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Question No. 1

Bill, 60 years old, is a resident of B County, Pennsylvania. Bill is single and has two adult daughters, Jen and Karen. Jen is an aspiring actress living in California who struggles to make ends meet, and Karen is a wealthy business executive residing in B County. Bill is employed as a sales associate for Pennsylvania Life Insurance Company, selling life insurance and annuities. For many years Bill has maintained a checking account at First Pennsylvania Bank. Four years ago, Bill added Karen as a joint owner on the account, and he signed forms at the bank naming Karen “co-owner” and giving her the right to withdraw funds from the account.

Last year, Bill met with Luke Smith, a B County lawyer and Bill’s longtime friend, to discuss his estate plan. Luke drafted Bill’s will, and on May 6, 2018, Bill properly executed the will, which provided as follows:

I leave my estate to Jen. I love and cherish my daughters equally, however, Jen has much financial need while Karen is well provided for. I name Jen as my executor.

The will was witnessed by Luke and his assistant, Lisa, and attested by Leo, a notary public. Bill left the original executed will with Luke. The next day, Luke made a photocopy of the will and printed on the copy, “Original retained by Law Office of Luke Smith.” He mailed that copy of the will to Bill, with a cover letter stating, in part, “As discussed, I will hold the original will at my office.”

A few days later, Bill called Luke and said, “I have an idea, why don’t you teach me how to draft wills? I have tons of clients who need wills. I’m not a lawyer but if you teach me what I need to know, I’ll take it from there. I’ll pay you $20,000 to get me started.” Luke agreed and had several subsequent meetings during which Luke coached Bill on the basics of estate law and drafting wills. Bill began promoting estate planning to his clients and started preparing wills. Bill met with each client, then drafted the will and supervised its execution. Bill was paid by the client for each
will he drafted. Between the time of his meetings with Luke and October 28, 2018, Bill prepared 20 wills, all for Pennsylvania residents.


On October 28, 2018, Bill suffered a heart attack and died suddenly. Jen searched Bill’s office and residence for the original will but found only Luke’s May 7, 2018, letter and a photocopy of the will. She contacted Luke, who searched his office and then called Jen saying: “I’m so sorry Jen, but I can’t find the will – it must have accidentally gotten shredded when we moved our office! My staff and I feel terrible; we’ll do anything we can to help, we remember everything and can tell the court what’s what.”

As of the date of Bill’s death, the First Pennsylvania Bank checking account held $300,000, all of which had been contributed by Bill. On December 22, 2018, Pennsylvania Life Insurance Company issued a check payable to Bill in the amount of $50,000 for sales commissions earned on life insurance and annuity products sold by Bill before he died.

1. If Jen files a procedurally proper petition to have a photocopy of Bill’s May 6, 2018, will admitted to probate, will she be successful under the above facts and Pennsylvania law?

2. Assume for this question only that Bill’s May 6, 2018, will is admitted to probate. Under the Pennsylvania Probate, Estate and Fiduciaries Code, who will receive the funds in the First Pennsylvania Bank checking account following Bill’s death?

3. Did Luke violate the Pennsylvania Rules of Professional Conduct when he assisted Bill with Bill’s will drafting business?

4. Assume for this question only that Bill is a cash-basis, calendar-year tax filer, that the will is probated and that the $50,000 commission check is deposited into the appropriate bank account. For purposes of federal income tax, should the commission be reported on Bill’s final personal income tax return or on an estate income tax return?
1. Jen will likely be successful in probating a copy of Bill’s will.

When an original will cannot be found after death, there is a presumption that the will was revoked or destroyed by the testatrix. *In re Estate of Janosky*, 827 A.2d 512, 519 (Pa. Super. 2003); citing *In re Murray’s Will*, 171 A.2d 171, 176 (Pa. 1961). “To overcome that presumption, the evidence must be positive, clear and satisfactory.” *Id.* (internal quotations and citations omitted).

Certain proof is essential to establish a destroyed or suppressed will: (1) that testatrix duly and properly executed the original will; (2) that the contents of the executed will were substantially as appears on the copy of the will presented for probate; (3) that, when testatrix died, the will remained undestroyed or unrevoked by her. *Murray*, 171 A.2d at 175.

However, “if [the] will is lost while in the hands of [some] one other than the decedent, it is presumed that the person who had possession of it lost the document.” *In re Estate of Mammana*, 564 A.2d 978, 981-82 (Pa. Super. 1989).

Thus, we have no dispute with the tenet in the law that the failure to find a will, after a careful and exhaustive search, raises a presumption that the decedent destroyed it with the intent to revoke it. . . . However, such a presumption is rebutted by proof that after the execution of the will, it was deposited by the testator or testatrix with a custodian (in this case, an attorney) and that the decedent did not thereafter have it in his/her possession or have access to it.

*Id.* The “lost” will can be probated if “(1) the presumption that the testator revoked the lost instrument is rebutted; and (2) proof is given of both the execution and of the contents of the missing document.” *Id.* at 980.

The Probate, Estates and Fiduciaries Code requires that to be admitted to probate, all wills must be “proved” by two competent witnesses. 20 Pa.C.S.A. § 3132. The Pennsylvania Supreme Court recently held that this requirement applies to lost wills; however, it does not require that two witnesses are able to attest to the contents of the lost will, merely to the validity of the will. *In re Estate of Wilner*, 142 A.3d 796, 804-05 (Pa. 2016). In that case, the will had been held by the testator and could not be found after her death. *Id.* at 799. The drafting attorney testified as to the contents of the will, and along with another attorney testified that he had witnessed the decedent execute the will. *Id.* at 799.

In *In re Estate of Mammana*, the Superior Court held that the presumption of revocation had been rebutted where the decedent’s will had been retained by the attorney, that the evidence, including testimony from the drafting attorney and his staff, showed that the decedent had not had access to it, and that the attorney or his staff had accidentally destroyed the will while cleaning out office documents. *In re Estate of Mammana*, 564 A.2d at 981. The contents of the will were proven through the testimony of the attorney. *Id.*
Because the original will cannot be found, there arises a presumption that it was revoked or destroyed by Bill. However, it is likely that Jen will be able to rebut the presumption.

Bill did not retain the will and did not have access to the will. Instead the original will was held by his attorney, Luke. Luke and his staff have offered to testify and can establish that Bill did properly execute the will, that the photocopy accurately reflected the contents of the original will, and that prior to his death, Bill had taken no action to destroy or revoke the will. Between Luke, Lisa, and Leo, there are more than the two witnesses available to testify as to the execution of the will.

Luke’s December 3, 2018, cover letter and statement on the photocopy that the original had been retained by his law office will offer further support that the will was retained by Luke and that Bill had no opportunity to revoke it. The facts are substantially similar to those of In re Estate of Mammana, where the Superior Court held that the presumption of revocation had been overcome and that the execution and contents could be proven through the testimony of the drafting attorney and his staff. Under the facts above, it is likely that the presumption of revocation will be rebutted and Jen will be able to probate the photocopy of Bill’s will.

2. Karen will receive the funds in the First Pennsylvania Bank account under the Pennsylvania Estates and Fiduciaries (PEF) Code.

The Pennsylvania Probate, Estate and Fiduciaries Code governs multi-party accounts. See 20 Pa.C.S.A. § 6301 et seq. (often referred to as the “Multiple-Party Accounts Act” or “MPAA”). An account is a “contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account and other like arrangements.” 20 Pa.C.S.A. § 6301. A “joint account” is defined as “an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship.” Id.

With respect to joint accounts upon the death of a joint owner, the Multiple-Party Accounts Act provides:

**Right of survivorship.**

(a) **Joint account.** — Any sum remaining on deposit at the death of a party to a joint account belongs to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent at the time the account is created.

***

(d) **Change by will prohibited.** — A right of survivorship arising from the express terms of an account or under this section, or a beneficiary designation in a trust account cannot be changed by will.

20 Pa.C.S.A. § 6304. The Pennsylvania Supreme Court has held that
One who knowledgeably creates a joint account with another arguably does so with the present intent to employ the account's survivorship characteristic in substitution for a testamentary device.

_In re Novosielski_, 992 A.2d 89, 102 (Pa. 2010). Interpreting section 6304(d) concerning the prohibition on changes by will, the court stated the following:

> [T]his section only reinforces the conclusion that the legislature did not intend that the MPAA be read to conform to the provisions in the PEF Code governing wills. On the contrary, the MPAA rather clearly evidences a legislative intent that, except when the instrument explicitly provides to the contrary or in the unusual case based on a heightened degree of evidence, individuals and institutions may safely rely upon the presumed right of survivorship of MPAA joint accounts.

_Id._ at 529. A distribution scheme in a will that conflicts with survivorship rights to a joint account does not establish clear and convincing evidence of a contrary intent and is not sufficient to supersede the survivorship rights associated with the joint account. _Id._; _see also In re Estate of Orenak_, No. 32-15-0019, 2015 Pa. Dist. & Cnty. Dec. LEXIS 9170, at *6, *7 (Pa. Com. Pl. 2015).

The First Pennsylvania Bank checking account clearly meets the definition of an account. Because both Bill and Karen have the right to withdraw funds, the account is a joint account under the MPAA. As a co-owner of a joint account, Karen becomes the owner by right of survivorship unless there was clear and convincing evidence of a different intent at the time the account is created. No such evidence is presented by the facts.

An argument could be made that the statement in Bill’s will that he wanted to leave his entire estate to Jen and not to Karen because of Jen’s financial need provides evidence of his intent that the account pass to Jen, as well. However, the MPAA expressly provides that a right of survivorship to a joint account cannot be changed by will. 20 Pa.C.S.A. § 6304(d). Since the will was made after the joint account was established, it cannot alter the survivorship rights. The Pennsylvania Supreme Court has held that even if the will were made prior to the establishing of the joint account, it would not, by itself, override the rights of survivorship. _In re Novosielski_, 992 A.2d at 101-02. Therefore, Karen will receive the funds in the First Pennsylvania checking account following Bill’s death.

3. **Luke violated the Pennsylvania Rules of Professional conduct by assisting Bill with engaging in the unauthorized practice of law.**

The Rules of Professional Conduct provide that “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.” Pa. RPC 5.5(a).

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. . . .

Pa. RPC 5.5 cmt. 2.
There is a wealth of authority for the proposition that the habitual drafting of legal instruments for hire constitutes the practice of law, even though the individual so engaged makes no attempt to appear in court or to give the impression he is entitled to do so.


The Pennsylvania Supreme Court has held that an attorney assisting non-lawyers with the sale of living trusts and counseling clients regarding estate planning matters violated Rule 5.5(a). _Office of Disciplinary Counsel v. Bohmueller_, 158 A.3d 617 (2015). In that case, the attorney in question was disbarred. _Id._

Here, Luke knowingly assisted Bill, a non-lawyer, with establishing Bill’s will-drafting business. Bill met with and counseled clients, and prepared wills for them, in exchange for a fee. These activities constitute the practice of law, and, therefore, can only be conducted by attorneys licensed by the Commonwealth of Pennsylvania. By assisting Bill with the unauthorized practice of law, Luke violated the Pennsylvania Rules of Professional Conduct and is subject to discipline.

The Pennsylvania Rules of Professional Conduct also provide that an attorney engages in professional misconduct if he or she:

(a) violate[s] or attempt[s] to violate the Rules of Professional Conduct, knowingly assist[s] or induce[s] another to do so, or do[es] so through the acts of another;
(b) commit[s] a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects . . . .

Pa. RPC 8.4. Luke assisted Bill with violating Rule 5.5 when he taught him about estate planning and how to draft wills knowing that Bill was going to begin drafting wills for individuals in Pennsylvania. Therefore, by assisting Bill’s violation of Rule 5.5, Luke likely violated Rule 8.4(a). In addition, since unauthorized practice of law is a criminal act in Pennsylvania, see 42 Pa.C.S.A. § 2524, Bill may have also violated Rule 8.4(b).

4. **The $50,000 commission payment should be reported by Bill’s estate as income in respect of a decedent.**

For federal income tax purposes, decedent’s estates are separate taxable entities, and are subject to reporting and payment of federal income tax. 26 U.S.C. § 641; 26 C.F.R. § 1.661(a)-1.

The amount of all items of gross income in respect of a decedent which are not properly includible in respect of the taxable period in which falls the date of his death or a prior period (including the amount of all items of gross income in respect of a prior decedent, if the right to receive such amount was acquired by reason of the death of the
prior decedent or by bequest, devise, or inheritance from the prior decedent) shall be included in the gross income, for the taxable year when received, of:

(A) the estate of the decedent, if the right to receive the amount is acquired by the decedent's estate from the decedent;

26 U.S.C. § 691. Income in respect of a decedent is defined as follows:

[T]hose amounts to which a decedent was entitled as gross income but which were not properly includible in computing his taxable income for the taxable year ending with the date of his death or for a previous taxable year under the method of accounting employed by the decedent. . . . Thus, the term includes:

(1) All accrued income of a decedent who reported his income by use of the cash receipts and disbursements method;

26 C.F.R. § 1.691(a)-1(b).

Generally, under the cash receipts and disbursements method in the computation of taxable income, all items which constitute gross income (whether in the form of cash, property, or services) are to be included for the taxable year in which actually or constructively received.

26 C.F.R. § 1.446-1(c)(1)(i).

For example, income that is earned during a decedent’s lifetime but is not paid until after death is income in respect of a decedent, and is not properly includible on the decedent’s final personal income tax return. Findlay v. Commissioner, 332 F.2d 620, 622 (2d Cir. 1964). Commissions on insurance policies sold by a decedent during life, but payable after death are income in respect of a decedent and should be reported as income by the decedent’s estate. Id.; Estate of Goldstein v. Commissioner, 33 T.C. 1032, 1038 (1960).

Here, Bill earned commissions based on work performed while he was alive. As a cash method taxpayer, Bill reports items of income when received. The commissions were not paid until after he died, and were deposited into the estate. Therefore, the commissions constitute income in respect of a decedent, and are not reportable on Bill’s final personal return. Instead, the commissions should be reported as income by Bill’s estate, which is considered a separate taxpayer for federal income tax purposes.
Question No. 1: Grading Guidelines

1. **Lost will, admissibility of photocopy to probate.**

Comment: Applicants should recognize the presumption that ordinarily, an original will must be located for probate, but that a photocopy can be probated in certain circumstances, including when it can be established the will was held by a custodian.

5 points.

2. **Joint bank account – effect of will.**

Comment: Applicants should identify the right of survivorship for joint bank accounts under the Multi-Party Account Act, and that same cannot be changed by a subsequent will.

5 points.

3. **Unauthorized practice of law.**

Comment: Applicants should identify and apply the rule prohibiting lawyers from assisting with the unauthorized practice of law.

5 points.

4. **Income in respect of a decedent.**

Comment: Applicants should recognize that decedent’s estates are separate taxpayers, and that when the recipient is a cash-basis taxpayer income earned during life but paid after death should be reported by the estate.

5 points.
Question No. 2

In 1999, brothers Al, Ben, and Carl formed Gourmet Brothers, Inc. (GBI), a Pennsylvania corporation, to own and operate a deli and grocery store. Al, Ben, and Carl each received 100 shares of GBI stock upon its formation and served as GBI’s sole directors until January 2018 when Ben and Carl both died. Al has been GBI’s president since formation.

Ben’s will left his stock in GBI equally to his five children, and Carl’s will left his stock in GBI equally to his five children. Al has taken his brothers’ deaths very hard. He was also outraged when he learned that his brothers did not leave their stock in GBI to him. He had believed that he and his brothers had always intended that the survivor of the three would end up owning GBI. Ben and Carl’s children have received their respective father’s stock in GBI. They demanded that Al call a shareholder’s meeting at which they elected two new directors (in addition to Al) from amongst themselves to replace Ben and Carl on the GBI board. Al remained as president of GBI.

Al recently learned that a bakery that supplies GBI is for sale. Prior to Ben and Carl’s deaths, they had discussed purchasing this bakery if it ever was for sale because ownership of the bakery by GBI would allow GBI to increase profits by controlling the cost of baked goods. GBI has sufficient reserves to pay cash for the bakery. Given his anger over not receiving his brothers’ shares and his dissatisfaction with now being in the minority, Al decided not to tell any of the other directors or shareholders of the bakery being for sale. Instead, Al has devised a plan to form a new corporation, which Al would solely own, that will at his direction buy the bakery. Al then plans to have his new corporation continue to sell baked goods to GBI and to keep all bakery profits for himself.

For some time, Al has been unhappy with the company from whom GBI has been purchasing bags and containers used for packaging GBI products. Three weeks ago, Al telephoned Packages,
Inc. (Packages), a supplier of bags and containers. Al, acting on behalf of GBI, reached an oral agreement with a duly authorized representative of Packages for GBI to purchase various bags, boxes, and packaging materials at a total cost of $5,000. Since Packages had never dealt with GBI previously, shortly after the call, Packages faxed a confirming memo (signed by a duly authorized representative of Packages) to Al detailing the oral agreement that had been reached, accepting GBI’s order, and setting forth the type and quantity of items ordered and the price. The confirming memo also included the following provision, which was not discussed by Al or Packages when they spoke by telephone: “Any sums outstanding on this order for more than 30 days from the date of invoice shall bear interest at a rate of 1.5% per month (18% annually).” Al carefully read the confirming memo upon receipt and filed it away without taking any further action. Packages has not yet delivered any of the supplies.

1. If Al proceeds with his plan to have his new corporation purchase the bakery and the directors and shareholders of GBI learn of the sale after it has occurred, under Pennsylvania corporate law:

   (a) what substantive argument should be asserted on behalf of GBI to challenge the purchase?

   (b) in such a challenge, what remedy(ies) might GBI seek?

2. If Al contacts Packages and indicates he has found a better deal for the supplies and, as a result, GBI will not honor its oral agreement with Packages, under the Pennsylvania Uniform Commercial Code (Code), if Packages seeks to enforce the agreement, will GBI be able to successfully defend by asserting that its agreement with Packages was oral and therefore not enforceable under the Code?

3. Assuming, for this question only, that the agreement between GBI and Packages is enforceable and that GBI has not contacted Packages as set forth in 2 above, under the Code will Packages be able to enforce the interest provision in the confirming memo that was never discussed or expressly agreed to if GBI fails to pay within 30 days of the date of invoice?
Question No. 2: Examiner’s Analysis

1.(a) GBI should assert that Al breached his duty of loyalty to GBI by taking advantage of a corporate opportunity that came to his attention that would have benefited and, most likely, been taken advantage of by GBI.

The Pennsylvania Business Corporation Law of 1988 (BCL) states, “[a] director of a business corporation shall stand in a fiduciary relation to the corporation and shall perform his duties as a director . . . in good faith, in a manner he reasonably believes to be in the best interests of the corporation.” 15 Pa.C.S.A. § 1712(a). This is often referred to as the duty of loyalty. Section 1712(c) of the BCL similarly imposes a duty of loyalty upon corporate officers. Directors of a corporation are somewhat analogous to trustees of a trust; with the shareholders of the corporation being the beneficiaries of the trust. See, 3 W. Edward Sell & William H. Clark, Jr., Pennsylvania Business Corporations § 1712.3 (Rev. 2d ed. 1997). As such, “a director acting in good faith will not put herself in a position where her personal interests conflict with her duty to the corporation.” Id. § 1712.4.

Al’s acquisition of the bakery presents a classic “corporate opportunity” situation.

The law has long recognized the doctrine of corporate opportunity, which prohibits one who occupies a fiduciary relationship to a corporation from acquiring, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy or that is essential to its existence.

3 Fletcher Cyc. Corp. § 861.10 (Perm. ed. 1994). A corporate opportunity is said to exist “when a proposed activity is reasonably incident to the corporation’s present or prospective business and is one in which the corporation has the capacity to engage.” Id. Directors “must devote themselves to the corporate affairs with a view to promote the common interests and not their own, and they cannot, either directly or indirectly, utilize their position to obtain any personal profit or advantage other than that enjoyed also by their fellow shareholders.” Seaboard Indus., Inc. v. Monaco, 276 A.2d 305, 309 (Pa. 1971) (citations omitted). The Seaboard court further stated:

In short, there is demanded of the officer or director of a corporation that he furnish to it his undivided loyalty; if there is presented to him a business opportunity which is within the scope of its own activities and of present or potential advantage to it, the law will not permit him to seize the opportunity for himself; if he does so, the corporation may elect to claim all of the benefits of the transaction.

Id. (citations omitted).

As an officer and director of GBI Al had a duty to disclose to the GBI board his knowledge that the bakery was for sale. If, after full and fair disclosure of the opportunity the corporation chose not to avail itself of the opportunity then Al could, assuming no other conflict exists, pursue the opportunity. Sell & Clark, supra. § 1712.6. “Thus, the appropriate method to determine whether or
not a corporate opportunity exists is to let the corporation decide at the time the opportunity is presented.”  *Fletcher, supra* § 861.10.

The facts indicate that obtaining the bakery would have enhanced GBI’s operations and increased its profits.  GBI also had the financial capability to purchase the bakery.  Acquiring the bakery would likely have increased GBI’s margins and profitability.  Al appeared to be acting out of spite and anger arising from the decisions of his brothers to pass their stock in GBI to their children rather than to Al.  His usurpation of the bakery opportunity flies directly in the face of his duty of loyalty to GBI and its shareholders.  Al should not have taken advantage of the opportunity until he first fully disclosed it to the GBI board and only if the board had rejected the opportunity, could he have proceeded with the purchase of the bakery.  Al purchased the bakery without first giving GBI the opportunity to act, and, as a result, he breached his duty of loyalty to GBI.

1(b).  **The remedies GBI could seek are the impression of a constructive trust and an accounting from Al.**

“The corporate opportunity doctrine rests upon the broad foundation of public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.”  *Fletcher, supra* § 861.50.  Accordingly, a director who breaches his duty of loyalty to a corporation by usurping an opportunity that properly belongs to the corporation will not be allowed to benefit from his breach.  *Id.*

The remedies for usurpation of a corporate opportunity will generally lie in equity.  *See Sell & Clark, supra* § 1712.3.  The remedy most often applicable to a misappropriation of corporate opportunity is the imposition of a constructive trust for the benefit of the corporation upon the property or opportunity.  *See Fletcher, supra* § 861.50.  A constructive trust is a relationship with respect to property usually subjecting the title holder to an equitable duty to convey the property to another who has been wrongfully deprived of the property resulting in unjust enrichment to the one upon whom the constructive trust is imposed.  *Restatement (Third) of Trusts,* § 1 cmt. e. (Am. Law Inst. 2003).  “[A] constructive trust is imposed, not necessarily to effectuate an expressed or implied intention, but [instead seeks] to redress a wrong or to prevent unjust enrichment.”  *Id.*  On occasion, courts have also required the party who has usurped the corporate opportunity to account for all profits derived because of the usurpation of opportunity and to pay over those profits for the benefit of the corporation.  *See Seaboard, 276 A.2d* at 309.

Accordingly, GBI could seek the imposition of a constructive trust upon the bakery opportunity that was taken by Al.  GBI could also ask the court to compel Al to account for any profits derived as a result of his usurpation of the opportunity.

2.  **The oral agreement between GBI and Packages is an enforceable contract because the confirming memo between merchants satisfies the Uniform Commercial Code’s statute of frauds requirements.**

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1 It should be noted that even if GBI would have passed on the opportunity, thereby allowing Al to purchase the bakery, that any contract between Al’s corporation, which would then own the bakery, and GBI would have to pass muster under any applicable conflict of interest rules.  This would be due to the fact that Al would then own a business that is doing business with another business in which he was a board member.  *See, Sell & Clark, supra* § 1712.
Article II of the Pennsylvania Uniform Commercial Code (Code) is relevant to this situation as it applies to transactions in goods. 13 Pa.C.S.A. § 2102. The sale of packages, etc. is a transaction in goods to which Article II shall apply. Section 2201 of the Code is implicated by the facts as this transaction involves a sale of goods in excess of $500.

Section 2201 of the Code provides, *inter alia*:

(a) **General rule.**—Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in such writing.

(b) **Writing confirming contract between merchants.**—Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (a) against such party unless written notice of objection to its contents is given within ten days after it is received.


Under the Code both GBI and Packages are merchants. The Code defines a transaction “between merchants” as “any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.” 13 Pa.C.S.A. § 2104. A merchant is a person who:

(1) deals in goods of the kind; or (2) otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

13 Pa. C.S.A. §2104. GBI and Packages each deal in the sale or use of bags, cartons, and other packaging materials and thus would each fall within the definition of a merchant with respect to this order.

Under the Code, between merchants if (i) within a reasonable time, (ii) a party sends a writing in confirmation of the contract “sufficient against the sender[,]” (iii) that is received by the receiving party and read and understood by the receiving party, (iv) and not objected to within 10 days, then the writing is a confirming memo that will satisfy the writing requirement of subsection (a) of Code Section 2201. 13 Pa.C.S.A. § 2201(b). In the instant case, Packages immediately prepared the confirming memo and faxed it to Al the day the oral agreement was reached. It was received by Al. The memo was sufficient against Packages as it contained the items, the quantity ordered, the price, and was signed by Package’s agent. Al carefully read the memo and filed it away assumedly understanding its contents which should have been clear from the face of the memo. Al
did not object to the memo within ten days which he should have done under the Code if he did not wish to be bound by the memo. Thus, the memo satisfies the writing requirement of the Statute of Frauds under the Code and the oral agreement reached between GBI and Packages is enforceable. See, James J. White and Robert S. Summers, Uniform Commercial Code, §§ 2-3 and 2-5 (4th Ed. 1995).

3. **Packages will be able to enforce the interest provision if GBI fails to pay within 30 days of invoice if such a provision is reasonable within the industry.**

As indicated above, GBI and Packages are both merchants under the Code. The confirming memo faxed by Packages accepted GBI’s order and confirmed the oral agreement that had been reached by GBI and Packages even though it added additional terms. See 13 Pa.C.S.A. § 2207(a). The issue is one of the applicability of the interest provision, not discussed by the merchants, that was included in the confirming memo sent by Packages.

Section 2207 of the Code addresses this situation. It provides, *inter alia*, as follows:

Additional terms in acceptance or confirmation

(a) **General rule.**--A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(b) **Effect on contract.**--The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

1. the offer expressly limits acceptance to the terms of the offer;
2. they materially alter it; or
3. notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

13 Pa.C.S.A. § 2207. Under section 2207, a written confirmation accepting an offer operates as an acceptance although it contains additional terms. If the confirmation is directed to a non-merchant the new terms are proposals for addition to the contract. If between merchants, however, the terms are proposals that become part of the contract unless the offer limited acceptance to the terms of the offer, the terms materially alter the contract, or there is an objection to the terms within a reasonable time.

Subpart (b)(2) of section 2207 is particularly relevant to the facts in this case. The language adding interest on outstanding sums if payment is not made within 30 days is an additional term. It was not discussed when Al and the representative of Packages spoke by telephone. Given that the
transaction involves two merchants, the issue becomes whether this additional term materially alters the contract. The comments to section 2207 suggest that an additional term will materially alter the contract if it will result in surprise or hardship if incorporated into the contract. 13 Pa.C.S.A. § 2207 cmts. 3, 4. The comments to 2207 also provide that a clause providing for interest on an overdue invoice is a clause that does not materially alter a contract if it is within the range of trade practice. 13 Pa.C.S.A. § 2207 cmt. 5. A 30 day time for interest to attach and the interest rate of 1.5% monthly appears to be reasonable and would most likely be consistent with trade practice for similarly situated parties. See James J. White & Robert S. Summers, Uniform Commercial Code, § 1-3 at 15 (4th ed. 1995); Herzog Oil Field Serv, Inc. v. Otto Torpedo Co., 570 A.2d 549, 551 (Pa. Super. 1990) (finding a 30 day time for interest to attach and an interest rate of 1.5% monthly to be reasonable).
Question No. 2: Grading Guidelines

1 (a).  Business Organizations -- Corporate opportunity doctrine

Comments: Candidates should recognize that the usurpation of a corporate opportunity by a director is a violation of the director’s duty of loyalty to the corporation he serves and should discuss how the director should have handled the opportunity.

5 points

1 (b).  Business Organizations -- Remedies for usurpation of corporate opportunity

Comments: Candidates should discuss the remedies of constructive trust and an accounting.

4 points

2.  Sales -- Confirming memo between merchants – statute of frauds

Comments: Candidates should recognize that the statute of frauds is implicated, that the facts demonstrate that the parties involved are merchants, and that the confirming memo satisfies the requirements of the statute of frauds.

6 points

3.  Sales – Confirming memo adding new terms between merchants

Comments: The candidates should recognize that between merchants the confirming memo with new terms acts as an acceptance even though a new term is added and that the new term becomes part of the agreement between the merchants if it does not materially alter the contract.

5 points
Question No. 3

Mary, a 28-year-old single woman, has been a lifelong resident of C County, Pennsylvania. She lives in a small home on five acres of land in the suburbs of C County. Mary has dated Thad for several years, but their relationship has been deteriorating. On May 15, 2019, Mary left her home and walked to her car that was parked in her driveway. As she was about to get into her car, Mary saw Thad walking up the driveway towards her, and he appeared to be angry. Uncertain of Thad’s intentions, she called the police from her cell phone. When Detective Stan answered the phone, Mary calmly said: “Hey, this is Mary from Box 313 Cunningham Road. Thad is coming up the driveway and he looks angry. Please come out so he doesn’t cause any trouble.” The police legally taped the conversation between Detective Stan and Mary.

As Thad reached Mary’s car, he ripped Mary’s cell phone from her hand and immediately threw her to the ground while stating that she wouldn’t be seeing her phone again. As Mary hit the ground, her neck was impaled by a metal stake which was protruding twelve inches out of the ground. The stake severed an artery in Mary’s neck and blood sprayed onto Thad’s sneakers and sweatpants. Thad then fled the scene with Mary’s cell phone. Mary bled to death within minutes of sustaining the neck injury. It is undisputed that Thad did not see the metal stake when he threw Mary to the ground and that he did not intend to kill her.

Detective Stan knew Thad, and when his call with Mary terminated, he went to her home to make sure everything was all right. When he arrived at Mary’s driveway, he found her lying dead. Next to her body was a bloody footprint, which appeared from its characteristics to come from a sneaker, and there was evidence that blood sprayed around the scene. Twenty minutes later, Detective Stan went to Thad’s home, and noticed Thad standing outside on the public
Detective Stan saw what looked like blood on Thad’s sneakers and sweatpants. Detective Stan asked Thad to accompany him to the police station for questioning and Thad agreed. Before transporting Thad to the station and without a search warrant, Detective Stan ordered Thad to place his shoes and pants in an evidence bag to avoid contamination and to preserve the potential evidence for future testing. Thad complied and put on other clothing before being taken to the police station.

1. Thad is charged with robbery and second-degree murder. Assuming the above facts can be proven and that a theft was committed, do the facts support those charges?

2. Was Detective Stan’s warrantless seizure of Thad’s sneakers and sweatpants legally permissible pursuant to the Pennsylvania Constitution?

Assume Thad proceeds to trial on the above charges and the Commonwealth attempts to introduce Mary’s tape-recorded, cell-phone call to Detective Stan to show that Thad was at the scene immediately before Mary was killed. Thad’s counsel objects on the basis of hearsay.

3. How should the Commonwealth respond to the hearsay objection and how should the court rule?

Detective Stan learns, through incontrovertible proof, that his wife of eighteen years, Louise, who is a highly successful business woman, has been having an extramarital affair during the last two years of their marriage. Assume Stan initiates a divorce action against his wife and includes claims for alimony and equitable distribution and the parties do not reach a settlement over those claims.

4. If Stan proves Louise’s extramarital affair at a hearing regarding his claims for alimony and equitable distribution, what effect, if any, would that have on Stan’s claims?
Question No. 3: Examiner’s Analysis

1. The charges of robbery and second-degree murder are likely supported by the facts.

Initially, the question assumes that Thad has committed a theft. “A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof.” 18 Pa.C.S.A. § 3921(a). “A person is guilty of robbery if, in the course of committing a theft, he . . . inflicts serious bodily injury upon another . . . or physically takes or removes property from the person of another by force, however slight . . .” 18 Pa.C.S.A. § 3701(a)(1)(i),(v). “An act shall be deemed ‘in the course of committing a theft’ if it occurs in an attempt to commit theft or in flight after the attempt or commission.” 18 Pa.C.S.A. § 3701(a)(2). Serious bodily injury is defined as “[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.” 18 Pa.C.S.A. § 2301.

As applied here, Thad took Mary’s cell phone from her hand, told her she wouldn’t be seeing the phone again and, in the course of doing so, immediately threw her to the ground. It can be inferred from his words, and his actions of taking the phone, that he intended to permanently deprive Mary of her cell phone, which would constitute a theft. In the process of taking the phone, Thad threw Mary to the ground and caused her neck to hit a metal stake which was protruding from the ground. The impact of the stake on Mary’s neck severed an artery which ultimately led to her death. This would clearly satisfy the requirement of inflicting serious bodily injury “in the course of committing a theft” as he inflicted these injuries during the commission of the theft before he fled the scene. Moreover, as Mary’s injury immediately led to her death, this would clearly constitute serious bodily injury; thus, these facts would likely support a charge of robbery under 18 Pa.C.S.A. § 3701(a)(1). In addition, since Thad physically ripped the phone from Mary’s person and threw her to the ground, this would likely support a charge under 18 Pa. C.S.A. § 3701(a)(1)(v) as well.

“A criminal homicide constitutes murder of the second degree when it is committed while the defendant was engaged as a principal or an accomplice in the perpetration of a felony.” 18 Pa.C.S.A. § 2502(b). A principal is “[a] person who is the actor or perpetrator of the crime.” 18 Pa.C.S.A. § 2502(d). The perpetration of a felony is defined as “[t]he act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery” and other enumerated felonies. 18 Pa.C.S.A. § 2052(d). “[S]econd degree murder does not require that a homicide be foreseeable; rather, it is only necessary that the accused engaged in conduct as a principal or an accomplice in the perpetration of a felony.” Commonwealth v. Lambert, 795 A.2d 1010, 1023 (Pa. Super. 2002). “The malice or intent to commit the underlying crime is imputed to the killing to make it second-degree murder, regardless of whether the defendant actually intended to physically harm the victim.” Lambert, 795 A.2d at 1022, citing Commonwealth v. Mikell, 729 A.2d 566, 569 (Pa. 1999).

As applied here, Thad would be deemed to be a principal as he was the perpetrator of the crime of robbery. When Thad threw Mary to the ground causing her neck to be impaled by the metal stake, he was doing so during the commission of the crime of robbery. Thus, these actions
would be deemed to have been committed during the perpetration of a felony as defined by 18 Pa.C.S.A. § 2502(b),(d). Since Thad’s actions resulted in Mary’s death during the commission of the crime of robbery, a charge of second-degree murder against Thad would likely be supported by the facts.

2. The seizure of Thad’s sneakers and sweatpants was legally permissible under the Pennsylvania Constitution pursuant to the plain-view exception to the search warrant requirement.

“[B]oth the Fourth Amendment to the United States Constitution and Article I, § 8 of the Pennsylvania Constitution prohibit unreasonable searches and seizures.” Commonwealth v. Harris, 888 A.2d 862, 868 (Pa. Super. 2005); see U.S. Const. amend. IV; Pa. Const. art. I § 8. “As a general rule, a search or seizure without a warrant is deemed unreasonable for constitutional purposes.” Commonwealth v. Lewis, 576 A.2d 63, 65 (Pa. Super. 1990). Plain view is an exception to the warrant requirement. Commonwealth v. Petroll, 738 A.2d 993, 999 (Pa. 1999). In Commonwealth v. McCullum, 602 A.2d 313, 320 (Pa. 1992), the Pennsylvania Supreme Court analyzed a factual scenario similar to the one presented here. In that case, the police were at the appellant’s girlfriend’s apartment and asked him to accompany them to the police station for questioning. While the appellant was putting on his shoes, one of the detectives noticed blood stains on the appellant’s shoes. The McCullum Court, quoted Horton v. California, 496 U.S. 128, 136 (1990), regarding the “plain-view” doctrine:

It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. There are, moreover, two additional conditions that must be satisfied to justify the warrantless seizure. First, not only must the item be in plain view, its incriminating character must be “immediately apparent” . . . Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself. McCullum, 602 A.2d at 320.

The McCullum Court went on to reason that “the blood-stained shoes were plainly displayed and the incriminating character of the shoes was immediately apparent to the detective. . . . [T]he police were aware that the appellant had been spotted in the vicinity of the murder, and that bloody shoe prints had been observed at the crime scene [and that the] appellant’s blood-stained shoes were relevant to the criminal investigation.” Id. The court also concluded that “it was reasonable for the detective to confiscate the shoes in order to eliminate the risk of contaminating the evidence, which would have occurred if appellant had been permitted to wear the shoes to the police station.” Id. The court went on to hold that the seizure of the shoes was proper and that the evidence was admissible. McCullum, 602 A.2d at 321.
As applied here, when Detective Stan was in Mary’s driveway he observed what appeared to be a bloody sneaker print next to Mary’s lifeless body and evidence that blood had sprayed around the scene. Within twenty minutes of Officer Stan finding Mary dead, Detective Stan approached Thad on the public street outside of Thad’s home. Detective Stan had a right to be on the public street much as would any other citizen. The detective immediately observed what appeared to be blood on Thad’s sneakers and sweatpants. Thus, the items were in plain view. Based on Mary’s phone conversation with Detective Stan that Thad had been at the scene, the detective’s familiarity with Thad, the bloody sneaker print from the scene, the evidence that blood had sprayed at the scene, and the corresponding blood on Thad’s sneakers and sweatpants, it was immediately apparent that the sneakers and sweatpants were potentially pertinent to the investigation into Mary’s death. Because of the risk of contamination, Detective Stan had the right to seize the apparently relevant evidence. Since the sneakers and sweatpants were identified and seized pursuant to the plain-view exception to the warrant requirement, their seizure will likely be deemed to be legally permissible under the Pennsylvania Constitution.

3. **The Commonwealth should respond that the statements made by Mary would constitute a present-sense impression, which is an exception to the hearsay rule; and the court would likely rule that her statement is admissible.**

Pa.R.E. 801 sets forth general definitions regarding hearsay. A “[s]tatement means a person’s oral assertion, written assertion, or non-verbal conduct, if the person intended it as an assertion.” Pa.R.E. 801(a). A declarant is defined as a “person who made the statement.” Pa.R.E. 801(b). Hearsay is defined as “a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” Pa.R.E. 801 (c). “Hearsay is not admissible except as provided by [the rules of evidence], by other rules prescribed by the Pennsylvania Supreme Court, or by statute.” Pa.R.E. 802. The Pennsylvania Rules of Evidence have numerous exceptions including the present-sense impression exception, which makes a statement admissible regardless of whether the declarant is available as a witness. See Pa.R.E. 803 – 804. In particular, the present-sense impression exception permits “[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.” Pa.R.E. 803(1). In Commonwealth v. Cunningham, 805 A.2d 566, 573 (Pa. Super. 2002) the Pennsylvania Superior Court held that the transcript of a 911 call made to the police by a witness who saw a robbery unfold fell within the present-sense impression exception to the hearsay rule. The court also held that the admission into evidence of the 911 transcript did not violate the defendant’s right to confrontation.

As applied here, the declarant would be deemed to be Mary as she was the one who made the statement. Mary’s oral assertions to Detective Stan on her cell phone call would be deemed to be a statement under Pa.R.E. 801(a). The Commonwealth is attempting to admit this statement at trial, where Mary is obviously not testifying as she is deceased. They are seeking to admit the recording to show that Thad was there immediately before Mary’s murder, which would be deemed to be for the truth of the matter asserted. Thus, this would qualify as hearsay

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1 Dying declaration is not implicated here because at the time of Mary’s statement she did not believe she was going to die. See Commonwealth v. Griffin, 684 A.2d 589, 592 (1996)
under Pa.R.E. 801(c). Unless Mary’s statement fits within an exception to the hearsay rule, it would be inadmissible at trial. See Pa.R.E. 802.

Here, the Commonwealth should argue that Mary’s statement constitutes a present-sense impression and should, therefore, be admissible under this exception to the hearsay rule. In particular, Mary was describing or explaining that Thad was approaching her in the driveway and her concern that he might cause trouble. These statements were calmly made contemporaneously with her perceiving the events. The recording of the call between Detective Stan and Mary is substantially similar to the transcript of the 911 call that was admitted in Commonwealth v. Cunningham. The court would, therefore, likely overrule the hearsay objection raised by Thad’s counsel and admit the contents of Mary’s phone call under the present-sense impression exception to the hearsay rule.

4. Louise’s extramarital affair can be argued as a factor to be considered in Stan’s alimony claim but not in his claim for equitable distribution of marital property.

“In determining whether alimony is necessary and in determining the nature, amount, duration and manner of payment of alimony, the court shall consider all relevant factors, including . . . [t]he marital misconduct of either of the parties during the marriage.” 23 Pa.C.S.A. § 3701(a), (b)(14). By statute, Pennsylvania also sets forth the factors which are relevant to equitable division of marital property, and specifically excluded marital misconduct. 23 Pa.C.S.A. § 3502(a). In Perlberger v. Perlberger, 626 A.2d 1186, 1195 (Pa. Super. 1993), the court made clear that marital misconduct may not be considered in determining equitable distribution of marital property.

As applied here, the facts indicate that Detective Stan has incontrovertible proof that his wife of eighteen years has been having an extramarital affair during the last two years of their marriage. This affair will constitute marital misconduct and so can be considered as a factor in Detective Stan’s alimony claim against his wife. However, the court will not be permitted to consider this same marital misconduct in Detective Stan’s equitable distribution claim for marital property.
Question No. 3: Grading Guidelines

1. **Criminal Law – Second-Degree Murder/Robbery**

   Comments: The applicant should recognize that robbery and second-degree murder are likely supported by the facts and should apply the relevant facts to the elements of each offense.

   7 points

2. **Criminal Procedure – Plain-View Search Exception**

   Comments: The applicant should discuss the plain-view exception to the search warrant requirement, apply the relevant facts, and conclude that the seizure of the evidence was permissible under the Pennsylvania Constitution.

   5 points

3. **Evidence – Present-Sense Impression Exception to Hearsay Rule**

   Comments: The applicant should identify the present sense impression exception to the hearsay rule and should apply the relevant facts in reaching the conclusion that the statement is admissible.

   5 points

4. **Family Law – Equitable Distribution/Alimony**

   Comments: The applicant should recognize and discuss the distinction between considering marital misconduct in awarding alimony and in arriving at the equitable distribution of marital property.

   3 points
Concerned about health risks of foods containing artificial dyes, Congress promulgated the federal Food Dye Safety Act (Fed Ad Law), which heavily regulates foods containing artificial dyes. The Fed Ad Law also states: “No State shall impose any requirement or prohibition regarding the advertising of foods based on the inclusion of artificial dyes.” Also concerned with safety, State A recently passed the Colorless Food Act, providing, “No foods that contain artificial dyes may be marketed to children under 15.” (State Ad Law). KidPop Co. (KidPop) produces MinPop, a bright yellow lollipop with bulging eyes containing “Yellow Dye No. 6.” State A’s Department of Health has fined KidPop for violating the State Ad Law by marketing MinPops during cartoons on local State A television stations.

Khalil is an Arab-American Muslim with a bachelor’s degree in marketing and 12 years of experience as a marketing associate for KidPop. Khalil has never supervised employees or managed a department. In the last year, KidPop advertised three times for the position of marketing director in various KidPop divisions. All of the ads stated, “Master’s Degree and Management Experience preferred.” Khalil applied for all three positions, which all would have resulted in his promotion, but each time KidPop hired outside candidates. All of the candidates hired have master’s degrees and at least 3 years of management experience. KidPop’s vice president of marketing (VP), makes all hiring decisions for marketing jobs. Khalil asked the VP why he was not promoted and the VP said, “You are great at marketing behind the scenes Khalil, but we can’t put you in a director’s position. Our customers want to buy American-made products from people who understand their Christian values.”

Khalil recently traveled to State B where he was attacked in a parking lot by Bob Smith and Joe Jones. When the attack occurred, Khalil was getting into his car, which has a State A
license plate and a bumper sticker that says “Always at Home in State A.” Smith owns a house in State B, works full-time in State B, and has only been to State A once, about 10 years ago. Smith and Jones were both born in State B, grew up together, and for many years Jones has rented a room in Smith’s house. About six months ago, Jones became engaged to one of his co-workers who lives in State A. After getting engaged, Jones transferred his driver’s license to State A, changed his car registration to State A, registered to vote in State A, and started looking for full-time work there. Jones and his fiancé have also started looking at houses in State A to buy after they get married. Jones still stays at Smith’s house on nights he works in State B, but spends the rest of his time at his fiancé’s apartment in State A.

1. KidPop properly initiates a lawsuit in the appropriate federal court alleging that the State Ad Law is superseded by the Fed Ad Law. Excluding any First Amendment or Commerce Clause claims, what doctrine should KidPop raise under the United States Constitution and with what likelihood of success?

2. Khalil has sued Smith and Jones in federal court in State A pursuant to a federal hate crime statute that provides for civil claims. Subject-matter jurisdiction is satisfied, but both Smith and Jones hire attorneys to challenge personal jurisdiction in State A. State A’s long-arm statute allows the exercise of personal jurisdiction “to the extent permissible under the United States Constitution.” Excluding the possibility that personal jurisdiction will be established by personal service in State A, will the federal court in State A be able to properly exercise personal jurisdiction over each of Smith and Jones?

3. After exhausting administrative remedies, Khalil properly filed a Title VII claim against KidPop in the appropriate district court alleging that he was discriminated against based on his religion and national origin. Khalil is seeking declaratory relief, monetary damages, attorneys’ fees, and costs.

   (a) Excluding a burden-shifting analysis based on circumstantial evidence, what facts support Khalil’s claim and what type of evidence is this in a Title VII claim?

   (b) If Khalil can establish that KidPop considered his religion and/or national origin in deciding not to promote him, what Title VII theory would provide KidPop with an affirmative defense to limit Khalil’s remedies and with what impact on the outcome of the case?
1. **KidPop should raise the constitutional doctrine of pre-emption under the Supremacy Clause and is likely to be successful.**

   The Supremacy Clause of the United States Constitution provides that “the laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. Article VI, cl. 2.

   As a threshold matter, it is presumed that the Fed Ad Law falls within the criteria enumerated in *Murphy v. NCAA*, __U.S.__, 138 S.Ct. 1461 (2018) for a statute to have pre-emptive effect and not run afoul of the anti-commandeering principle of the 10th Amendment.\(^1\) Thus, pre-emption occurs where: (1) pre-emption is expressly provided for by Congress (express pre-emption); (2) pre-emption is implied “from the depth and breadth of a congressional scheme that occupies the legislative field” (implied field pre-emption); and (3) pre-emption is implied “because of a conflict with a congressional enactment” (implied conflict pre-emption). *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) superseded by statute as to other issues, *Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence, R.I.*, 731 F.3d 71, 80 (1st Cir. 2013).

   “Congress may indicate pre-emptive intent through a statute’s express language or through its structure and purpose.” *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). When Congress legislates “in a field traditionally occupied by the States,” courts are to assume that the police power of states is not to be superseded by federal law “unless that was the clear and manifest purpose of Congress.” *Good*, 555 U.S. at 77 (quotations and citations omitted). Advertising falls within a field of traditional state regulation. *Id.*

   Here, the Fed Ad Law provides the following language: “No State shall impose any requirement or prohibition regarding the advertising of any foods based on the inclusion of artificial dyes.” Thus, Congress has expressly stated that it intends the Fed Ad Law to pre-empt any state laws related to the advertising or promotion of foods containing artificial dyes. The State Ad Law provides that “No foods that contain artificial dyes may be marketed to children under 15.”

   The express pre-emption provision contained in the Fed Ad Law at issue here mirrors an oft-litigated provision of the Federal Cigarette Labeling and Advertising Act (Labeling Act), 15 U.S.C. §1334(b) (“No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provision of this chapter.”). *See, e.g., Lorillard*, 533 U.S. at 551 (holding that state law advertising regulations targeting cigarettes were pre-empted by the Labeling Act); *Good*, 555 U.S. at 91 (holding that the Labeling Act did not pre-empt state law deceptive advertising claims); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 530-31 (1992) (plurality holding that common law fraud claims were not pre-empted by the Labeling Act).

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\(^1\) Specifically, regulating the content and advertising of foods: (1) “represent[s] the exercise of a power conferred on Congress by the Constitution;” and (2) “regulate[s] individuals, not States.” *Murphy*, __U.S.__, 138 S.Ct. at 1479.
Both the Fed Ad Law and the State Ad Law are contained within legislation aimed at addressing health-related concerns about foods containing artificial dyes. The Fed Ad Law contains an express pre-emption provision stating that no state can impose any requirement or prohibition regarding the advertisement of such foods. The State Ad Law proceeds to do exactly that – impose a prohibition on the advertising of foods containing artificial dyes. Thus, the State Ad Law falls directly within the type of laws that Congress intended to pre-empt with the Fed Ad Law. Accordingly, it is likely that the court will hold that the State Ad Law violates the Supremacy Clause.

2. **Smith does not have sufficient contacts in State A such that the exercise of personal jurisdiction by the federal court there would be proper.** While Jones’ suit-related contacts are insufficient for specific jurisdiction, he is likely domiciled in State A, thereby making the exercise of general jurisdiction over him proper.

Federal courts will look to the state law in which the federal court sits in order to determine the “the bounds of their jurisdiction over persons.” *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014) (citing service provisions of F.R.C.P. 4(k)(1)(A)). This means that the court will first look at whether there is a statutory basis, or a long-arm statute, that provides for personal jurisdiction within the forum state. *Id.* Here, State A’s long-arm statute provides for its courts to exercise personal jurisdiction “to the extent permissible under the United States Constitution.” Accordingly, to determine whether it can exercise personal jurisdiction over Smith and Jones, the court will have to inquire whether doing so would satisfy the limits of the due process clause of the Fourteenth Amendment. *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464 (1985)).

As the Supreme Court has explained, “[a]lthough a non-resident’s physical presence within the territorial jurisdiction of the court is not required, the nonresident generally must have ‘certain minimum contacts [with the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.’” *Walden v. Fiore*, 571 U.S. 277, 283 (2014) (citing and quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). A defendant’s contacts with a forum state may give rise to two categories of personal jurisdiction – specific jurisdiction and general jurisdiction. *Daimler*, 571 U.S. at 126-27.

Specific jurisdiction is “the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role.” *Daimler*, 571 U.S. at 128 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 925 (2011)). “The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation.” *Fiore*, 571 U.S. at 283-84 (quotations and citations omitted). For purposes of specific jurisdiction, courts will look at whether the defendant has “purposefully availed” herself of the “privilege of conducting activities within the forum [S]tate.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (quotation omitted). Stated another way, “the defendant’s suit-related conduct must create a substantial connection with the forum State.” *Id.* at 284 (emphasis added). It is not sufficient that the plaintiff has contact with the forum state; rather, the inquiry is “defendant-focused” in terms of contacts with the forum state. *Id.* The analysis looks at contacts of the defendant with the forum
state, “not the defendant’s contacts with persons who reside there.” Id. at 285 (citing Int’l, 326 U.S. at 319). In sum, “the plaintiff cannot be the only link between the defendant and the forum.” Id.

In Walden, the Court held that a Nevada court could not exercise specific jurisdiction over a Georgia resident. Walden, 571 U.S. at 288. There, the defendant had allegedly committed an intentional tort against Nevada residents at an airport in Georgia, which caused harm in Nevada. Id. at 288-89. The Court noted that “[Defendant] never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to [the forum state].” Id. at 289. The Court further concluded that the court of appeals below had improperly taken into consideration the defendant’s knowledge of the plaintiffs’ contacts with the forum. Id.

It is unlikely that either Smith’s or Jones’ case-related contacts are sufficient to establish specific jurisdiction over these defendants. The facts do not include any contacts between Smith and State A, except that he traveled there one time a decade ago. This single trip is in no way connected to Khalil’s suit. As discussed more fully below, Jones has significantly more contacts with State A than does Smith. However, none of those contacts are related to Khalil’s claims or the lawsuit that he brought against Smith and Jones. Thus, for both Smith and Jones, as it relates to Khalil’s claim, their only contact with State A was that they attacked a resident of State A. Even if one or both of them knew that Khalil was from State A since he was getting into his car that had a State A license plate and a bumper sticker that says “Always at Home in State A,” that knowledge is insufficient contact to satisfy constitutional notions of fair play and substantial justice to give rise to specific jurisdiction over Smith or Jones. As in Walden, knowledge of the Plaintiff’s contacts with the forum state are insufficient to create personal jurisdiction.

With general jurisdiction, a party’s contacts with the forum state may be unrelated to the underlying lawsuit, and courts will look at whether the defendant’s “affiliations with the State in which the suit is brought are so continuous and systematic as to render [him] essentially at home in the forum State.” Daimler AG v. Bauman, 571 U.S. 117, 122 (2014) (quotation omitted). “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile.” Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011) (citing Brilmayer et al., A General Look at General Jurisdiction, 66 Texas L. Rev. 721, 728 (1988)). “A person acquires a ‘domicile of origin’ at birth, and this domicile is presumed to continue absent sufficient evidence of change.” Acridge v. Evangelical Lutheran Good Samaritan Soc., 334 F.3d 444, 448 (5th Cir. 2003) (citing Palazzo v. Corio, 232 F.3d 38, 42 (2d Cir. 2000)). In order to establish the existence of a new domicile, the following must be shown: (1) residence in a new state, and (2) an intention to remain in that state indefinitely. Id. (citation and quotation omitted). Courts have identified a number of factors to determine whether a person has changed domiciles, including “places where the litigant exercises civil and political rights, pays taxes, owns real and personal property, has driver's and other licenses, maintains bank accounts, belongs to clubs and churches, has places of business or employment, and maintains a home for his family.” Id. (internal quotations and citation omitted).

With regard to Smith, there is no argument in favor of general jurisdiction in State A. He has only been there once in his life, and that was a decade ago for reasons wholly unrelated to
Khalil’s lawsuit. There are no facts indicating he has any additional contacts with State A that would give rise to personal jurisdiction in State A.

In contrast, there is a strong argument that Jones has changed his domicile to State A. While Jones does still work and stay some nights in State B, he has taken residence in State A by staying at his fiancé’s apartment whenever he is not working in State B. Moreover, he has taken many steps that indicate his intent to remain in State A indefinitely. His driver’s license, vehicle registration, and voter registration are all in State A. He is also looking for full-time work and wants to purchase a home there. He has a physical residence there and intends to remain there for the indefinite future. Given Jones’ “continuous and systematic” contacts with State A, he is likely at home in the state and has moved his domicile, therefore subjecting him to personal jurisdiction in the State.

For the above reasons, it is likely that the court will hold that the exercise of personal jurisdiction over Jones in State A is proper, but that Smith does not have sufficient contacts with State A such that the exercise of personal jurisdiction over him in State A would be proper.

3(a) The facts that support Khalil’s Title VII claim are the VP’s comments to Khalil and are direct evidence of discrimination.

Khalil alleges that KidPop violated Title VII by discriminating against him based on his religion and national origin when it failed to promote him. The facts that most strongly support Khalil’s discrimination claim is the VP’s answer to Khalil’s question about why he was not promoted. When specifically asked, the VP said that KidPop could not make Khalil a Marketing Director because of a perceived bias among KidPop’s customers to know that they are buying “American-made products from people who understand their Christian values.”

The facts are silent regarding the religion or national origin of the successful candidates, and the call of the question specifically excludes circumstantial evidence from an analysis of the “type” of evidence that supports the claim. Thus, the VP’s statements are direct evidence of discrimination given that Khalil is not Christian and that he is of Arab descent. Direct evidence of discrimination is evidence that would prove the existence of a fact at issue without any inference or presumption. Torre v. Casio, Inc., 42 F.3d 825, 829 (3d Cir. 1994).2 When Khalil asked the VP why he was not promoted, he was talking directly to the decision-maker regarding the actual decision at issue. The response he got unequivocally referenced only Khalil’s religion and national origin as the basis for the decision. The response was not coupled with any reference to Khalil’s work performance, educational background or experience. Thus, the VP’s response when specifically asked why Khalil was not promoted requires no inference or presumption about whether the VP, on behalf of KidPop, discriminated against Khalil based on his religion and/or national origin.

2 Notably, the Supreme Court has held that it is not necessary that a plaintiff present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII. Desert Palace, Inc. v. Costa, 539 U.S. 90, 100-102 (2003). In Desert Palace, the Supreme Court recognized “the utility of circumstantial evidence in discrimination cases,” and that “[t]he adequacy of circumstantial evidence also extends beyond civil cases…” Id. at 99-100. Thus, in the present case, Khalil would likely present both circumstantial and direct evidence of discrimination. However, the strongest evidence of discrimination here is the statement by the VP, which is direct evidence. The circumstantial evidence, which would require an inquiry into Khalil’s qualifications, is weaker.
KidPop is likely to limit Khalil’s damages by showing that this is a mixed motive case and KidPop would have made the same decision not to promote Khalil even if it had not considered his national origin or religion.

Assuming that Khalil can prove that his religion and national origin were improperly considered in KidPop’s decision not to promote him, KidPop’s best defense is to argue that this a “mixed motive” case, meaning that KidPop considered both legitimate (lawful) and illegitimate (unlawful) factors in its repeated decision not to promote Khalil. In Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989), the Supreme Court held that employers have an affirmative defense to a Title VII claim if they could show that the same decision would have been made in the absence of an improper or discriminatory consideration. Subsequent to the Price Waterhouse decision, Congress amended Title VII to provide that an employer can still be held liable for discrimination when consideration of an employee’s protected class “was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m). However, the employer’s ability to prove that it would have taken the same action absent consideration of an impermissible factor will limit the plaintiff from being awarded damages, promotion, or reinstatement, if applicable. 42 U.S.C. § 2000e-5(g)(2)(B). In such a case, the plaintiff’s remedies will be limited to declaratory relief, certain injunctive relief, and attorney’s fees and costs. Id.

As discussed above, there is evidence that KidPop relied on unlawful factors (religion and national origin) in making its employment decisions related to Khalil. However, there is also evidence indicating that KidPop would have taken the same action absent consideration of these factors. All of the job postings for Marketing Director positions indicated, “Master’s Degree and Management Experience preferred.” Khalil did not have a master’s degree, nor did he have any management or supervisory experience, while all of the candidates who were hired did have the “preferred” level of education and experience. Khalil, of course, might argue that these were “preferred” qualifications, and not “required” qualifications. Nevertheless, these facts would weigh in favor of KidPop establishing that it considered legitimate factors in making the decision to fill the positions.

Given the above facts, it is likely that KidPop could establish that it would have made the same decision, in which case Khalil’s remedies would be limited to declaratory relief and attorney’s fees and costs.
Question No. 4: Grading Guidelines

1. **Constitutional Law**

Candidates should demonstrate an understanding of the constitutional doctrine of pre-emption under the Supremacy Clause, apply it to a set of facts, and conclude that KidPop would likely be successful.

6 points

2. **Civil Procedure**

Candidates should demonstrate an understanding of personal jurisdiction in federal court, including both specific and general jurisdiction, and apply the facts to the rules.

8 points

3. **Employment Law**

Candidates should demonstrate an understanding of direct evidence of discrimination as well as mixed-motive Title VII claims and their impact on remedies as applied to a specific set of facts.

6 points
Question No. 5

Andy and Sue, his wife, owned Blackacre, a home in Big City, Pennsylvania, and Woods, a large tract of land in nearby Rural County, Pennsylvania, as tenants by the entireties. Woods consisted of a western half, Lot 1, which abuts County Road, a public highway, and an eastern half, Lot 2, on which there was a cabin built but never used by the prior owner of Woods. Due to Andy’s poor health, Andy and Sue never used the cabin.

Andy and Sue signed a valid written contract with Tin Men, Inc. (Tin) to install new siding on Blackacre. The contract stated in part, “If Andy can get disability insurance, Andy and Sue will pay Tin for the work.” A week after signing the contract, Tin’s crew arrived to install the siding. Andy objected because he had not obtained the insurance. Tin had Andy speak with an agent who took Andy’s application for the insurance. Tin then immediately installed the siding. Andy’s application for disability insurance was denied two weeks later. Andy suddenly died and Sue, by operation of law, became the sole owner of Blackacre and Woods.

After Andy’s death, Sue decided to move to the cabin. She entered into a valid written contract with Pete to repair the cabin. Pete finished his work and sent a bill for $3,000 to Sue. Sue, however, refused to pay the bill stating that Pete’s work was incomplete and of poor quality. After a month of back-and-forth argument about the work and Pete’s bill, Sue sent an $1,800 check clearly marked “final payment” to Pete. Accompanying the check was a note from Sue stating, “The enclosed check is tendered as payment in full and represents all outstanding monies owed.” Pete read the note, struck the words “final payment” on the check and deposited it into his bank account.

On March 1, 2019, Sue entered into a written agreement to sell Blackacre to Dave. The sales agreement provided for a $5,000 cash deposit and payment of the remaining purchase price at a closing on May 1, 2019. The agreement also contained the following clauses: “Time is of the essence;”
“formal presentation of deed and of purchase money at closing are expressly waived;” and “in the event of seller’s breach, buyer’s sole remedy shall be a refund of the cash deposit.”

On April 1, 2019, Dave provided Sue with a title report that revealed the existence of an old, but still valid, mortgage on Blackacre in an amount greater than what Sue would realize from the sale of the property. When Sue asked for a postponement of the scheduled closing to raise money to satisfy the mortgage, Dave refused. To pay off the old mortgage on Blackacre, Sue sold Lot 1 to Bill. After validly conveying Lot 1 to Bill on May 2, 2019, Lot 2 was surrounded completely on all sides by other tracts of land owned by persons other than Sue and had no access to County Road.

1. When Sue refused to pay Tin for the siding work, Tin sued for breach of their written contract. In defending the suit, Sue relied upon the contract’s requirement that Andy obtain disability insurance. Will Tin’s suit be successful?

2(a). Pete filed a breach-of-contract suit against Sue for not paying his bill for repairing the cabin. Based upon Pete’s cashing of the check, what common-law defense should Sue assert in response to the suit and will it be successful?

2(b). Assume for purposes of this question only that instead of giving an $1,800 check to Pete, Sue offered and Pete agreed to accept two front-row seats to the hit musical “Washington” worth $900 each in full satisfaction of Pete’s $3,000 repair bill upon receipt of the tickets. Sue later refused to give the tickets to Pete and Pete sued for $3,000. Will Sue be successful in arguing that Pete’s recovery is limited to the value of the tickets?

3. Sue’s deed conveying Lot 1 to Bill made no mention of a right for Sue to use Lot 1 for ingress and egress between Lot 2 and County Road. Bill refused to allow Sue to use Lot 1 to get to and from Lot 2 to County Road. What claim under the common law of real property can Sue successfully assert in a suit to use Lot 1 to travel to and from the cabin to get to County Road?

4. Neither Sue nor Dave appeared at the scheduled Blackacre closing. On May 3, 2019, Sue provided conclusive evidence that the mortgage on Blackacre had been satisfied and tendered a deed to the property to Dave. Dave refused the deed and demanded return of the cash deposit. Sue refused Dave’s demand. How should the court rule if Dave filed suit against Sue seeking return of his deposit?
1. **Tin’s breach-of-contract suit against Sue will be unsuccessful.** The duty to pay for the siding is discharged because the express condition activating the duty, Andy’s obtaining disability insurance, has not and cannot occur.

“A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.” RESTATEMENT (SECOND) OF CONTRACTS § 224 (AM LAW INST. 1981). A promise in a contract must be distinguished from a condition in a contract. “A promise creates a duty; a condition postpones the performance of the existing duty until the conditioning event occurs.” JOHN E. MURRAY, JR. and TIMOTHY MURRAY, CONTRACT LAW FOR THE 21st CENTURY LAWYER, § 25-2 (PBI Press 3rd ed. 2015).

“In order for an event to be a condition, it must qualify a duty under an existing contract. Events which are part of the process of formation of a contract, such as offer and acceptance are therefore excluded under the definition [of condition].” RESTATEMENT (SECOND) OF CONTRACTS § 224, cmt. c. Additionally, “an act or event designated in a contract will not be construed as a condition unless that clearly appears to be the intention of the parties.” Shovel Transfer & Storage, Inc. v. Pa. Liq. Contr. Bd., 739 A.2d 133, 139 (Pa. 1999) (citations omitted). “No particular form of language is necessary to make an event a condition, although such words as ‘on condition that,’ ‘provided that’ and ‘if’ are often used for this purpose. An intention to make a duty conditional may be manifested by the general nature of an agreement, as well as by specific language.” RESTATEMENT (SECOND) OF CONTRACTS § 226, cmt. a. In this case, the language of the existing contract between Andy, Sue, and Tin clearly stated an intention that the duty of Andy and Sue to perform under the contract, that is, to pay Tin for installing the siding on Blackacre, was dependent upon the occurrence of an express¹ event or condition – Andy’s obtaining disability insurance.

“The failure of a condition to occur, however, breaches no duty. It leaves the duty in its dormant state, i.e., it is simply not activated and, unless the condition is excused, the duty will be discharged when there is no longer any possibility of its activation.” MURRAY § 100 [D]; see also, RESTATEMENT (SECOND) OF CONTRACTS § 225 (1) - (2) (“(1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused. (2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.”).

The facts in this case are very similar to those in Cambria Savs. & Loan Ass’n v. Estate of Gross, 439 A.2d 1236 (Pa. Super. 1982). In Gross, a homeowner signed a contract with an aluminum siding company promising to pay for new siding subject to the following condition: “This contract [sic] null and void if customer cannot get disability and death and sickness insurance.” Id. at 1237. The homeowner applied for disability insurance and the company completed the work. The homeowner later discovered that he was unable to obtain disability insurance and then died without paying for the

¹ Traditionally, conditions in a contract were classified as “conditions precedent” or “conditions subsequent.” JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 102 [A] (5th ed. 2013). The Restatement (Second) of Contracts has abandoned such a classification. RESTATEMENT (SECOND) OF CONTRACTS § 224, cmt. c; see also, Cambria Sav. & Loan Ass’n v. Gross, 439 A.2d 1236, 1239 (Pa. Super. 1982). Instead, in classifying conditions, the Restatement uses the terms “express,” “implied in fact” and “constructive” conditions. RESTATEMENT (SECOND) OF CONTRACTS § 226, cmt. c.
work. The company sought payment from his widow. The widow argued that the inability to procure insurance discharged the obligation to pay. In finding for the widow, the Pennsylvania Superior Court declared, “The parties made a bargain and its terms were complied with, until, upon the happening of the event, the purchaser was released from his duty of payment.” *Id.* at 1240.  

In conclusion, the duty to pay for the siding is discharged because the express condition activating that duty, Andy obtaining disability insurance, did not occur and never could occur after Al’s death. *See*, MURRAY, §102 [B] [4]. Therefore, Tin’s breach-of-contract suit against Sue will be unsuccessful.

2a. **In response to Pete’s suit, Sue should be able to successfully assert the defense that Pete’s cashing of the check operates as an accord and satisfaction that discharges Sue’s remaining debt to Pete.**

Sue’s defense to Pete’s breach-of-contract suit should be based upon the existence of an accord and satisfaction. Pennsylvania common law has long recognized that a party receiving and cashing a check tendered in full satisfaction of a disputed claim is barred from seeking any additional amount of the claimed indebtedness because the retention and use of the check operates as an accord and satisfaction that discharges the debtor from any remaining indebtedness. *See*, *e.g.*, *Law v. Mackie*, 95 A.2d 656, 660 (Pa. 1953); *Washington Nat. Gas Co. v. Johnson*, 16 A. 799, 802 (Pa. 1889).

The Restatement (Second) of Contracts defines an accord as “a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor’s existing duty.” RESTATEMENT (SECOND) OF CONTRACTS, § 281 (1) (AM LAW INST. 1979). Because an accord and satisfaction is a contract, the elements necessary to establish the existence of an accord and satisfaction are the same as those required to show the existence of a contract. *Brunswick Corp. v. Levin*, 276 A.2d 532, 534 (Pa. 1971). Thus, there must be an unequivocal offer of payment or performance in full satisfaction of the underlying claim, an acceptance and consideration. *PNC Bank, Nat. Ass’n v. Balsamo*, 634 A.2d 645, 655 (Pa. Super. 1993), *appeal denied*, 648 A.2d 790 (Pa. 1994). Consideration to support an accord exists when the parties have a legitimately disputed claim and the creditor accepts less than the creditor claims to be due. *Nowicki Const. Co., Inc. v. Panar Corp., N.V.*, 492 A.2d 36, 40 (Pa. Super. 1985).

In this case, the elements for a valid accord and satisfaction under Pennsylvania law between Sue and Pete are present. Sue’s check marked “final payment” and her note stating, “The enclosed check is tendered as payment in full and represents all outstanding monies owed,” is the offer of an accord. Further, Pete’s negotiation of the check is the acceptance of the accord. *See* *Occidental Chem.1 Corp. v. Envtl. Liners, Inc.*, 859 F. Supp. 791, 793, 795 (E.D. Pa. 1994). Although Pete struck the words “final payment” from the check, such attempts to reject the limitations which the payor places upon the check through obliterations or additions to the payor’s notations on the check prior to its endorsement have been regarded as legally inconsequential and do not negate his assent to the offer of an accord. *See*, *e.g.*, *Hagerty Oil Co. v. Chester C’ty Sec. Fund, Inc.*, 375 A.2d 186, 187 n.1 (Pa. Super. 1977); *Melnick v. Nat’l Air Lines*, 150 A.2d 566, 569-70 (Pa. Super. 1959); *Hutchinson v. Culbertson*, 55 A.2d 567, 568 (Pa. Super. 1947); accord, RESTATEMENT (SECOND) OF CONTRACTS, § 281, cmt. d & illust. 6 (“The creditor cannot generally avoid the consequences of his exercise of dominion by a declaration that he does not assent to the condition attached by the debtor.”). Finally, the resolution of a

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2 The *Gross* court also held that the contractor was not even entitled to quasi-contractual relief. *Gross*, 439 A.2d at 1240.
bona fide dispute between the parties as to the incompleteness and quality of Pete’s work and Pete’s bill is the consideration for the accord. See Nowicki Const. Co., Inc., 492 A.2d at 40.

When he received Sue’s check marked “final payment” and the accompanying letter, Pete had two choices. He either could return or destroy the check and demand the full amount that he believed Sue owed for the repairs to the cabin; or Pete could cash the check as final payment of the debt. See Melnick, 150 A.2d at 570. Pete’s attempt to retain the benefit of both options by cashing the check and then ignoring the limiting language by demanding further payment will not succeed because he accepted the offer of an accord by cashing the check. Therefore, Sue’s defense based upon accord and satisfaction will be successful.

2b. Sue’s failure to give the theatre tickets to Pete is a breach of the accord. Pete either can enforce the original duty in the underlying agreement or enforce the duty in the accord.

The existence of an accord does not operate as a substituted contract that extinguishes an obligor’s existing duty by substituting the promise of another duty in its place. Nowicki Const. Co., Inc., 492 A.2d at 40. Instead, an accord suspends the obligee’s right to enforce the original duty and “entitles the obligor to a chance to render the substituted performance in satisfaction of the original duty.” Restatement (Second) of Contracts, § 281 cmt b. Only actual payment or performance of the promise in the accord can discharge the original duty. Lazzarotti v. Juliano, 469 A.2d 216, 221 (Pa. Super. 1983). Sue’s original duty to pay Pete for the repairs to the cabin was not discharged because Sue failed to provide the substituted performance (i.e. – the two front-row theatre tickets) required by the accord.

When an accord is breached by the obligor’s failure to perform, the obligee is no longer bound by the accord. “He [the obligee] may then choose between enforcement of the original duty and any duty under the accord.” Restatement (Second) of Contracts, § 281 cmt b; Zager v. Gubernick, 208 A.2d 45, 49 (Pa. Super. 1965).

Because Sue breached the accord by failing to turn over the theatre tickets, Pete has a choice of seeking recovery of either his original $3,000 bill or the theatre tickets.

3. Sue successfully can assert that she has an implied easement by necessity across Lot 1 for ingress and egress to the cabin on Lot 2.

“A right-of-way by necessity may be implied when after severance from adjoining property, a piece of land is without access to a public highway.” Burns Mfg. Co. v. Boehm, 356 A.2d 763, 767 n. 4 (Pa. 1976) (citation and internal quotations omitted). “Claiming the existence of an easement by necessity contemplates a situation in which a parcel of land is landlocked.” Phillippi v. Knotter, 748 A.2d 757, 760 (Pa. Super. 2000); see also, Youst v. Keck’s Food Serv., Inc., 94 A.3d 1057, 1076 (Pa. Super. 2014) (easement by necessity recognized in Pennsylvania only for claims for ingress to a piece of property and egress from a piece of property). An easement by necessity “may be implied in favor of the grantor or grantee of the land. A grantee is entitled to an easement over the lands of his grantor where the property conveyed to him is so situated that access to it from the highway cannot be had except by passing over the land of the grantor. Similarly, a grantor is entitled to an implied easement by necessity when he grants away his exterior land thereby leaving his remaining land without an

For an easement by necessity to arise, three requirements must be satisfied:

1) The titles to the alleged dominant and servient properties must have been held by one person;  
2) This unity of title must have been severed by a conveyance of one of the tracts;  
3) The easement must be necessary in order for the owner of the dominant tenement to use his land, with the necessity existing both at the time of the severance of title and at the time of the exercise of the easement.  

*Id.*

“An easement implied on the grounds of necessity is always of strict necessity.”  *Id.*  Strict necessity only will be found to exist where a property is “without any access to a public road.”  *Phillippi*, 748 A.2d at 761.

The facts here support the conclusion that Sue has an easement by necessity across Lot 1.  First, the facts show that there was unity of title because Sue was the common owner of Lot No. 1 and Lot No. 2 and that the unity of title was severed when Sue sold Lot 1 to Bill.  The facts additionally state that Lot 2 was surrounded completely on all sides by other tracts of land owned by persons other than Sue.  Thus, the implication of an easement is necessary because Lot 2 is “landlocked” and without any access to or from County Road.  See *Id.* at 760 n. 4.  Finally, the necessity for the easement exists both at the time of the sale of Lot 1 to Bill (the severance of unity of title between the two lots) and at the time of Sue’s suit against Bill to use Lot 1 for ingress and egress to Lot 2.

Therefore, even though Sue failed to reserve an easement across Lot 1 when she conveyed it to Bill, Sue successfully can assert in a suit against Bill that she has an implied easement by necessity to use Lot 1 for ingress and egress to the cabin on Lot 2.

4.  **The court should rule in Dave’s favor because Sue was not able to convey marketable title to Blackacre on date of the closing.**

There is nothing in the facts to indicate that the sales agreement between Sue and Dave specified the character of title to be conveyed.  In the absence of such a statement, every agreement for the sale of real property implies an undertaking on the part of the seller to convey marketable title to the buyer.  R. BOYER, H. HOVENKAMP and S. KURTZ, *THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY*, § 14.6 (West Pub. 4th ed. 1991).

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3 An implied easement by necessity is distinguishable from another type of implied easement – an implied easement from a prior use or an easement by implied reservation.  Although both easements have common elements, the essential difference between the two kinds of easements is that an implied easement by reservation is based upon the theory of a continuous prior use giving rise to the implication that the parties intend the use to continue.  An easement by necessity has no requirement of a prior existing use.  *Graff*, 673 A.2d at 1032 n. 4;  *see also*, WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY*, § 8.5 (West Publishing Co. 3d ed. 2000).
“A marketable title is one that is free from liens and encumbrances and which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and ready to perform his contract, would in the exercise of that prudence which businessmen ordinarily bring to bear upon such transactions, be willing to accept and ought to accept.” Barter v. Palmerton Area Sch. Dist., 581 A.2d 652, 654 (Pa. Super. 1990) (citation and internal quotations omitted). “A title is not marketable if it is such that the grantee may be exposed to the hazard of a lawsuit.” Id. (citing LaCourse v. Kiesel, 77 A.2d 877 (1951); Bonebrake v. Koons, 5 A.2d 184 (Pa. 1939): see also, Moyer v. DeVincentis Constr. Co., 164 A. 111, 112 (Pa. Super. 1933) (“Every title is doubtful which invites or exposes the party holding it to litigation.”) (citation and internal quotations omitted). “However, where there is no color of outstanding title which might prove substantial, and there is no reasonable doubt either at law or in fact concerning the title, the mere possibility of some future litigation concerning it does not prevent the title from being good and marketable.” Barter, 581 A.2d at 654 (citing Rice v. Shank, 115 A.2d 210 (Pa.1955)).

“Pennsylvania law recognizes mortgages as acting both as conveyances and as security interests or liens.” Pines v. Farrell, 848 A.2d 94, 100 (Pa. 2004) (citation omitted). “If the mortgagor is unable or unwilling to pay the debt or perform the obligation, the mortgagee has recourse against the property.” 2 RONALD M. FRIEDMAN, LADNER PENNSYLVANIA REAL ESTATE LAW, § 22.01 (6th ed. 2013). An outstanding mortgage is a common defect which may render a title to land unmarketable. R. BOYER, at §14.6. Given the existence of the outstanding mortgage on Blackacre, Dave would have sufficient justification to refuse to accept Sue’s title as marketable because another party might challenge the title to Blackacre.

In this case, Sue ultimately removed the cloud on the title to Blackacre by providing conclusive evidence that the old mortgage on the property had been satisfied. But the sales agreement between Sue and Dave specified that time was of the essence. Where the parties have expressly agreed in their contract that time should be treated as of the essence, “courts will ordinarily[] accept the agreement as made and refuse to decree performance in the event of failure to make payment within the stipulated time.” Morrell v. Broadbent, 140 A. 500, 501 (Pa.1928). Because time was of the essence, Sue was required to produce marketable title on May 1, 2019, the date of closing, not at a later time. Under Pennsylvania law, whether a party breached a covenant against encumbrances or failed to convey good and marketable title must be determined as of the time of the transaction. See, e.g., Juniata Valley Bank v. Martin Oil Co., 736 A.2d 650, 660-61 (Pa. Super.1999) (recognizing covenant against encumbrances is “breached, if at all, at the time of conveyance”); Leh v. Burke, 331 A.2d 755, 762 (Pa. Super.1974) (covenant against encumbrances breached only if encumbrances exist at the time the deed is delivered); Berger v. Weinstein, 63 Pa. Super. 153, 157 (1915) (“The covenant against encumbrances is in praesenti and is broken when the deed is delivered, if broken at all.”).

By failing to convey marketable title on the date of settlement, Sue breached the sales agreement with Dave. See, Barnes v. McKellar, 644 A.2d 770, 775 (Pa. Super. 1994). Due to this breach, the court would find that Dave is entitled to the stated remedy under the sales agreement - return of his cash deposit.
Question No. 5: Grading Guidelines

1. **Conditions in a Contract**

   Comments: Candidates should discuss the distinction between a promise in a contract and a condition in a contract. Candidates should recognize that the performance of a contractual duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused. Candidates should analyze the stated facts and reach the conclusion that the duty to pay was discharged because the condition did not and cannot occur.

   4 Points

2. **Accord and Satisfaction**

   Comments: Candidates should recognize an accord and satisfaction is the defense to the breach-of-contract claim. Candidates should note that the elements necessary to establish the existence of an accord are the same as those required to show the existence of a contract. Candidates should apply the requirements for an accord and satisfaction to the stated facts and conclude that the defense will be successful. Candidates also should recognize that the original duty in the underlying agreement is not discharged if the accord is not satisfied by performance. When an accord is not satisfied, candidates should recognize that the obligee has the choice of enforcing the original duty in the underlying agreement or the duty in the accord.

   6 Points

3. **Implied Easement by Necessity**

   Comments: Candidates should recognize that easements may be implied when a parcel of land is landlocked and when there is no other prior existing use. Candidates should discuss the elements necessary for an implied easement by necessity and conclude that the stated facts support the finding of the existence of an implied easement by necessity.

   5 Points

4. **Marketable Title and Time of the Essence Clause**

   Comments: Candidates should recognize and express an understanding of the concept of marketable title. Candidates should recognize that an outstanding mortgage is a common defect which may render a title to land unmarketable. Candidates should consider how a time of the essence clause in a real estate sales agreement would affect efforts to convey a marketable title.

   5 Points
Paul, a resident of C County, Pennsylvania, is developing a successful career as a textile artist creating unique and valuable art quilts. To build his reputation and market his work, he frequently enters prestigious juried exhibitions and competitions.

Paul’s studio is in his home basement. He keeps the studio locked. Paul’s neighbor Devin, a 15-year-old high school student, often does odd jobs for Paul to earn cash. Paul, who lives alone, has entrusted Devin with his only spare house and basement studio keys and the code to disarm his home security system so that Devin can do chores after school when Paul is not home. Devin wants to study textile arts in college, so he especially enjoys looking at Paul’s quilt projects. No one else has a key to Paul’s house or home studio or knows his security code. When Paul is not at home, the security alarm is always activated and the house and studio are both locked. Paul never allows anyone except Devin in his basement studio unaccompanied.

Having completed his quilt project for an upcoming competition, Paul photographed it and then packed it away carefully in a zipped bag to protect it for the week remaining before his departure for the quilt event. Paul showed Devin the photographs, but Devin did not have a chance to see the finished quilt before Paul carefully packed it away. Paul stored the packed quilt in his home studio. During the week before the quilt competition, Devin was alone in Paul’s house every day for an hour after school.

When Paul departed for the competition, he hand carried the packaged quilt rather than checking it with his luggage at the airport. He did not place it in the overhead bin or stow it under the seat. It was in his sight and remained unopened at all times during the flight and in the taxi to the hotel. No one else, including cleaning staff, was in his hotel room before Paul left to attend the competition. To protect the quilt from possible damage, Paul left it unopened in its
bag and held it himself while transporting it to the site of the competition, where he carefully opened the package in the presence of competition personnel.

When Paul removed the quilt from the packaging, however, he was horrified to discover a conspicuous tear on the front of the quilt. An invisible repair was impossible. The artistic value of the quilt was destroyed. Paul had no choice but to withdraw from the competition.

On returning home, Paul confronted Devin about the damage to the quilt. Devin denied causing any damage. Paul timely filed a civil negligence action in the C County Court of Common Pleas. He named Devin as a defendant, and because Devin is a minor, Paul sued Devin’s parents for negligent supervision.

1. (a) Does Devin’s age affect the applicable standard of care in Paul’s claim against him?

(b) What is Paul’s likelihood of success in his claim against Devin’s parents?

2. Paul wants to determine whether anyone else that employed Devin suffered unexplained property damage. During pretrial discovery, Paul serves written interrogatories asking Devin to identify everyone who has ever paid him for odd jobs. Devin timely objects to the interrogatories as not relevant and not likely to lead to the discovery of admissible evidence. Under the Pennsylvania Rules of Civil Procedure, what can Paul file with the court to require Devin to answer, and if Devin argues the above objections, how would the court likely rule?

3. Devin accidentally broke Paul’s lawnmower a year ago and did not tell Paul about it. When Paul confronted him, Devin said he forgot. Paul intends to offer evidence about this incident at trial to suggest Devin’s character is one of carelessness and denial of responsibility. Devin files a pretrial motion to preclude that evidence on the basis that it is not relevant to whether Devin damaged the quilt. How should the court analyze the issue under the Pennsylvania Rules of Evidence, and with what likely outcome?

4. At trial, Devin persists in denying that he damaged the quilt, but offers no explanation of how the damage could have occurred. If Paul seeks to invoke the doctrine of *res ipsa loquitur* to raise an inference that Devin was negligent, how will the doctrine’s application affect the burdens of proof applicable to Paul and Devin?
Question No. 6: Examiner’s Analysis

1. Devin’s age does affect his duty of care, which is that of someone of his age, intelligence, and experience.

   (a) “[T]he standard of care applicable to a minor differs from that applicable to an adult . . . .” Kuhns v. Brugger, 135 A.2d 395, 401 (Pa. 1957). A minor is expected to exercise the degree of care reasonable for a person of his age, intelligence, and experience. Id. at 401 n.7 (citing Restatement of the Law of Torts § 283 cmt. e). See also Congini v. Portersville Valve Co., 470 A.2d 515, 518 & n.5 (Pa. 1983) (citing and discussing Kuhns). Further, “[i]n so far as concerns the child’s capacity to realize the existence of a risk, the individual qualities of the child are taken into account.” Kuhns, 135 A.2d at 401 n.7 (quoting Restatement of the Law of Torts § 283 cmt. e).

   Pennsylvania follows the common law rule:

   [W]e place minors in three categories based on their age: minors under the age of seven years are conclusively presumed incapable of negligence; minors over the age of fourteen years are presumptively capable of negligence, the burden being placed on such minors to prove their incapacity; minors between the ages of seven and fourteen years are presumed incapable of negligence, but such presumption is rebuttable and grows weaker with each year until the fourteenth year is reached.

   Id. at 401 (footnotes omitted) (emphasis added).

   Here, Devin’s age, 15, places him in the category of minors presumptively capable of negligence. Given the level of responsibility he has exhibited in doing odd jobs around the neighborhood, including the fact that Paul felt confident entrusting Devin with his house and studio keys and security code and allowing him access to Paul’s house when Paul himself was not home, it is unlikely Devin will be able to rebut the presumption that he has the capacity to be negligent.

   (b) Devin’s parents are unlikely to be liable for negligent supervision.

   Paul’s potential action against Devin’s parents would lie in negligent supervision. A parent’s duty of supervision over a minor child is governed by the Restatement:

   Duty of Parent to Control Conduct of Child

   A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent

   (a) knows or has reason to know that he has the ability to control his child, and
(b) knows or should know of the necessity and opportunity for exercising such control.


“[A] parent/child relationship by itself is insufficient to render the parents liable for the tortious acts of their children.” K.H., 826 A.2d at 873. However, “liability may attach where the negligence of the parents makes the injury possible.” Id. “Section 316 of the Restatement reflects this principle by limiting the duty of a parent to control the conduct of a child to those instances in which a parent has the ability to control the child, knows of its necessity, and has the opportunity to do so.” Id. Moreover, “the extension of liability [to parents] is further conditioned upon a finding that the failure to control created an unreasonable risk of harm.” Id. Therefore, a parent’s duty “is only to exercise such ability to control his child as he in fact has at the time when he has the opportunity to exercise it and knows the necessity of so doing.” Id. For example, in K.H., the Pennsylvania Supreme Court found a father could not be liable for his son’s injury of another minor with a BB gun where, although the father had purchased the BB gun for his son, the injury occurred while the son was in the sole custody of his mother. Id. at 875.

In practice, applying this rule simply requires analysis of the normal principles of duty and applicable standard of care in a negligence action. In short, parents should exercise the degree of care reasonable under the circumstances in supervising their child. They are not liable for the conduct of their minor child solely because they are his parents. See, e.g., Keener v. Hribal, 351 F. Supp.3d 956, 965-66 (W.D. Pa. 2018) (collecting and discussing Pennsylvania appellate decisions applying this rule).

Here, the facts do not indicate any reason to impose liability on Devin’s parents. There is no indication his parents were present at Paul’s house, or that they had either an opportunity to control Devin’s actions or a knowledge that there was any need to do so. Accordingly, under the facts as given, Paul would not have a viable claim of negligent supervision against Devin’s parents.

2. Paul may file a motion to compel discovery responses, but will likely be unsuccessful.

As a general rule, “a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Pa.R.C.P. No. 4003.1(a). Regarding the relevance of information sought in discovery, “[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Pa.R.C.P. No. 4003.1(b).

Interrogatories are governed by Rule 4005 of the Pennsylvania Rules of Civil Procedure: “Subject to the limitations provided by Rule 4011, any party may serve upon any other party written interrogatories to be answered by the party served. . . .” Pa.R.C.P. No. 4005(a). As
applicable here, the limitations on discovery set forth in Rule 4011 preclude discovery of information that would be beyond the general scope of discovery set forth in Rule 4003.1. Pa.R.C.P. No. 4011 (c). A party believing information requested in interrogatories is not subject to discovery may object to answering, stating the reason for the objection. Pa.R.C.P. No. 4006(a)(2). Interrogatories may be objectionable where they seek information not relevant to the events at issue in the litigation and not reasonably calculated to lead to the discovery of admissible evidence. See Berkeyheiser v. A-Plus Investigations, Inc., 936 A.2d 1117, 1127 (Pa. Super. 2007).

A requesting party who believes objections to interrogatories are insufficient or improper may file a motion in the trial court seeking an order to compel responses. See Pa. R.C.P. No. 4019(a)(1)(i). The trial court has broad latitude in granting, denying, or limiting the requested discovery. See generally Pa. R.C.P. No. 4019; see also Berkeyheiser, 936 A.2d at 1125.

The trial court is responsible to oversee discovery; therefore, the court has discretion to determine what measures are necessary to assure prompt and adequate discovery as permitted by the rules of civil procedure. Berkeyheiser, 936 A.2d at 1125. However, the trial court is also responsible to assure that discovery requests are tailored to the specific litigation. The court should not permit discovery that is merely a “fishing expedition.” Id. at 1127.

Here, the objection raised by Devin is that the interrogatory is irrelevant and not reasonably calculated to lead to admissible evidence. Paul wants Devin to disclose everyone for whom he has ever worked. Based on the facts as given, Paul seeks the information because he really wants to look into all unexplained property damage those people experienced. The interrogatory is clearly overbroad for that purpose because it would identify people who never incurred such damage. Accord Latzanich v. Sears Roebuck & Co., 193 A.3d 1118, 2018 Pa. Super. Unpub. LEXIS 2282, *2-*3 (Pa. Super. June 27, 2018) (in suit regarding defective lawnmower, interrogatory seeking information on all other similar lawnmowers sold was overbroad). That information is not relevant and not calculated to lead to discovery of admissible evidence. What Paul really wants to know is whether Devin ever damaged anyone else’s property and failed to disclose it. Even a request for the identities of persons who incurred unexplained property damage would be far too broad to elicit relevant information, as the interrogatory is not limited to damage within Devin’s capabilities or which occurred during a time when Devin had access to the property that was damaged. Moreover, it is not clear that information about other property damage would be admissible in any event. Therefore, the court is likely either to deny Devin’s motion to compel or to severely limit the response required.

3. Evidence illustrating a defendant’s character is inadmissible to prove subsequent negligent conduct in conformity with that character.

As a general rule, “[a]ll relevant evidence is admissible.” Pa.R.E. 402. “Evidence is relevant if it has any tendency to make [the existence of any] fact more or less probable than it would be without the evidence; [and] the fact is of consequence in determining the action.” Pa.R.E. 401.
“Evidence of . . . [an] act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” Pa. R.E. 404(b)(1).

Here, Paul seeks to present evidence that Devin damaged a lawnmower and failed to disclose it. The use of such a prior specific act as illustrative of character, in order to suggest Devin acted in conformity with that character in negligently damaging Paul’s quilt, is exactly the kind of evidence that is precluded. It is unclear whether Devin was negligent on that prior occasion, or whether he failed to tell Paul about it because he was hiding it, because he simply forgot as he told Paul, or because he did not see Paul to tell him until later. More importantly, even if evidence of this incident were probative of Devin’s character, such evidence would be inadmissible for the purpose of suggesting that Devin acted in conformity with that character by negligently damaging Paul’s quilt.

4. **Under the doctrine of res ipsa loquitur, the burden of proof shifts to Devin to explain how the quilt was damaged other than by his negligence.**

The doctrine of *res ipsa loquitur* is set forth in the Restatement (Second) of Torts:

(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when

   (a) the event is of a kind which ordinarily does not occur in the absence of negligence;

   (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and

   (c) the indicated negligence is within the scope of the defendant’s duty to the plaintiff.

(2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.

(3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.

“A res ipsa loquitur case is ordinarily merely one kind of case of circumstantial evidence, in which the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant’s relation to it.” Restatement (Second) of Torts § 328D cmt. b (italics added). The defendant must then provide an explanation of how the damage occurred without his fault. Madrid Motor Corp. v. Dawson, 71 A.2d 849, 850 (Pa. Super.1950).

When the defendant in turn offers evidence that the event was not due to his negligence, the inference which arises under the conditions stated in this Section is not necessarily overthrown. Although the defendant testifies that he has exercised all reasonable care, the conclusion may still be drawn, on the basis of ordinary human experience, that he has not. Although his evidence is that there was no negligence in operating his train or his bus or his bakeshop, inspecting his elevator or his chandelier or his gas pipes, or parking his car, still the fact remains in evidence that the train went off of the track, the bus into the ditch, the bread was full of glass, the elevator or the chandelier fell, the gas pipe leaked, or the car came down the hill. From this the jury may still be permitted to infer that the defendant’s witnesses are not to be believed, that something went wrong with the precautions described, that the full truth has not been told. As the defendant’s evidence approaches complete demonstration that the event could not possibly have occurred, it is all the more clearly contradicted by the fact that it has occurred. Normally, therefore, a verdict cannot be directed for the defendant in a res ipsa loquitur case, solely upon the basis of the defendant’s evidence of his own due care.

Restatement (Second) of Torts § 328D cmt. n (italics added). See also Mack v. Reading Co., 98 A.2d 399, 401 (Pa. Super. 1953) (where defendant offers evidence of due care, the presumption arising under the doctrine of res ipsa loquitur requires that case must still be submitted to a jury).

Under the facts as given, Paul can establish his prima facie case of Devin’s negligence by offering evidence that the quilt was in pristine condition when he placed it in its protective zip bag, that only Devin had access to the house and basement studio when Paul was not at home, that no one but Devin had an opportunity to damage it prior to its arrival at the quilt competition site, and that the quilt was discovered to be torn when it was opened at the competition site. Under the doctrine of res ipsa loquitur, the jury may then infer negligence by Devin. The burden will shift to Devin to explain how the quilt was damaged other than by his negligence. If all Devin does is persist in denying that he did any damage, that denial may be inadequate to rebut the presumption of negligence.
1. **Torts – Negligence by a Minor**

Comments: The applicant should analyze the element of duty and should discuss (a) its application to a minor defendant and (b) its application to the minor’s parents. The applicant should conclude that Devin’s duty of care to Paul will reflect his age and level of maturity, and that his parents’ duty of care in supervising Devin does not extend to his conduct outside their presence.

6 points

2. **Civil Procedure – Interrogatories, Motion to Compel**

Comments: The applicant should discuss the general scope of discovery and the rules applicable to interrogatories. The applicant should recognize that Paul may file a motion to compel answers and the factors analyzed by a court considering a motion to compel. Base on the objection that the request seeks information not relevant and not reasonably calculated to lead to the discovery of admissible evidence, the applicant should recognize that an interrogatory asking for the identity of everyone who ever paid Devin for odd jobs is not reasonably calculated to lead to the discovery of admissible evidence. The applicant should conclude that the trial court will deny Paul’s motion or at least severely limit Devin’s required response.

5 points

3. **Evidence – Character of Defendant**

Comments: The applicant should set forth the analytical framework in determining admissibility of evidence concerning a defendant’s character, apply that framework to the facts of the case, and conclude that evidence claimed to be illustrative of character is inadmissible to show subsequent negligent conduct by the defendant consistent with that character.

5 points

4. **Torts – Doctrine of *Res Ipsa Loquitur***

Comments: The applicant should set forth the elements and shifting burdens of proof regarding the doctrine of *res ipsa loquitur*, apply those elements to the facts of the case, and conclude that the doctrine’s application would shift the burden of proof to Devin.

4 points
Supreme Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination
July 30 and 31, 2019

PERFORMANCE TEST
July 30, 2019

*Use GRAY covered book for your answer to the Performance Test.*
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FILE
TO: Applicants
FROM: Lilly Rees, Managing Partner
RE: Assignment to Draft Legal Memorandum
DATE: July 30, 2019

Our client, Ethan Aaron, was pulled over by the Pennsylvania State Police yesterday. The State Police charged Mr. Aaron with several violations, including driving under the influence and, as a result, he will lose his driver’s license for one year, if convicted. I met with Mr. Aaron today to see how we can assist him. Although I do not routinely practice in these areas, Mr. Aaron is a dear friend of mine and I am convinced that he is innocent of all charges.

Your assignment is to review the documents in the accompanying File and Library and to draft a legal memorandum addressing whether we will be able to successfully defend Mr. Aaron against the charges filed (as outlined in the police report). If the law on these charges demonstrates that my belief in Mr. Aaron’s innocence is misplaced, I need to know so that I can properly advise our client. Also, I do not recall the legal standard for challenging whether an officer has probable cause or reasonable suspicion to pull someone over. Please let me know what is required for such an argument and whether you believe we will be able to successfully argue that the officer in this matter lacked probable cause or reasonable suspicion to stop the vehicle Mr. Aaron was driving. It would be great if we could prevail on that issue and have the charges dismissed right away. Regardless of the conclusion you reach concerning the issue of probable cause, please address all remaining issues raised in this memorandum.

Along with this Assignment Memorandum, the File contains an Intake Memorandum outlining Mr. Aaron’s situation and the narrative section only of the police report that I obtained. The accompanying Library includes statutes and a case related to the charges against Mr. Aaron and the question on probable cause/reasonable suspicion.

You should only use facts contained in the File, and you should only use the statutes and case contained in the Library for your legal analysis. Do not rely upon your personal knowledge of these issues or on any legal authority not included in the Library. Instead, you should base your legal analysis and conclusions only upon the documents provided in the File and the Library.
Intake Memorandum

TO: File
FROM: Lilly Rees, Managing Partner
RE: Meeting with Ethan Aaron concerning traffic stop
DATE: July 30, 2019

I met with Ethan Aaron today concerning the many charges brought against him on July 29, 2019, by the Pennsylvania State Police in connection with a traffic stop. This memorandum summarizes the facts concerning Mr. Aaron and the traffic stop.

Mr. Aaron

Mr. Aaron is a 59-year-old former electrician who lives in Goodtown in Good County, Pennsylvania. Mr. Aaron was forced to sell his business performing electrical work as a result of an electrical shock that he suffered 12 years ago that caused an undiagnosed form of neurodegenerative disease. This condition has left Mr. Aaron with deficiencies in his fine motor skills, meaning he can no longer use his hands to perform many tasks that an electrician would normally do. At times it also causes Mr. Aaron to lose his balance and stumble when walking. He has no problems with balance while he is seated, and his condition has not affected his ability to safely and properly operate a motor vehicle. An additional side effect of the neurodegenerative disease is dry-eye syndrome, for which Mr. Aaron takes eye drops before going to sleep. This has helped his dry eyes, but it leaves his eyes bloodshot and watery.

Mr. Aaron has been treated by numerous physicians to find a cure for his condition or to at least help with the symptoms. On May 1, 2019, he went to see Dr. Maria Townsley, who has helped several people with a similar condition via the use of medical marijuana. The treatment is perfectly legal under Pennsylvania law, which allows for the prescription of medical marijuana to persons who suffer from neurodegenerative diseases. Nonetheless, Mr. Aaron, who never used drugs, never drank alcohol, and shunned prescription drugs, was reluctant to try the treatment. Dr. Townsley convinced Mr. Aaron to participate in the treatment by promising a two-month trial to see if the treatment was effective. After properly enrolling in Pennsylvania’s medical marijuana program and receiving his patient certification, Mr. Aaron had his first treatment on June 15, 2019. Although the effects of the treatment were not beneficial, Mr. Aaron agreed to take the second treatment on July 15, 2019. The second treatment was equally ineffective in reducing symptoms, so Mr. Aaron and Dr. Townsley agreed to cease treatment. Mr. Aaron has not had medical marijuana since his July 15 treatment.

Mr. Aaron is married with two sons. His oldest son turned 21 years of age about five months ago and has been in near-constant trouble with alcohol ever since. Mr. Aaron and his wife have tried everything to help their son stop drinking to excess, but to no avail.

July 29, 2019, Traffic Stop

Mr. Aaron was sound asleep at 2:00 a.m. on July 29, 2019, when his telephone rang and awakened him. The caller was his eldest son who had been out drinking with friends and was too intoxicated to drive home. His son asked for a ride for himself and his friends. Mr. Aaron, not wanting his son to be injured trying to make his own way home, got up, got dressed, and immediately went to the garage to get his car and pick up his son from the bar. Upon arriving in the garage, Mr. Aaron noticed that his son had, for some reason, taken Mr. Aaron’s car when he went out. The only other car available to Mr. Aaron was a
tan Toyota Rav4 owned by his son’s friend that was parked in the Aaron’s driveway with the keys in the ignition. Mr. Aaron drove his son’s friend’s car to pick up his son and his son’s friends.

At approximately 2:20 a.m. on July 29, 2019, Mr. Aaron pulled up in front of the bar. His son, who had an open bottle of whiskey in his hand, got in the front passenger seat of the car and leaned over to hug his father. When he did, he spilled the whiskey all over the front of his father’s shirt. Mr. Aaron took the bottle and threw it in a nearby public recycling container while his son’s friends got in the car. The four young men had consumed so much alcohol that, combined with the whiskey spilled on Mr. Aaron, the entire car smelled like a distillery. Mr. Aaron was both mad and upset that his son was drinking so much and that he had spilled alcohol all over Mr. Aaron, but he was relieved his son called for a ride home instead of trying to drive himself. Mr. Aaron simply wanted to drop off his son’s friends and get back to bed as soon as possible.

The fastest way to the friend’s house was via a state highway. Mr. Aaron drove to the highway and began driving 2-miles-per-hour under the speed limit, as he routinely did for safety. After a few moments on the highway, Mr. Aaron’s son was so filled with intoxicated gratitude for his father agreeing to pick him up that he attempted to hug Mr. Aaron again. While doing so, his hand hit the steering wheel, causing Mr. Aaron to cross into the passing lane and back into the travel lane on two separate occasions in close proximity to one another. Thankfully no one was traveling beside them in the passing lane, and Mr. Aaron quickly steered the car back into the travel lane.

Unfortunately, a Pennsylvania state police trooper had entered the highway and was traveling behind Mr. Aaron when the car swerved into the passing lane. After seeing the swerving vehicle, the officer activated his lights and sirens to signal Mr. Aaron to pull over. Mr. Aaron immediately pulled off to the shoulder of the road. As the officer approached the vehicle, Mr. Aaron lowered the window. The officer was immediately hit with the stench of alcohol. Making matters worse, Mr. Aaron’s son and his friends, who were noticeably intoxicated by any standard, began laughing uncontrollably at the situation. This further angered Mr. Aaron.

Having witnessed the swerving car with its noticeably intoxicated occupants, and having smelled the strong odor of alcohol – some of which was coming from Mr. Aaron – the officer asked Mr. Aaron to exit the vehicle. Mr. Aaron was happy to comply with the officer and immediately got out of the car. Upon exiting the vehicle, Mr. Aaron’s neurodegenerative disease-caused instability caused him to stumble forward and he needed to grab ahold of the car to keep himself from falling. The combination of the foregoing events caused the officer to immediately place Mr. Aaron under arrest for driving under the influence. After placing Mr. Aaron under arrest and inspecting the registration and proof of insurance card, the officer noticed that the car insurance policy had lapsed. Because the officer was not able to conduct a field sobriety test as outlined in the police report, he asked Mr. Aaron to submit to a blood test to determine whether or not he was under the influence of alcohol or a controlled substance. Mr. Aaron said the officer read a paper to him and had Mr. Aaron sign it before Mr. Aaron agreed to submit to the blood test. Mr. Aaron told me that he was eager to have the blood drawn and tested so that he could clear his name. Mr. Aaron also told me that he was so upset at the totality of the situation that he could hardly speak to the officer to explain the situation, which – even as admitted by Mr. Aaron – seemed suspicious. The officer took Mr. Aaron to have his blood drawn at a nearby hospital. Mr. Aaron was certain that the blood test would come back with no result that would be adverse to him. Therefore, he did not bother to explain his medical condition to the officer; instead, he was hoping to rely on the complete absence of any alcohol consumption to compel the officer to drop the charges against him.
The blood test of Mr. Aaron’s blood came back showing no evidence of alcohol consumption. However, it showed trace amounts of Tetrahydrocannabinol (“THC”), a metabolite that can remain present in the blood for weeks after ingesting marijuana. As a result of the presence of THC, the charge of driving under the influence remained against Mr. Aaron despite the fact that he lawfully ingested the medical marijuana two weeks before his arrest; despite the fact that he was not impaired by the presence of the THC in his system; and despite the fact that he was not impaired in any way in the operation of the motor vehicle at the time of the incident.

The officer cited Mr. Aaron for the violations listed in the police report. Knowing Mr. Aaron, I find it difficult to believe that a judge or jury would find him guilty of the charges.
c. Narrative Section

On July 29, 2019, at approximately 0230 hours, I, Officer Smith, was on routine patrol checking vehicles operating on state highways, when I entered State Route 6 South behind a tan Toyota Rav4 bearing Pennsylvania registration KRZ0624 traveling in the driving lane. This area of State Route 6 is a four lane highway with two lanes going in each direction, separated by a center guardrail barrier. Although it was nighttime, the area of the highway I was traveling on is well-lit as there are many lights illuminating the highway and exit/entrance ramps in that vicinity of the roadway. While traveling approximately six car lengths behind said vehicle, I observed the vehicle swerve into the passing lane in an unsafe manner, and then swerve back into the driving lane. This happened two times within a ten-second period of time, and both times it happened without the use of a directional signal. I noted that the driver of the vehicle did not first look to his left to ascertain if another car was oncoming in the passing lane and, in fact, appeared to be looking at the front seat passenger at the time the vehicle swerved. I turned on my lights and siren and safely pulled the vehicle to the shoulder of the road.

As I approached the vehicle, the driver, Ethan Aaron, lowered the window. I was immediately struck by the strong smell of alcohol coming from the interior of the vehicle, and witnessed the passengers in the vehicle laughing uncontrollably at what seemed to be an inappropriate moment. I observed that the passengers of the vehicle were clearly and visibly intoxicated. I further observed that Mr. Aaron’s eyes were bloodshot and watery, indicative of drug or alcohol use. I asked Mr. Aaron to exit the vehicle in order to perform a field sobriety test. As Mr. Aaron exited the vehicle, there was a strong odor of alcohol coming from his person. Further, as he stepped out of the vehicle, Mr. Aaron stumbled uncontrollably and had to use the vehicle to stop from falling, and hold himself up. I instructed Mr. Aaron to stand up without holding the vehicle so that I could administer a field sobriety test, but he stated, “I can’t.”

0230 hours is a common time for patrons of drinking establishments to make their way from those establishments to their homes; Mr. Aaron failed to operate his vehicle within a single lane, instead swerving into the passing lane in an unsafe manner, and then back into the driving lane; Mr. Aaron’s eyes were bloodshot and watery; Mr. Aaron’s person smelled of alcohol at the time of the traffic stop and as he exited the vehicle; Mr. Aaron was unable to maintain his balance upon exiting the vehicle; Mr. Aaron needed to hold onto the vehicle in order to keep himself from falling over; Mr. Aaron was not able to stand without holding onto the vehicle. For these reasons I placed Mr. Aaron under arrest for suspicion of driving under the influence, and for failing to drive within a single lane of travel on a roadway laned for traffic.

I read Mr. Aaron his Miranda warning. For his own safety, and because he could not even stand, I decided to forego a field sobriety test and asked Mr. Aaron if he would consent to a blood test at a nearby hospital. In conjunction with my request, I read to Mr. Aaron the Pennsylvania Department of Transportation Form DL-26, Chemical Testing Warnings and Report of Refusal to Submit to [a Blood Test], verbatim. Upon questioning, Mr. Aaron indicated that he understood the form and its contents, and he voluntarily signed it. Mr. Aaron then the consented to have his blood drawn for purposes of conducting a chemical analysis.
Defendant Name: Ethan Aaron  
Report No.: 2019-06031995  
Date: July 29, 2019

c. Narrative Section (Continued)

At approximately 0245 hours, I transported Mr. Aaron to the Good County Medical Center. His blood was drawn at approximately 0250 hours, and was immediately tested by its certified lab. Although the lab results were negative for alcohol, which surprised this officer and the staff at the medical center, the lab results were positive for small amounts of Tetrahydrocannabinol, a metabolite of marijuana, a Schedule I controlled substance, as defined in the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act. A certified copy of the lab certification and results are attached to this police report.

Mr. Aaron was charged with Driving Under the Influence (75 Pa.C.S. § 3803(d)(1)) and Failing to drive within a single lane of travel on a roadway laned for traffic (75 Pa.C.S. § 3309). The financial responsibility (car insurance) for the vehicle Mr. Aaron was driving had lapsed, so Mr. Aaron was also cited for driving without required financial responsibility (75 Pa.C.S. § 1786(f)). He was appropriately processed and released.
Use the following guidelines and format for preparing all internal legal memoranda:

1. The document should be entitled “Memorandum of Law.”

2. At the top of the memorandum, include a heading similar to the heading above (e.g. – To, From, Re, and Date). **In the “From” section, state only the word “Applicant;” do not include your name.**

3. Include a brief introductory paragraph laying out the purpose of the memorandum.

4. The memorandum should be divided into sections, one for each issue discussed. Each section should begin with a short heading that reflects the issue being addressed.

5. Each section should also include a statement setting forth the issue being addressed and a reasoned analysis supporting your conclusion. Identify the relevant and controlling legal principles and apply these legal principles to the facts to demonstrate the reasoning that supports your conclusion on the issue presented. If there are facts and legal principles relevant to any point or element in your analysis that could be argued to support a different conclusion, identify and discuss those principles or facts.

6. Include all relevant facts needed to resolve the issues presented as well as any background facts helpful to understanding the issues.

7. State your conclusion(s) as a positive statement that responds to the question(s) raised by the issue presented.

8. Bluebook citations are not necessary; however, you must include sufficient informal citations to the appropriate authority (legal or otherwise), such that I will know to which document you are referring.
LIBRARY
75 Pa.C.S. § 1786 - Required financial responsibility

(a) General rule. -- Every motor vehicle of the type required to be registered under this title which is operated or currently registered shall be covered by financial responsibility.

(b) Self-certification. -- The Department of Transportation shall require that each motor vehicle registrant certify that the registrant is financially responsible at the time of registration or renewal thereof. The department shall refuse to register or renew the registration of a vehicle for failure to comply with this requirement or falsification of self-certification.

(c) Consent to produce proof of financial responsibility. -- Upon registering a motor vehicle or renewing a motor vehicle registration, the owner of the motor vehicle shall be deemed to have given consent to produce proof, upon request, to the Department of Transportation or a police officer that the vehicle registrant has the financial responsibility required by this chapter. Proof of financial responsibility may be satisfied under this chapter by production of a financial responsibility identification card in paper or electronic form. If an owner of a motor vehicle is providing electronic proof of financial responsibility to a police officer, the police officer shall only view content that is reasonably necessary to demonstrate proof of financial responsibility. The owner of the electronic device assumes liability for any damage to the electronic device containing the financial responsibility identification card while in possession of the police officer or agents of the department.

(f) Operation of a motor vehicle without required financial responsibility. -- Any owner of a motor vehicle for which the existence of financial responsibility is a requirement for its legal operation shall not operate the motor vehicle or permit it to be operated upon a highway of this Commonwealth without the financial responsibility required by this chapter. . . . Any person who fails to comply with this subsection commits a summary offense and shall, upon conviction, be sentenced to pay a fine of $300.

75 Pa.C.S. § 3309 -- Driving on roadways laned for traffic

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others not inconsistent therewith shall apply:

(1) Driving within single lane. -- A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety.

(2) Three lane roadways. -- Upon a roadway which is divided into three lanes and provides for two-way movement of traffic, a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle traveling in the same direction when the center lane is clear of traffic within a safe distance, or in preparation for making a left turn, or where the center lane is allocated exclusively to traffic moving in the same direction that the vehicle is proceeding and the allocation is designated by official traffic-control devices.
(3) **Lanes limited to specific use.** -- Official traffic-control devices may be erected to restrict the use of specified lanes to specified classes or types of traffic or vehicles, including multioccupant vehicles or car pools, and drivers of vehicles shall obey the directions of every such device.

(4) **Prohibitions against changing lanes.** -- Official traffic-control devices may be installed prohibiting the changing of lanes on a section of roadway and drivers of vehicles shall obey the directions of every such device.

**75 Pa.C.S. § 3802 - Driving under influence of alcohol or controlled substance**

(a) **General impairment.** --

(1) An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle.

(2) An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.08% but less than 0.10% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

(b) **High rate of alcohol.** -- An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.10% but less than 0.16% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

(c) **Highest rate of alcohol.** -- An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is 0.16% or higher within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

(d) **Controlled substances.** -- An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances:

(1) There is in the individual's blood any amount of a:

   (i) Schedule I controlled substance, as defined in the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act;

   (ii) Schedule II or Schedule III controlled substance, as defined in The Controlled Substance, Drug, Device and Cosmetic Act, which has not been medically prescribed for the individual; or

   (iii) metabolite of a substance under subparagraph (i) or (ii).

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75 Pa.C.S. § 6308(b) -- Investigation by police officers

(b) Authority of police officer. -- Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

75 Pa.C.S. § 6502. Summary offenses.

(a) Violations of this title. -- It is a summary offense for any person to violate any of the provisions of this title unless the violation is by this title or other statute of this Commonwealth declared to be a misdemeanor or felony. Every person convicted of a summary offense for a violation of any of the provisions of this title for which another penalty is not provided shall be sentenced to pay a fine of $25.

35 P.S. §780-104. Schedules of controlled substances

The following schedules include the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated

(1) Schedule I—

The following controlled substances are included in this schedule:

(iii) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers, and salts of isomers, unless specifically excepted, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(17) Tetrahydrocannabinols [a metabolite of marijuana].
This is an appeal from the judgment of sentence entered in the Court of Common Pleas of York County following Appellant Jesse Ray Bush's conviction in a non-jury trial on the charges of possession of drug paraphernalia, driving under the influence of alcohol or a controlled substance ("DUI"), driving under suspension as a habitual offender, and driving under suspension-DUI related. [footnote omitted] Appellant's sole claim is that the police officer did not have probable cause or reasonable suspicion to stop his vehicle, and therefore, the lower court erred in denying his pre-trial motion to suppress the physical evidence seized by the police. After a careful review, we affirm.

The relevant facts and procedural history are as follows: Appellant was arrested, and on April 11, 2016, he filed a counseled pre-trial motion seeking to suppress the physical evidence seized by the police following the stop of his vehicle. Specifically, Appellant averred the stop of his vehicle was illegal since the police officer had neither probable cause nor reasonable suspicion to initiate the stop.

On June 28, 2016, the matter proceeded to a suppression hearing at which the sole witness was Pennsylvania State Police Trooper Raymond W. Rutter, who testified that he has been a trooper for approximately three years. N.T., 6/28/16, at 4. He indicated that, on November 1, 2015, at approximately 3:15 a.m., he was on duty and traveling in the left-hand lane on I-83 southbound near the Maryland state line when he observed the following:

[A] SUV, a dark colored SUV, which was traveling northbound, which had passed me, which had its high beams on. While that [SUV] had passed me there was another vehicle-that [SUV] was traveling in the right lane, there was a smaller sedan which was traveling in the left-hand lane, passing that [SUV] that was in the right which had its high beams on, and then I spun around just north of the Maryland line, the divider, and approached that [SUV] which I saw [with] its high beams on from the rear.

Id. at 6-7.

When asked by the prosecutor how he could "tell that the high beams were on[,]” Trooper Rutter answered that the lights "were bright to me looking at them." Id. at 7. Trooper Rutter indicated that his experience as a trooper assisted him in making his determination. Id.

Moreover, when the prosecutor asked Trooper Rutter how close he was to the SUV when he first noticed the high beams were activated, Trooper Rutter testified that he was within 300 feet. Id. at 8. He further indicated that he "actually pas[ed] [the SUV] going south and they were still activated. So whatever the distance from two lanes over would be on the interstate, plus the center." Id.
Trooper Rutter clarified that, when he turned his police vehicle around at the highway divider and proceeded northbound, he did so with the intent of stopping Appellant's SUV "for the violation of the high beams." *Id.* He indicated that, once he caught up to the SUV, he did not immediately stop it, but he continued to follow it as he knew that the welcome center, which would be a safe place to stop the SUV, was "just north of [his] location." *Id.*

As he followed the SUV to the welcome center, Trooper Rutter noticed the vehicle "cross over the fog lines two times[.]" *Id.* at 8-9. Trooper Rutter testified that, at this point, in addition to the high beams traffic violation, Trooper Rutter suspected that Appellant might be DUI. *Id.* at 10-11. He clarified, however, that even if Appellant's SUV had not crossed the fog lines twice, he still intended to stop the vehicle "for the high beams violation." *Id.* at 11. Trooper Rutter indicated that he stopped Appellant's SUV, and charged Appellant with numerous crimes, including DUI-related charges and the high beams violation. *Id.* at 12.

On cross-examination, Trooper Rutter clarified that, in the area where the incident occurred, between the northbound and southbound lanes on I-83, there was a guardrail at the height of the concrete barriers. *Id.* at 13-14, 16. He confirmed that Appellant was driving in the northbound right-hand lane, and he was traveling in the southbound left-hand lane; the divider between the northbound and southbound lanes was approximately sixty feet in width. *Id.* at 16. Trooper Rutter testified that the highways were straight without curves in this area, so the northbound and southbound vehicles passed each other. *Id.*

Trooper Rutter reiterated that when he first noticed Appellant's SUV traveling northbound it "appeared to [him] that it had the high beams on." *Id.* at 14. He noted that he has "made numerous stops on high beam violations, and [Appellant's SUV] appeared to be [sic] high beams on to [him.]" *Id.* at 14-15. Further, Trooper Rutter noted that, based on his training and experience, Appellant's SUV had its high beams on. *Id.* at 15. He testified that Appellant's SUV's lights "affected [his] eyes, they were bright into [his] eyes, but it didn't make [him] swerve or crash or anything like that." *Id.* He noted that the sedan, which was passing Appellant's SUV, did not have its high beams activated. *Id.* at 16. Trooper Rutter testified that he is "pretty good" about "picking out" which vehicles have their high beams activated. *Id.* at 20. He reiterated that from his "training and experience it appeared to be high beams and that's why [he] initiated the stop [of Appellant's SUV]." *Id.* at 21.

At the conclusion of the hearing, the suppression court denied Appellant's motion to suppress, concluding that Trooper Rutter observed Appellant's SUV with its high beams improperly activated, and thus, he had probable cause to stop Appellant's SUV. *Id.* at 41-42. Subsequently, following a non-jury trial, the trial court convicted Appellant of the offenses indicated *supra* and sentenced him to an aggregate of nine and one-half years to twenty years in prison. This timely appeal followed, and all Pa.R.A.P. 1925 requirements have been met.

On appeal, Appellant contends that the stop of his SUV was illegal since Trooper Rutter did not have the requisite probable cause or reasonable suspicion to initiate a stop. Accordingly, he argues the trial court erred in denying his pre-trial motion to suppress the physical evidence seized as a result of the stop of
his SUV.

The issue of what quantum of cause a police officer must possess in order to conduct a vehicle stop based on a possible violation of the Motor Vehicle Code is a question of law, over which our scope of review is plenary and our standard of review is de novo. Commonwealth v. Chase, 599 Pa. 80, 960 A.2d 108 (2008).

***

Our analysis of the quantum of cause required for a traffic stop begins with 75 Pa.C.S.A. § 6308(b), which provides:

(b) Authority of police officer.--Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

75 Pa.C.S.A. § 6308(b) (bold in original). "Traffic stops based on a reasonable suspicion: either of criminal activity or a violation of the Motor Vehicle Code under the authority of Section 6308(b) must serve a stated investigatory purpose." Commonwealth v. Feczko, 10 A.3d 1285, 1291 (Pa.Super. 2010) (en banc) (citation omitted). For a stop based on the observed violation of the vehicle code or otherwise non-investigable offense, an officer must have probable cause to make a constitutional vehicle stop. Feczko, 10 A.3d at 1291 ("Mere reasonable suspicion will not justify a vehicle stop when the driver's detention cannot serve an investigatory purpose relevant to the suspected violation.").

Here, the trial court found that Trooper Rutter credibly testified that he stopped Appellant's vehicle on the basis that Appellant had his high beams activated in violation of 75 Pa.C.S.A. § 4306, use of multiple-beam road lighting equipment. Since an investigation following the traffic stop would have provided Trooper Rutter with no additional information as to whether Appellant violated Section 4306, probable cause was necessary to initiate the stop on this basis. See Commonwealth v. Slattery, 139 A.3d 221, 222-23 (Pa.Super. 2016) (holding that where the "vehicular stop is to determine whether there has been compliance with the Commonwealth's vehicle code, it is incumbent upon the officer to articulate . . . probable cause to believe that the vehicle or the driver was in violation of some provision of the code") (citation omitted)); Feczko, supra.

Our Supreme Court has defined probable cause as follows:

Probable cause is made out when the facts and circumstances which are within the knowledge of the officer at the time of the [stop], and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime. The question we ask is not whether the officer's belief was correct or more likely true than false. Rather, we
require only a *probability*, and not a *prima facie* showing, of criminal activity. In determining whether probable cause exists, we apply a totality of the circumstances test.

*Commonwealth v. Martin*, 627 Pa. 623, 101 A.3d 706, 721 (2014) (citation omitted) (emphasis in original). Pennsylvania law makes clear, however, that a police officer has probable cause to stop a motor vehicle if the officer observes a traffic code violation, even if it is a minor offense. *Chase, supra.* Here, Trooper Rutter stopped Appellant's SUV for a violation of Section 4306, which provides, in relevant part, the following:

§ 4306. Use of multiple-beam road lighting equipment

(a) **Approaching an oncoming vehicle.** - Whenever the driver of a vehicle approaches an oncoming vehicle within 500 feet, the driver shall use the low beam of light.

75 Pa.C.S.A. § 4306(a) (bold in original). [footnote omitted]

***

Pursuant to the plain and clear language of Section 4306(a), a driver commits a traffic code violation whenever the driver approaches an oncoming vehicle within 500 feet and does not use the vehicle's low beam lights. In *Irwin, supra*, we noted that the term "approaches," as used in Section 4306(a), is defined as "to come nearer in space." *Irwin*, 769 A.2d at 522. Moreover, the dictionary definition of "oncoming" is "coming nearer in time or space." *Webster's Collegiate Dictionary* 811 (10th ed. 1997).

In the case *sub judice*, the trial court found that Trooper Rutter credibly testified that, as he was driving in the southbound left-hand lane of I-83, Appellant, who was driving his SUV in the northbound right-hand lane of I-83, drove by Trooper Rutter with his SUV's high beams activated. N.T., 4/12/16, at 41. The trooper testified that Appellant's SUV was within 300 feet of his cruiser. *Id.* at 8. He further testified that he had a clear view of Appellant's SUV's lights; Appellant's SUV's lights were noticeably brighter than the lights of the sedan, which passed Appellant's SUV; and Appellant's SUV's lights affected the trooper's eyes. *Id.* at 15-16. Trooper Rutter testified that he has made numerous stops based on high beam violations, and based on his training and experience, he concluded Appellant did not properly dim his lights when he passed by the trooper's cruiser. *Id.* at 14, 21.

Based on the aforementioned, we conclude the trial court properly determined that Trooper Rutter had probable cause to stop Appellant's SUV for a violation of Section 4306(a). Simply put, Appellant's SUV approached (came closer to) Trooper Rutter's police cruiser as the cruiser was oncoming (coming near to Appellant's vehicle) within 500 feet, and Appellant did not use the low beam of light. [footnote omitted]

We find unavailing Appellant's specific argument that he was not required to dim his lights as his SUV did not approach an oncoming vehicle as required for a violation of Section 4306(a). In this regard, Appellant reasons that, since a guardrail and concrete barrier divided I-83's southbound lane in which Trooper Rutter was driving from the northbound lane in which Appellant was driving, the SUV was not
"approaching" and the trooper's cruiser was not "oncoming" for purposes of the statute.

As fully discussed supra, giving the statute's express terms their plain meaning, we disagree with Appellant's argument. While the guardrail and concrete barrier should be taken into consideration in determining whether Appellant's SUV approached within 500 feet of Trooper Rutter's oncoming police cruiser, the existence of such does not alter or negate the plain language of the statute. Moreover, while the Legislature listed exceptions to the use of high beams in Section 4306(c), it did not include a blanket exception related to the use of high beams on a divided highway [footnote omitted] as was present in this case.

***
For all of the aforementioned reasons, we conclude that the facts of this case [footnote omitted] presented probable cause of violation of Section 4306(a) for purposes of the traffic stop of Appellant's SUV. Further, Trooper Rutter offered specific and articulable facts that provided probable cause that Appellant violated the section. Accordingly, as the traffic stop was not illegal, the trial court did not err in denying Appellant's pre-trial suppression motion. Accordingly, we affirm Appellant's judgment of sentence.

Affirmed.

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The applicant is assigned to draft a legal memorandum addressed to the assigning Managing Partner providing a legal analysis concerning whether the officer had probable cause for a traffic stop, and whether our client will be convicted on the charges for driving under the influence and vehicle code violations related to that traffic stop.

**Formatting**  
1 Point

Following directions is an important skill of every lawyer. The applicant is expected to present the analysis in the form of a legal memorandum, which addresses the issues identified.

**Probable Cause/Reasonable Suspicion**  
10 Points

75 Pa.C.S. § 6308(b) provides:

**(b) Authority of police officer.** Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

Traffic stops based on a reasonable suspicion: either of criminal activity or a violation of the Motor Vehicle Code under the authority of section 6308(b) must serve a stated investigatory purpose. *Commonwealth v. Bush*

For a stop based on the observed violation of the vehicle code or otherwise non-investigable offense, an officer must have probable cause to make a constitutional vehicle stop. *Commonwealth v. Bush*

Mere reasonable suspicion will not justify a vehicle stop when the driver's detention cannot serve an investigatory purpose relevant to the suspected violation. *Commonwealth v. Bush*

Here, Officer Smith purportedly stopped Mr. Aaron’s vehicle because he witnessed the vehicle swerve twice into the passing lane, and back, in a ten-second time period, in violation of 75 Pa.C.S. § 3309, Driving on roadways laned for traffic.

Because the stated purpose of the traffic stop was the violation of the statute, an investigation following the traffic stop would not have provided Officer Smith with additional information as to whether Mr. Aaron violated § 3309; for that reason, probable cause was necessary to initiate the stop. See *Commonwealth v. Bush* (where the "vehicular stop is to determine whether there has been compliance with the Commonwealth's vehicle code, it is incumbent upon the officer to articulate . . . probable cause to believe that the vehicle or the driver was in violation of some provision of the code").
The Pennsylvania Supreme Court defined probable cause as follows:

Probable cause is made out when the facts and circumstances which are within the knowledge of the officer at the time of the [stop], and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime. The question we ask is not whether the officer's belief was correct or more likely true than false. Rather, we require only a probability, and not a prima facie showing, of criminal activity. In determining whether probable cause exists, we apply a totality of the circumstances test.

_Commonwealth v. Bush_

Pennsylvania law makes clear, however, that a police officer has probable cause to stop a motor vehicle if the officer observes a traffic code violation, even if it is a minor offense. _Commonwealth v. Bush_

Officer Smith stopped Mr. Aaron’s vehicle as a result of a violation of 75 Pa.C.S. § 3309, which provides, in relevant part, the following:

 Whenever any roadway has been divided into two or more clearly marked lanes for traffic . . . [a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety.

Pursuant to the plain and clear language of § 3309, a driver commits a traffic code violation whenever the driver of a vehicle on a highway laned for traffic fails to drive as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety.

Mr. Aaron, who was traveling on a highway laned for traffic had a duty to drive as nearly as practicable entirely within a single lane and should not have moved from the lane until he first ascertained that the movement could be made with safety, which he failed to do. Police Report

Officer Smith’s police report indicates that the vehicle operated by Mr. Aaron swerved, in an unsafe manner, two times into the passing lane, without the aid of a directional signal, and without Mr. Aaron even looking to see if another car was in the passing lane. At the time, Officer Smith was traveling approximately six car lengths behind Mr. Aaron’s vehicle, in a lighted area of the highway, and had a clear view of the events described in his police report. Police Report

Officer Smith likely had probable cause to stop the vehicle driven by Mr. Aaron based upon a violation of 75 Pa.C.S. § 3309 and, thus, applicants should conclude that Mr. Aaron will not be successful on a claim that the officer lacked probable cause to make the traffic stop.

**Driving Under the Influence**

4 Points
75 Pa.C.S. § 3802(d) states an individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances:

(1) There is in the individual's blood any amount of a:

(i) Schedule I controlled substance, as defined in the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act;

* * *

(iii) metabolite of a substance under subparagraph (i) or (ii).

The plain language of the statute prohibits someone from driving a vehicle if they have any amount of a metabolite of a Schedule I controlled substance in the individual’s blood. 75 Pa.C.S. § 3802(d)

Tetrahydrocannabinol (THC), a metabolite of marijuana, is a Schedule I controlled substance. 35 P.S. § 780-104(1)(iii)(16)

The testing of Mr. Aaron’s blood revealed the presence of THC. Police Report

75 Pa.C.S. § 3802(d) does not set a minimum amount of a metabolite of a Schedule I controlled substance that must be in present in the blood; rather, the statute says “any amount.” 75 Pa.C.S. § 3802(d)

Given the legal authority provided, it is likely that Mr. Aaron will be convicted of driving under the influence because there existed in his blood at the time of his driving of the vehicle some amount of THC.

**Driving on Roadways Laned for Traffic**

2 Points

75 Pa. C.S. § 3309(1) states “[w]henever any roadway has been divided into two or more clearly marked lanes for traffic . . . [a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety.

The officer was driving six car lengths behind the Toyota Rav4 and saw the vehicle swerve into the passing lane in an unsafe manner and then swerve back into the travel lane two times within a ten-second period of time. No directional signal was used. The driver did not first look to see if it was safe to change lanes. The driver appeared to be looking at the front seat passenger at the time the vehicle swerved. The officer then put on his lights and safely pulled the Rav4 over. Police Report

Upon seeing Mr. Aaron’s vehicle swerve between lanes in an unsafe manner, Officer Smith had the authority to stop the vehicle. 75 Pa.C.S. § 6308(b).
It is a summary offense for any person to violate any of the provisions of this title unless the violation is by this title or other statute of this Commonwealth declared to be a misdemeanor or felony. 75 Pa.C.S. § 6502

Applicants should conclude that Mr. Aaron will likely be convicted of this violation.

**Driving Without Required Financial Responsibility**  

3 Points

75 Pa. C.S. § 1786(f) states [a]ny owner of a motor vehicle for which the existence of financial responsibility is a requirement for its legal operation shall not operate the motor vehicle or permit it to be operated upon a highway of this Commonwealth without the financial responsibility required by this chapter.

Having seen Mr. Aaron’s vehicle swerve between lanes in an unsafe manner, Officer Smith had the authority to stop the vehicle for purposes of checking for proof of financial responsibility. 75 Pa.C.S. § 6308(b).

A reading of the plain language of the statute limits violations of 75 Pa.C.S. § 1786(f) to the “owner” of a vehicle that lacks the required financial responsibility.

Mr. Aaron was driving a vehicle owned by his son’s friend; Mr. Aaron was not the owner of the vehicle that was not properly insured. Intake Memorandum

Therefore, applicants should conclude that Mr. Aaron will not be convicted of a violation of 75 Pa.C.S. § 1786(f).