute therefore meets the first element of negligence per se.

The second element of negligence per se is whether the statute clearly applies to the conduct of the defendant. As stated in issue two above, the conduct of Dench falls within the Pennsylvania statute. He was operating a motorcycle on a highway in the Commonwealth while using an interactive wireless device (his smart phone) to send and receive text messages. Therefore, the second element is met. The third element that must be met is that the defendant must violate the statute. Dench's conduct clearly violated the statute, so that element is met. Finally the violation must be the proximate cause of the plaintiff's injuries. In this case, it was Dench's taking his eyes off the road and looking at his smart phone that caused him to hit the curb and become airborne. This is when he collided with Pasternak's vehicle. The violation of the statute is what caused Dench to hit and seriously injure Pasternak and thus caused Pasternak to be injured. Pasternak sustained a concussion, back and neck injuries, and her vehicle was totaled. (Police Incident Report) She suffered both medical and financial injuries as a result of Dench's conduct. Had Dench not been distracted while playing his game, he would not have hit Pasternak. Therefore, the final element of negligence per se is met.

Dench's attorney will argue that the statute in question is too general to support a negligence per se claim. He will say that the statute is there to protect the general public, and not the interest of a group of individuals. However, the Schemberg case makes it clear that the PA statute here is different from those which were held to protect the general public. The statute in the Schemberg case was held to protect a group of individuals, namely public servants who find themselves in the zone of danger created by the individual preventing the public servant from discharging his or her duty. Similar to that case, the PA statute here only protects a group of individuals, and not the public at large. Therefore, this argument will be invalid.

Accordingly, Dench's conduct can be a basis for a successful negligence per se claim.

Question No. 1: Sample Answer

Issue 1

Darryl will not be successful in his claim under the Pennsylvania Probate Estates and Fiduciaries Code because there is no contract for the Code to recognize.

In Pennsylvania, in order for a contract concerning a will to be valid, the following must be true:

- The contract must be in writing and signed by the decedent,
- The contract must be referenced by the will; or
- The will must quote significant, material language from the contract into the will itself.

Roger's will made no reference to the promise that Roger made to Darryl that he would add a \$20,000 bequest to the will. There was no written agreement separate from the will. Therefore, this is not recognized as a legal agreement or contract under the Pennsylvania Probate Estates and Fiduciaries Code.

Issue 2

Jane's claim will be unsuccessful because the will specifically reserves a power of appointment in Sam and the will states that Sam can distribute any or all of Roger's estate to himself or to my other children such as he chooses and the court will read the statement in the will as one creating a power of appointment. This power and the language of the will makes clear that Roger intended for the estate to be distributed by Sam in any manner he so chooses. The condition upon which the equal distribution was directed has not yet occurred.

A testator can reserve a power of appointment in a person to distribute the testator's estate if the testator wishes to have the estate be distributed during that person's lifetime. The will can set out how or when the estate should be distributed.

Here the will was very specific in how the estate was to be distributed during the life of Sam. The bequest was to Sam for his life and gave him the power to distribute the estate among himself or his children as Sam saw fit. This means that Sam could keep all of the estate for himself, none of the estate for himself, or make distributions to Roger's children as he so chose. Sam chose to provide Robert with the 50% distribution because Sam considered him to be in the most financial need. Sam could do this because the language of the will permitted him to do so. Further, the equal distribution scheme is pre-conditioned on Sam's death, which the facts tell us has not yet occurred. Thus, Jane's claim will not be successful

Issue 3

Normally, life insurance policy distributions paid to beneficiaries on the death of the person named in policy are not included in gross income; however, since Darryl became the beneficiary of Roger's policy for consideration, he will have to include the life insurance policy in his gross income. Gross income is defined as income from whatever source derived. Under federal tax law, certain things are explicitly excluded from gross income. Usually, life insurance payments to the beneficiary of the policy upon the death of the person named in the policy are not included in gross income; the policy reason behind this being not to punish those, usually close family members, left behind after a decedent's death. Here, however, Darryl paid consideration to be named beneficiary of the policy (\$2,000 to Roger in order to become the beneficiary as Roger was tight on money and needed cash immediately). Thus, this life insurance payment will be included in Darryl's gross income. However, since he already paid \$2,000 for the policy, his realization in terms of gross income for the policy will be \$8,000.

Issue 4

If Larry felt that there was an immediate need to disclose privileged info about his client in order to prevent the death or serious bodily harm to someone, he will not be in violation of the PA Rules of Professional Conduct.

The issue here is whether Larry was in the right for breaking his privilege with a client by telling the DA that Sam was going to assist in the death of Roger.

Typically, all communication between a lawyer and his client (or sometimes prospective clients and former clients) is privileged and cannot be communicated outside of that relationship without valid consent from the client. However, there are exceptions. One of those exceptions is when an attorney feels that his client is about to kill or seriously injure himself or another person.

Here, Larry apparently felt the need to tell the DA that Sam was going to assist in Rogers's suicide. Sam asked for legal advice on the subject, which would have stayed privileged. However, Sam specifically told Larry that he was going to go through with it, and it doesn't matter that he didn't. Larry in this situation may reach out to the authorities.

Larry was not in violation. He broke privilege to prevent his client from killing another person.

Question No. 2: Sample Answer

Issue 1

1(a) After service of the complaint Kim's attorney can raise the affirmative defense of statute of limitations in her answer under new matter.

Under the PA Rules of Civil Procedure defenses to actions can be raised in New Matter. All affirmative defenses must be raised in New Matter or they are waived. A defense under the running of the statute of limitations would be brought in New Matter and would be filed within 20 days after the service of the complaint.

1(b) The Court will rule that the action is barred by the statute of limitations because the cause of action accrued when Sue became aware of Kim's letter and received the memo from Ray. Sue's action should have been filed no later than July 20, 2016.

The statute of limitation for defamation begins to run when the plaintiff knew or should have known of the defamatory statement. Sue's claim that she did not have enough information to file a complaint is not enough to toll the statute of limitation.

Sue received the memo on July 20, 2015. The memo stated that the school was to rescinding Sue's promotion based on Kim's letter. After receiving the memo Sue knew or had reason to know that the letter contained something which had caused the school to change its mind. Sue already had a bad relationship with her sister, Kim, and based on the memo should have known that something bad was said about her because the school rescinded the promotion on July 20, 2015. Therefore, Sue had enough information on July 20, 2015, to file. Consequently, she had until July 20, 2016, to file suit. The court will rule that the claim is barred by the statute of limitations.

Issue 2

Whether Sue is likely to succeed in a defamation cause of action.

Defamation occurs when the defendant makes a defamatory statement, that is false, and is published to a third party that is of and concerning the plaintiff. A statement is libel per se and thus presumed defamatory if it, relevant here, calls into question a person's abilities in his profession or claims a person has committed a crime. A defamatory statement about a private individual about a matter of private concern must be proven to be made at least negligently.

Here, Kim's letter to the principal, stated, "she was unfit for her current teaching duties" and that "she's been stealing from our elderly father's accounts." This statement includes allegations that Sue is unfit in her profession and that she committed a crime by stealing from her father. Both of these statements are false. This letter was mailed to Ray, the chief administrator in writing. The statement mentioned Sue by name. Further, the school is a private school and thus Sue is a private individual. Finally, Kim sent the letter maliciously, which is more than the required negligence, and with the intent to cause Sue to lose her job.

Therefore, because of the subject matter of Kim's letter, Kim has committed libel per se. Further, Kim does not have truth as defense. Kim's letter was published to a third party because she sent it to Ray. Kim's letter was of and concerning Sue specifically because she mentioned her by name. Finally, Kim sent the letter maliciously which is above the standard needed to prove fault here. Thus Sue is likely to succeed in her defamation suit against Kim.

Issue 3

3(a) Sue's attorney must establish the authenticity of the memo. The attorney can do this by having Lori authenticate Roger's handwriting. In Pennsylvania, lay witnesses can authenticate the handwriting of another so long as the witness can demonstrate that she is familiar with the other's handwriting. Here, Lori worked with Ray for 10 years and should be familiar with his handwriting, and she will be able to authenticate it as his handwriting (and thus Ray as author of the memo).

3(b) The court should rule that the statement falls under state of mind exception to the hearsay rule.

Hearsay is an out of court statement used for the truth of the matter asserted. Hearsay is otherwise inadmissible unless it falls within an exception to the rules of hearsay. An exception to the rule of hearsay is the state of mind exception which is a statement that reflects the then existing person's state of mind.

Here, Ray was deemed incompetent to testify. Furthermore, the statement "I am not giving you the position because in my mind you are too indecisive" goes to show that Ray did not give Sue the job because of his state of mind.

The court will most likely rule the statement is admissible as an exception to the rule against hearsay because it goes to state of mind.

Question No. 3: Sample Answer

Issue 1

Jake's lottery winnings would likely be considered nonmarital property, and as such would not be subject to equitable distribution in his divorce with Thelma. Property that is acquired after separation, and with funds that have been earned after separation of the two parties is nonmarital property.

Thelma and Jake separated from each other on September 17, 2016. Thelma filed for divorce three days later. At this point, Jake and Thelma were living separate and apart and had already begun a period of separation. Jake purchased his lottery ticket after the date of the separation. Further, Jake used only funds that he earned after the date of separation. Because Jake used nonmarital funds to purchase the lottery ticket after the date of separation and after he had been served with the divorce complaint, and the lottery earnings were received after the date of separation, they will be considered nonmarital property.

Jake's lottery earnings are nonmarital property and will not be subject to equitable distribution in his divorce from Thelma.

Issue 2

The criminal charge supported by the facts that would be filed against Jake as a result of his entry into 115 Fox Chase Lane is criminal trespass and the charge would be successful. Criminal trespass is when an individual breaks and enters into a dwelling of another or enters the property of another without permission to do so. The distinction between burglary and criminal trespass is that one who commits the crime of criminal trespass does not have the intention to commit a crime therein whereas for burglary one must have the intent to commit a criminal act at the time of the breaking and entering. The use of a key will not negate the element of the breaking. If the key was used without permission or under fraudulent terms it is still considered a constructive breaking. A defense to either crime is that the property was open to the public, the individual had permission or a license to enter the property, or the building entered was abandoned.

Here, when Jake left the marital home on September 17, he stayed with his parents, who also lived in C County; but Jake was evicted the next day. Not having a place to stay and in need of a place to sleep, Jake decided to enter 115 Fox Chase Lane, which was a home located two doors down from his parent's home. Jake knew the owners of the home, the Joneses, and knew that they kept a spare key to the back door under a flower pot on their back porch. He also knew that the Joneses who permanently resided at 115 Fox Chase Lane, were away in Florida on vacation. Although he knew the Joneses, Jake did not have permission from them to stay at their home. Despite this, he used the key from under the flower pot to open the lock on the door and entered the home to sleep for a few nights.

Jake using the key constructively broke and entered into the dwelling of the Joneses. Jake did not have their permission. Jake did not have an intent to commit any crime at the time he broke into the home. Jake simply was looking for a place to sleep. Because Jake broke into the dwelling of another without permission, but did not have the intent to commit a crime at the time of the breaking, criminal trespass is the most appropriate criminal charge for Jake. Jake does not have any defenses, he did not have permission, the home was not open to the public, and the home was not abandoned. The criminal charge supported by the facts that would be filed against Jake as a result of his entry into 115 Fox Chase Lane would be criminal trespass and the charge would be successful.

Issue 3

Aside from any theft offense, Jake would likely be charged with Forgery.

Aside from any theft offense, Jake could likely be charged with forgery when he completed and presented Thelma's check to the bank for cashing.

Forgery consists of the knowing, purposeful, or intentional altering of a document, without license/permission to do so, with the intent to alter or falsify the document. Forgery can include any alteration of an official document with knowledge that the actor is wrongfully changing the document, such as the altering of the time/date on a chart use for official purposes. Additionally, as in this situation, forgery includes the writing and signing of another's name or endorsing a document without the proper authorization.

Here, when Jake took a check from Thelma's personal bank account, without her permission, and made the check payable to himself for \$1,000, he committed a forgery of the check. Jake knowingly and intentionally completed/endorsed a check, payable to him, from Thelma's account without her permission. At no time did Jake have Thelma's authority to write said check, and he did so with the intention to sign her name without authorization.

Therefore, forgery charges could be brought against Jake because of his completing and presenting the check to the bank for cashing as he did so without the proper authorization and with the intent to do so falsely.

Issue 4

The commonwealth (pros) can refresh Mrs. Smith's memory with the note.

Under PA rules of evidence, if a witness is having a hard time remembering an event, a party can attempt to refresh the memory of the witness by showing them a prior writing. Refreshing a witness' memory can be done in many ways, even by a newspaper heading, or by something she had previously written.

When refreshing a witness' memory, a party can show the document to the witness, have her look at it, take it away, and then ask her to testify to what she now remembers. Reading

straight from the document is not allowed. The document itself does not get offered into evidence. However, an adverse party may offer the writing into evidence if it so chooses.

Here, the pros can show Mrs. Smith the note she wrote after she saw Jake come out of the house. The pros should show her the note and refresh her memory so that she can testify with a better recollection of what happened that day. The defense may want to offer the note into evidence if they believe it would be helpful.

Question No. 4: Sample Answer

Issue 1

1(a). The Takings Clause states the government must compensate an individual when the individual's property is taken by the government without just compensation. While ownership of the land may not be taken, it will still be considered a taking if the government action completely deprives the owner of any economically viable use of the property. Finally, the action must be taken by the government to fall within the provision of the Takings Clause.

Here, Farmer owns 100 acres of farmland next to Little Creek above the high water mark. As the owner, Farmer has a vested property interest in the land as he uses it to farm and makes a living off of such production. The government is seeking to repair a bridge and hires A Corp to fix it. In order to repair the bridge, A Corp decides it must dam Little Creek which would cause the complete and permanent flooding of Farmer's lands. This shows that the government intends to permanently deprive a private property owner of his vested property right. Furthermore, they undertake this venture without notifying Farmer. After they dam the river, Farmer's lands are rendered valueless to Farmer. As a result, the land is completely destroyed and unusable. The court would look at these facts and determine that the acts of A Corp, an agent of the government, constituted a complete taking of Farmer's land. They would likely rule that despite Farmer retaining ownership of the land itself, the complete occupation by flooding and the lack of economically viable use amounts to a government taking.

The court will determine that the government took Farmer's land and Farmer will likely succeed in his action against the government.

1(b). The court will analyze the claim to determine if just compensation was given to Farmer and will likely rule that \$10,000 is not enough to adequately compensate Farmer for the taking.

When a taking occurs, the government must offer just compensation to the rightful owner for such taking. This amount can be equal to the fair market value of the land. While the amount of compensation may not take into account speculative earnings, it can take into account the fair market value of the land or the value equal to the cost of deprivation.

Here, Farmer used the land to grow and sell crops. He owned 100 acres and farmed on the entire 100 acres. His next door neighbor also grew and sold crops across 100 acres. Prior to the government's taking, Farmer's neighbor sold his land for \$200,000. Here, the government offered him \$10,000. The fact that the court has a direct comparison with Farmer's neighbor can help establish a fair market value for the land. \$200,000 for the value of the farmland is well above the government's offer of \$10,000 and thus the court will likely rule that the government did not provide just compensation for the taking that occurred and will order the government to pay more to Farmer for the deprivation of his property.

Issue 2

The District Court will rule in favor of the hikers because they have an interest in the property and standing is proper because they will suffer a harm if the property is flooded by the bridge project.

A person has standing if there is injury, causation, and redressibility. Injury must be concrete in that there must be a impending harm and not hypothetical harm. Causation exists when the action caused the harm suffered by the plaintiff. Redressibility exists when the court's adjudication will remedy the harm suffered by the Plaintiff. A third party has standing to bring a cause of action if they have sufficient connection to the injured party, the injured party is prevented from bringing a claim, and they have an interest in the outcome.

Here, the five hikers of trailblazers ("Hikers") will suffer an immediate and irreparable injury to their trail hiking area as a consequence of the damming of little creek. The harm suffered is immediate because it will occur in six months. Furthermore, the flooding of their trail by the government will cause them actual damages because they will lose the use of the hiking trail. In addition to the loss of the trails the members will lose the money they paid to use the trail. Lastly, the district court can issue a permanent injunction restricting the flooding of the land, or even a temporary injunction merely until after the year when the annual dues paid by the members expire which will redress the members harm.

The court may also determine if Hikers have 3rd party standing because they are members of Trail-blazers.

The court will likely rule in favor of the hikers because they have a sufficient interest for the remainder of their term in the property to use the land that is caused by the flooding and the court can issue a valid remedy in the form of a temporary/permanent injunction.

Issue 3

Reasonable Accommodation under the ADA

Andrew should prevail unless A Corp can prove that providing him with a reasonable accommodation would be unduly burdensome.

The Americans with Disabilities Act (ADA) prohibits employers from discriminating against employees based on the employee's disability. To qualify for protection under the ADA, the employee must have a disability as defined by the ADA, the employer must be aware of the disability, and the employee must be able to perform the necessary functions of the job either with or without a reasonable accommodation. The employer must engage in the interactive process with the employee to determine what reasonable accommodations can be made. A reasonable accommodation need not be the specific accommodation requested by the employee. The employer may claim that reasonable accommodation cannot be provided because doing so would impose an undue burden on the employer.

Here, the facts indicate that A Corp employs 75 individuals and so is subject to the ADA. Andrew has been paralyzed from the waist down for the last 5 years and has used a wheelchair. Paraplegia does constitute a disability under the ADA. Further, the facts indicate that A Corp is aware of Andrew's disability and wheelchair use. Andrew has been employed with A Corp during the entire 5 years since he became a paraplegic, and the facts indicate that he is one of their most respected engineers, thus indicating that he was able to perform his job so long as he did not have to traverse steps in order to access records. Now that the records have been moved and can only be accessed by ascending the stairs, Andrew has asked A Corp for a reasonable accommodation. There are no facts to indicate that he could not do his job with the reasonable accommodation. While A Corp is not required to install the ramp that Andrew has requested as a reasonable accommodation, it is required to engage in the interactive process with him by assessing his needs and providing him with some form of reasonable accommodation. A Corp would only be excused from providing Andrew with some form of reasonable accommodation if it can show that doing so would impose an undue burden, which nothing in the facts seems to indicate. Andrew should prevail unless A Corp can prove that providing him with a reasonable accommodation would be unduly burdensome.

Question No. 5: Sample Answer

Issue 1

Based solely on the language contained in the deed in which Amy transferred Blackacre to Brian, it is not likely that Brian has a legal remedy against Amy as Amy transferred Blackacre to Brian via quitclaim deed.

Under a quitclaim deed, the transferor provides no warranties regarding the title of land which is being passed. Such a deed provides the least amount of protection and provides that the transferor makes no warranties as to the quality of right, title and interest in the land which is being transferred. By providing a quitclaim deed, a transferor of real property makes no promises to defend against any title defects or other challenges to the deed and the transferee takes the property knowing the transfer is without such promises or warranties.

Here Brian took deed to Blackacre by a quitclaim deed; Amy provided no assurances/warranties regarding the right, title, and interest in the property. As such, Brian took title to Blackacre knowing that Amy provided no such warranties or guarantees as to the quality of title in the land.

Therefore, as Brian took Blackacre under quitclaim deed, he has no legal remedy against Amy as she made no warrants or representations in the deed regarding the quality of title and through the quitclaim deed provided the least amount of deed protection available.

Issue 2

The court should decide as follows: (1) the personal art work is personalty, removable and belongs to Amy; (2) the three new deck ovens are trade fixtures, removable and belong to Amy; (3) the sprinkler system is a fixture, not removable and belongs to Megan.

The court should follow Pennsylvania common law rules with regard to personalty, trade fixtures and fixtures. The personal art work are non-affixed. They were purchased by Amy for personal enjoyment. They fall into the category of personalty. They are easily removable and belong to Amy. Pennsylvania courts have held that items purchased and installed for the purposes of trade or business are trade fixtures. Even if they are affixed and difficult to remove, they belong to the purchaser/ business owner and can be removed at the termination of the lease. Therefore, Amy's three new deck ovens are trade fixtures. She purchased them in order to be used in her bakery. They are removable and belong to Amy. Lastly, Pennsylvania courts have held that fixtures are items that are affixed to the property. They cannot be removed without substantially damaging the leased space. Amy purchased and had a new automatic sprinkler system installed to satisfy the fire safety code applicable to all businesses in Philaburgh. It cannot be removed without substantially damaging the leased space. Therefore, it is a fixture and remains in the building and under Megan's ownership.

Issue 3

Mart has a low likelihood of success in its suit to rescind the sale based upon mistake.

This issue requires analysis under Pennsylvania's contract laws with regard to mutual mistake. A mutual mistake is found when:

- (1) both parties are mistaken
- (2) the mistake pertains to a material issue of the contract
- (3) the party seeking remedy did not bear the risk of loss

As evident from the facts, both parties were mistaken about the card's authenticity and therefore the value of the baseball card. Brian, the seller, relied on the note from his great-grandfather. Brian also relied on his own thorough investigation. Brian had no reason to doubt the card's authenticity. Mart, the merchant-buyer, was also mistaken about the card's authenticity. A top executive at Mart hired an expert in old sports memorabilia who inspected the card and gave the opinion that he believed the card was authentic.

However, there is a strong argument that Mart bore the risk of loss. First, the expert report was conducted only at the insistence of the seller. The executive of Mart decided to forego the chemical testing that would have provided a definitive answer about the card's authenticity. Mart took a risk. Furthermore, the court is likely to consider that Mart is a national retailer. As a merchant, Mart is more likely than Brian (who does not regularly deal in these or any other goods) to bear the risk of loss here. Given Mart's merchant status and decision to forego, chemical testing, it is likely that a court will find that they did bear the risk of loss for this contract. Therefore, the court will not permit Mart to avoid the contract.

Issue 4

4(a). To recover damages for lost profits, the party must show what profits were lost with specificity. Typically, this is shown by history of past dealing and historical sales data. The party must also show that but for the breaching party, the party would have earned those profits with reasonable certainty.

Here, Briar's business venture is potentially hugely profitable, but it is new and untried. Brian does not have historical data to prove what his lost profits would be. Brian could produce projected sales data instead. However, Brian would have trouble showing that he would earn those projected profits with reasonable certainty. Additionally, the facts state that Brian's sales numbers were very poor and were expected to remain poor. Unless Brian could prove with more specificity what his profits were likely to be, he could not recover lost profits from Veg-E.

Because of the newness of Brian's venture, Brian would likely be unable to prove damages for lost profits.

4(b). When party is found liable for breach of contract, the breaching party owes the non-breaching party damages. Reliance damages give the non-breaching party money for his expenditures he made in reliance on the agreement.

Here, Brian's out of pocket expenses would likely be recovered if Brian pursued reliance damages. Brian relied on the three year agreement he entered into with Veg-E and spent significant money in preparation of the three year venture. Veg-E materially breach this contract by cancelling it after Brian had spent \$150,000. Under a reliance damages theory, Brian would be entitled to \$150,000 to pay him back for what he spent in reliance on the agreement. Therefore, Brian will likely be able to recover his out of pocket expenses.

4(c). Brian will likely be unable to recover punitive damages. Punitive damages are awarded to punish outrageous conduct. Generally, punitive damages are not available in contracts cases. While the breach by Veg-E was improper, it would not be enough for an award of punitive damages.

Question No. 6: Sample Answer

Issue 1

The court should rule against the disgruntled shareholder because the board of trustees is given great discretion to determine how best to further the corporation, including withholding dividends.

In general, a board of directors has wide discretion to declare dividends that courts usually will not touch, absent fraud or abuse of discretion. The board of directors have a fiduciary duty to the corporation and are in the best position to decide the best interests of the corporation and may do so with all the means they can in gathering information for a decision, whether conducting research themselves or relying on reliable advisory opinions.

Here, while the Corporation is operating on a surplus currently, WFI anticipates that it will soon need to expand its facilities. Both corporate counsel and the accounting office have advised the board not to declare dividends in anticipation of this expansion. Based on these reliable opinions, the board voted down the measure to declare dividends in a reasonable manner consistent with their fiduciary duty to protect the interests of the corporation and the court will not question this decision.

Issue 2

WFI may validly accept the trucking proposal submitted by Chris if the material facts are disclosed and the contract is supported by a majority vote of disinterested board members, shareholders, or if the transaction is ultimately fair. Directors of a corporation are fiduciaries. One of their central duties is the duty of loyalty- i.e. they must not engage in self-dealing, take corporate opportunity, or compete with the corporation. Self-dealing is when the director conducts business with the corporation. While self-dealing is against the fiduciary duty of loyalty, PA has a safe harbor doctrine that removes the taint of any potential breach of loyalty if a majority of disinterested directors approve of the action, if a majority of shareholders without an interest approve, or if the transaction is fair. However, even if one of the safe harbors is met (i.e. approval), there may still be a breach of fiduciary duty if the transaction is harmful to the corporation (unfair).

On these facts, WFI can validly accept the trucking proposal submitted by Chris if the directors or shareholders know Chris is a ½ owner and if a majority of the non-interested directors approve, if a majority of the shareholders not having an interest approve, or if the deal is entirely fair. Thus, a majority of the other directors would need to approve the transaction. A majority vote of the shareholders (there are 20) without an interest for the transaction could also remove any taint. There is no indication of the price Chris and his brother would charge the corporation, but it can be compared to the going rate for trucking services to determine fairness. If the transaction is fair to WFI and there is approval of the disinterested members of the board or shareholders or both, then WFI may validly accept the trucking proposal submitted by Chris.

Issue 3

WFI may revoke its acceptance of the steel sheets as they are nonconforming goods that were immediately reported as such when discovered.

When a buyer accepts goods and an inherent flaw cannot be reasonable discovered upon inspection, a buyer may revoke acceptance of accepted goods when the buyer relied upon assurances from the seller that the goods were appropriate and the flaw becomes apparent upon use and renders the rest of the goods unusable. To effectively revoke, the buyer must inform the seller in writing within a reasonable time that the flaw has been discovered and it will be revoking the goods because of the flaw.

Here, WFI needed 100 sheets of steel that were "Passivated." Upon delivery, Kelsey inspected the goods and was concerned the steel wasn't passivated properly, she contacted the seller, who assured her that the goods were properly passivated. Only after WFI placed a sheet outside and it began to weather did they realize that the goods were not passivated properly, thus they were non-conforming. Because they relied on the seller's assurances, WFI was entitled to revoke its acceptance of the remaining goods, which they did by notifying the seller in writing immediately, which is a reasonable time.

Issue 4

WFI has a duty to contact SI to determine what should be done with the remaining goods and if they don't hear back from SI, they may sell the good's on SI's behalf and keep any costs associated with storing and maintaining the goods.

After revoking accepted goods, assuming the seller has no locations nearby to deliver the goods, the buyer is required to inquire as to what they are to do with the remaining goods in their possession. If they receive no response from the seller, the buyer is free to store, dispose, or sell the goods on the seller's behalf and retain any reasonable expense resulting from storage, sales and care of the non-conforming goods.

Here, the seller is located across the state. WFI may therefore inquire with the seller what should be done with the remaining non-conforming sheets of metal. If they do not receive instructions, WFI may attempt to sell the remaining steel sheets on the seller's behalf and retain any amount needed to cover expenses associated with storing, selling or maintaining the goods in their possession.